

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS C. GUERTIN,
Grievant,

v.

Docket No. 2017-1154-DOR

TAX DEPARTMENT,
Respondent, and

HEATHER B. VILLEME,
Intervenor.

DISMISSAL ORDER

Grievant, Thomas C. Guertin, filed the instant grievance on November 2, 2016, stating, "On or about October 26, 2016, I was informed by Dana Angel of Auditing Division I was not selected for promotion to Excise Tax Supervisor II. I believe Auditing Division has denied me equal opportunity for advancement and promoted a predetermined applicant to that position. Auditing Division used the personal appointment to justify the later promotion of the predetermined person before the actual selection." As relief Grievant seeks, "Make selection based on qualifications at the time of selecting acting promotions. Stop using acting promotions to pre-qualify or better qualify a preferred applicant, and not include qualifications that are not West Virginia Department of Personnel policies, procedures or law. Repost the position and make a selection based on the qualifications before the personal appointment to acting position".

On July 18, 2017, Respondent, by counsel, Cassandra L. Means, Assistant Attorney General, filed a *Motion to Dismiss* alleging the grievance to be moot due to Grievant's resignation for retirement. Grievant filed his response on July 20, 2017. This matter is now mature for decision.

Synopsis

Grievant grieves non-selection for promotion to Excise Tax Supervisor II. As relief, Grievant requests that the position be reposted and filled by proper procedures.

Respondent moved to dismiss the grievance asserting mootness due to Grievant's resignation from employment. Grievant, filed a response to the motion stating that he wishes to proceed with his grievance. Respondent proved the grievance is now moot due to Grievant's resignation. Grievant's resignation prior to the resolution of the grievance renders the matter moot, requiring that the grievance be dismissed.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant was employed by Respondent, Tax Department, as an Auditor III.
2. Grievant filed the instant grievance alleging Respondent denied him equal opportunity for advancement and promoted a predetermined applicant to the vacant Excise Tax Supervisor II. As relief, Grievant requests that the position be reposted and filled using proper procedures and rules.
3. Grievant resigned from employment with Respondent effective July 14, 2017.
4. On July 18, 2017, Respondent filed a *Motion to Dismiss* alleging the grievance to be moot due to Grievant's resignation.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008). This issue before the undersigned is Respondent's motion to dismiss. The burden of proof is on the Respondent to demonstrate that the motion should be granted by a preponderance of the evidence.

Respondent asserts that the grievance is moot because Grievant has resigned from employment. Grievant responded to Respondent's motion to dismiss providing he wishes to proceed with the grievance process to aid others who are applying for positions in the future.

"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). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "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).

Grievant has now resigned from employment with Respondent. He is not seeking reinstatement into the position in question. There is no substantive remedy he could receive from a decision on the merits. Therefore, any decision by the Grievance Board on this issue would now be advisory and have no practical effect, rendering the grievance moot.

Accordingly, the Respondent's *Motion to Dismiss* is granted, and this grievance, DISMISSED.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq.” Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008).

2. “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).

3. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). “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).

4. Respondent proved, by a preponderance of the evidence, that the grievance is now moot due to Grievant's resignation.

Accordingly, this 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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: August 2, 2017

William B. McGinley
Administrative Law Judge