

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SANDRA L. JEFFRIES, et al.,  
Grievants,**

**v.**

**Docket No. 2016-1741-CONS**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
WILLIAM R. SHARPE, JR. HOSPITAL,  
Respondent.**

**DISMISSAL ORDER**

Grievants are employed by Respondent, Department of Health and Human Resources at William R. Sharpe, Jr. Hospital. On June 4, 2016, Grievants filed this grievance stating, "In a level one decision dated October 15, 2015, in Blake et al v. DHHR, the attached Grievants were awarded back pay with interest for unpaid shift differential by Respondent's own hearing examiner. The nonpayment is flagrant bad faith on Respondent's part." For relief, Grievants seek "[t]o be made whole in every way including back pay plus interest from 18 month prior to the initial May 29, 2015 filing."

On June 14, 2016, Respondent's grievance evaluator waived the grievance to level two stating she had no authority to enforce her prior decision. Following unsuccessful mediation, Grievants appealed to level three on December 8, 2016.<sup>1</sup> On January 13, 2017, Respondent, by counsel, filed *Department's Motion to Dismiss Grievance* asserting the grievance must be dismissed for lack of jurisdiction because the Grievance Board lacks authority to enforce its own decisions, the grievance is moot, and the grievance was untimely filed. 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

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<sup>1</sup> Although the document was entitled "Appeal to Level II," it was filed after the *Order of Unsuccessful Mediation* was entered and was accepted as a level three appeal.

January 30, 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 Jamie J. Beaton. Respondent is represented by counsel, Michael E. Bevers, Assistant Attorney General.

### **Synopsis**

Grievants are employed by Respondent in various classifications at William R. Sharpe, Jr. Hospital. Grievants alleged they had not received back pay that had been awarded to them in a previous level one decision. Respondent filed a motion to dismiss alleging mootness, among other arguments, as Grievants had received their back pay in July 2016. Grievants failed to respond to the motion to dismiss and dispute this assertion, despite notice and opportunity to be heard and the instruction that the grievance may be dismissed if Grievants did not respond. Respondent has proved the grievance is moot and must be dismissed. 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:

### **Findings of Fact**

1. Grievants are employed by Respondent in various classifications at William R. Sharpe, Jr. Hospital.
2. Grievants previously filed a grievance against Respondent in *Blake, et al. v. Dep’t of Health & Human Res.*, Docket No. 2015-1375-CONS.
3. The level one decision in *Blake*, dated October 15, 2015, ordered Respondent “to pay Grievants back pay for all hours of Shift Differential Pay for the hours Grievant worked at least two hours during the facility’s evening or night shift, plus statutory

interest and less any applicable taxes and deductions for a period of one year prior to the filing of this grievance.”

4. Grievants filed this grievance alleging they had not received the back pay that had been awarded to them in the *Blake* level one decision.

5. Despite notice and opportunity, Grievants did not respond to Respondent’s motion to dismiss, which asserted Grievants received their back pay in July 2016.

### **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 (2008). “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 (2008). “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 (2008). “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 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 this grievance asserting they had not been paid back pay due them under a previous level one decision. Respondent asserts that the grievance must be dismissed for lack of jurisdiction because the Grievance Board lacks authority to enforce its own decisions, the grievance is moot, and the grievance was untimely filed. Respondent asserts the grievance is moot because Grievants were paid their back pay in July 2016. Grievants failed to respond to the motion to dismiss and dispute this assertion, despite notice and opportunity to be heard and the instruction that the grievance may be dismissed if Grievants did not respond.

As Grievants have now received back pay pursuant to the previous level one decision that they had alleged they had not received, the grievance is now moot. It is not necessary to address Respondent's other arguments for why the grievance must be dismissed. Therefore, Respondent's *Department'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 (2008). “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 (2008). “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 (2008).

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 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).

5. Respondent has proved the grievance is moot and must be dismissed.

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: May 23, 2017**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**