

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**TONIA GUTHRIE,
Grievant,**

v.

Docket No. 2017-1992-DHHR

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/HOPEMONT HOSPITAL,
Respondent.**

DISMISSAL ORDER

Grievant, Tonia Guthrie, had previously been employed by the Department of Health and Human Resources at Hopemont Hospital as a Health Service Worker. She was dismissed from employment on April 7, 2017, for patient abuse. Subsequently, the Office of Health Facility Licensure and Certification Nurse Aide and Neglect Registry Committee found that Ms. Guthrie's name should be placed on the Nurse Aide Abuse and Neglect Registry. Health Service Workers who are listed on the Office of Health Facility Licensure and Certification ("OHFLAC") registry may not be employed at the Hospital.

Grievant filed a challenge to the OHFLAC determination, and the Office of Inspector General Board of Review held a Fair Hearing on July 11, 2017. By *Decision of State Hearing Officer* dated August 4, 2017, the State Hearing Officer upheld OHFLAC's decision to place Ms. Guthrie's name on the Nurse Aide Abuse and Neglect Registry. Ms. Guthrie did not challenge this decision by filing an appeal in the Kanawha County Circuit Court. Ms. Guthrie's appeal period has expired. Respondent filed a Motion to Dismiss the grievance because she failed to state a claim upon which relief can be granted. Grievant

was provided an opportunity to reply to the motion, but chose to not file a response. Grievant appeared by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Michael E. Bevers, Assistant Attorney General.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed by the Department of Health and Human Resources as a Health Service Worker at Hopemont Hospital.

2. On March 2, 2017, the Hospital received an abuse and neglect report filed on behalf of a Hospital resident. The report stated that Grievant had wheeled the resident in the dining room, attempting to push the resident up to a table. The resident was pushing away, and Grievant forcefully pushed the resident back to the table, locked the wheelchair brake, and put her face within a couple inches from the resident's face and said something to the resident.

3. Grievant allegedly put a clothing protector around the resident's neck and tied it in a double knot. The resident attempted to remove the clothing protector and made a gesture that the protector was tied too tight.

4. The Hospital suspended Grievant on March 2, 2017, pending an investigation. On March 6, 2017, the Hospital brought Grievant back to work in the dietary department pending the conclusion of the Hospital's investigation.

5. The Hospital held a predetermination conference with Grievant and her representative regarding the allegation of resident abuse and/or neglect on March 21,

2017. The Hospital informed Grievant it was considering discipline that could include her dismissal from employment.

6. On March 22, 2017, OHFLAC came to the Hospital on a complaint survey and informed the Hospital that Grievant could not be on the Hospital premises during OHFLAC's investigation, which was separate from the Hospital's investigation. The Hospital notified Grievant in writing on March 22, 2017, that she would be suspended during OHFLAC's investigation.

7. OHFLAC completed its investigation and substantiated the allegations of patient abuse. Grievant filed a challenge to the OHFLAC determination, and the Office of Inspector General Board of Review held a Fair Hearing on July 11, 2017. By *Decision of State Hearing Officer* dated August 4, 2017, the State Hearing Officer upheld OHFLAC's decision to place Ms. Guthrie's name on the Nurse Aide Abuse and Neglect Registry. Ms. Guthrie did not challenge this decision by filing an appeal in the Kanawha County Circuit Court.

8. The West Virginia Nursing Home Licensure Rule prohibits a nursing home from employing persons that have had a "finding entered into the Registered Nursing Assistant Registry or the West Virginia Adult Abuse Registry concerning abuse, neglect, exploitation or mistreatment of residents or misappropriation of their property." 64 C.S.R. 13 § 4.16.c.3.B.¹

¹For a full discussion of these issues see *Walker v. Dep't of Health & Human Res.*, Docket No. 2009-1473-DHHR (Feb. 10, 2010).

Discussion

Respondent asserts that the grievance fails to provide for relief which could be granted, and therefore it must be dismissed. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.11(2008), “[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” In instances where “it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. ‘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).” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

As defined by statute, a grievance must allege “a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee.” W. VA. CODE § 6C-2-2(i). The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-3 (2008).

Hopemont Hospital’s professional staff members must be licensed, certified, or registered in accordance with applicable federal and state law. Whenever a charge of

abuse or neglect is reported in West Virginia, facilities are required to submit an Immediate Report to the Nurse Aide Program, which is administered by OHFLAC. When an Immediate and Follow-up Report are received by the OHFLAC Nurse Aide Program, an OHFLAC surveyor conducts an investigation and submits a report to the Nurse Aide Program. The Nurse Aide Program then makes a final disposition of the investigation, which can include sustaining the allegations and placing the nurse aide on the Nurse Aide Abuse and Neglect Registry. If the Nurse Aide Program determines the nurse aide should be placed on the Nurse Aide Abuse Registry, it notifies the nurse aide of its intent and provides the nurse aide 30 days to request a hearing. If the substantiation is upheld by the State Hearing Officer, the nurse aide's name is placed on the Nurse Aide Abuse and Neglect Registry. Hopemont Hospital is prohibited by law from employing a nursing assistant whose name appears on the OHFLAC registry. See *Walker, supra*.

In the instant case, OHFLAC informed Grievant that it intended to place her name on the Nurse Aide Abuse Registry. Grievant filed a challenge to the OHFLAC determination, and the Office of Inspector General Board of Review held a Fair Hearing on July 11, 2017. By *Decision of State Hearing Officer* dated August 4, 2017, the State Hearing Officer upheld OHFLAC's decision to place Ms. Guthrie's name on the Nurse Aide Abuse and Neglect Registry. Ms. Guthrie did not challenge this decision by filing an appeal in the Kanawha County Circuit Court. Since Grievant's placement on the Nurse Aide Abuse Registry is final, Hopemont Hospital is prohibited by law from returning her to work.

Based upon the above, no claim upon which relief can be granted is stated and the remedy requested is wholly unavailable to the Grievant; these facts present no case in controversy. When there is no case in controversy, the Grievance Board will not issue

advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

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

Conclusions of Law

1. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008).

2. As defined by statute, a grievance must allege “a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee.” W. VA. CODE § 6C-2-2(g)(1).

3. The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaiff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

4. “Because it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. ‘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).” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

5. This grievance presents no claim upon which relief can be granted and a remedy wholly unavailable is requested.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this 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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

Date: October 25, 2017

Ronald L. Reece
Administrative Law Judge