

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**NORMA ELKINS, et al.,
Grievants,**

v.

Docket No. 2017-0981-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.**

DISMISSAL ORDER

Grievants, Norma Elkins, Dottie Hatfield, and Sandra Kerby are employed by Respondent, Department of Health and Human Resources/Bureau for Children and Families. On September 13, 2016, Grievants filed individual but identical grievances against Respondent asserting pay discrimination. For relief, Grievants seek “[t]o be made whole in every way including back pay with interest.” The grievances were consolidated at level one.

Following the January 9, 2017 level one hearing, a level one decision was rendered on January 31, 2017, denying the consolidated grievance. Grievants appealed to level two on January 31, 2017. On February 13, 2017, Respondent, by counsel, filed a *Motion to Dismiss Grievance* asserting the grievance must be dismissed as “Grievants suffered no actual injury, the grievance fails to state a claim upon which relief can be granted, the requested remedy is unavailable, the Grievants seek an advisory opinion, and the grievance is moot.” On the same day, the Grievance Board notified Grievants’ representative by electronic mail that any response to the motion to dismiss must be made in writing by February 28, 2017, and that “[f]ailure to respond may result in the grievance being dismissed.” The Grievance Board has received no response from Grievants to Respondent’s motion. Grievants are represented by Gordon Simmons, UE Local 170,

West Virginia Public Workers Union. Respondent is represented by counsel, Michael E. Bevers, Assistant Attorney General.

Synopsis

Grievants are employed by Respondent as Economic Service Workers. Grievants alleged pay disparity after an Economic Service Worker position was posted above the minimum starting salary. The posting was removed and Respondent's human resources director asserts the posting above the minimum was an error. Although Grievants assert Respondent removed the posting it still intends to hire new employees above the minimum, that assertion is speculative. The grievance is moot and any decision would be advisory. Accordingly, the grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance including the transcript of the level one hearing with attached exhibits:

Findings of Fact

1. Grievants are employed by Respondent as Economic Service Workers.
2. Grievants filed the grievance because they heard a rumor that new Economic Service Workers were going to be hired in at a rate above the minimum salary, and then confirmed on September 13, 2016, that a posting had been listed for an Economic Service Worker with a salary of \$26,169.
3. The minimum salary for Economic Service Workers is \$23,724.
4. Notes from a CQI¹ meeting on September 12, 2016, state:

¹ No one at the level one hearing explained what is "CQI." Grievant Kerby testified, "I just know that they are come together when they have issues that they would like to,

ESW new starting salary

Increasing new ESW starting income to \$26,000.00, but not increasing current ESW's or WV Works staff to that amount. Morale is already low, workers may be less productive and leave, the agency would still be relying on the seasoned workers to assist and help train the new staff who are earning more.

Suggest- Do what is fair. Increase the current workers pay accordingly.

5. Grievants were not present at the CQI meeting.

6. By Memorandum dated September 16, 2016, from Human Resources Director Pam Holt to BCF Leadership, Ms. Holt explained that the posting of an Economic Service Worker position at above the minimum starting salary was in error, that the posting was removed, that the position would be reposted with the correct salary range, and that "applicants will be interviewed with a starting salary of \$23,724."

7. Despite notice and opportunity, Grievants did not respond to Respondent's motion to dismiss.

Discussion

"Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19. "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative

you know, discuss and see if there's anything else they can, you know, something can be done, if they can take it to management and see if anything can be done about it."

law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008).

“Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Bragg v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996); *Pritt, et al., v. Dep’t of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). This Grievance Board has continuously refused to deal with issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Champ v. Pendleton County Bd. of Educ.*, Docket No. 01-36-419R (July 14, 2003); *Khoury v. Public Serv. Comm’n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways Economic Development and Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17, 1998). "This Grievance Board does not issue advisory opinions. *Dooley v. Dep’t of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v.*

Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).” *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).

Grievants filed the grievance because of a rumor that new Economic Service Workers were going to be hired in at a rate above the minimum salary. The September 13, 2016 posting for an Economic Service Worker with a salary of \$26,169 appeared to confirm this rumor. However, Ms. Holt’s memorandum to BCF Leadership asserts that the posting was in error and was to be reposted with the correct salary range, and that “applicants will be interviewed with a starting salary of \$23,724.” Grievants did not dispute that the posting was removed. Grievant’s representative asserted in the level one hearing that the posting was only removed in response to the grievance filing and that, although the lower rate of pay would be listed lower, Respondent would still be hiring new employees at a higher rate.

The original basis of the grievance, the posting of the position at a rate above the minimum salary, is now moot because that posting was removed. Although Grievants assert employees may be hired at a higher rate despite the removal of the posting, that assertion is speculative. Grievant’s have not asserted that a new employee has actually been hired at a higher rate of pay, so Grievants have not yet suffered an actual injury. Any decision on whether Respondent’s should be allowed to hire at a rate of pay higher than the minimum would be advisory until such a hire actually occurs.

Therefore, Respondent’s *Motion to Dismiss Grievance* is granted, and this grievance, dismissed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

2. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2008).

3. “Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Bragg v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996); *Pritt, et al., v. Dep’t of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

4. This Grievance Board has continuously refused to deal with issues when the relief sought is “speculative or premature, or otherwise legally insufficient.” *Dooley v.*

Dept. of Trans./Div. of Highways, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991).

5. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Champ v. Pendleton County Bd. of Educ.*, Docket No. 01-36-419R (July 14, 2003); *Khoury v. Public Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways Economic Development and Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17, 1998).

6. "This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991)." *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).

7. Respondent has proved the grievance is moot and that any decision would be advisory.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should

be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: April 19, 2017

Billie Thacker Catlett
Chief Administrative Law Judge