

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LATISHA J. MARCUM,
Grievant,

v.

Docket No. 2017-1502-MinED

MINGO COUNTY BOARD OF EDUCATION,
Respondent,

and

DANIEL DEAN
Intervenor.

DISMISSAL ORDER

Grievant, Latisha J. Marcum, was employed by Respondent, Mingo County Board of Education. On January 12, 2017, Grievant filed this grievance against Respondent stating,

On or about December 22, 2016, Mingo County Board of Education selected an applicant for the position of Principal, Mingo Central High School. Grievant asserts she was more qualified for the position, and that said selection was predetermined, arbitrary & capricious, and that the posting limited the pool of applicants. WVC 18A-4-7a.

For relief, "Grievant seeks to be awarded the position of Principal, Mingo Central High School, to be made whole, and any other relief the grievance evaluator deems appropriate."

On January 26, 2017, Daniel Dean, filed to intervene, and was granted intervenor status at level one. Following the February 16, 2017 level one conference, a level one decision was rendered on March 3, 2017, denying the grievance. Grievant appealed to

level two on March 10, 2017. On March 23, 2017, Respondent, by counsel, filed *Respondent's Motion to Dismiss* asserting the grievance had been rendered moot by Grievant's voluntary resignation from employment. Respondent certifies the motion was mailed to Grievant's counsel by first class mail on March 23, 2017. On March 27, 2017, the Grievance Board notified Grievant's counsel by electronic mail that any response to the motion to dismiss must be made in writing by April 10, 2017, and that "[f]ailure to respond may result in the grievance being dismissed." The Grievance Board has received no response from Grievant to Respondent's motion. Grievant is represented by counsel, Justin J. Marcum, Marcum Law Office, PLLC. Respondent is represented by counsel, Denise M. Spatafore, Dinsmore & Shohl LLP. Intervenor is represented by Ben Barkey, West Virginia Education Association.

Synopsis

Grievant was employed by Respondent as a Counselor. Grievant protests her non-selection for the position of Principal of Mingo Central High School. Respondent moved to dismiss the grievance as moot due to Grievant's voluntary resignation from employment. Respondent has proven the grievance is moot and must be dismissed due to Grievant's voluntary resignation from employment. 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. Grievant was employed by Respondent as a Counselor.
2. Grievant applied for the position of Principal of Mingo Central High School,

but was not selected for the position.

3. Grievant filed the instant grievance protesting her non-selection and seeking reinstatement into the position.

4. Thereafter, Grievant resigned from employment with Respondent effective February 21, 2017, and Grievant's resignation was accepted by the Mingo County Board of Education on February 13, 2017.

5. Respondent moved to dismiss the grievance as moot due to Grievant's voluntary resignation from employment.

6. Despite notice and opportunity to be heard, Grievant failed to 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 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).

Respondent asserts the grievance must be dismissed as moot because Grievant has voluntarily resigned from employment. As proof of their assertion, Respondent provided the minutes from the board meeting in which Grievant's resignation was accepted. Despite notice and opportunity to be heard, Grievant failed to respond to Respondent's motion to dismiss to dispute this assertion.

"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).

In *Beckett v. Dep't of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013), the grievant protested her non-selection for a position and sought instatement into the position. After the grievant resigned from employment while the grievance was pending, the respondent moved to dismiss. The Grievance Board

dismissed the grievance stating, “When a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, ‘a decision on the merits of her grievance would be a meaningless exercise, and would merely constitute an advisory opinion.’ *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997); *Wright v. Div. [of] Motor Vehicles & Div. of Pers.*, Docket No. 2013-0714-DOT (Jul. 14, 2014); *Komorowski [v. Marshall County Bd. of Educ]*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).]” *Beckett v. Dep’t of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013). The decision was based primarily on *Komorowski*, wherein the Supreme Court of Appeals affirmed the dismissal of a non-selection grievance when the grievant had retired while the grievance was pending stating, “Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative.”

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. 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).

5. “When a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, ‘a decision on the merits of her grievance would be a meaningless exercise, and would merely constitute an advisory opinion.’ *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997); *Wright v. Div. [of] Motor*

Vehicles & Div. of Pers., Docket No. 2013-0714-DOT (Jul. 14, 2014)[. See] *Komorowski v. Marshall County Bd. of Educ*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).]” *Beckett v. Dep’t of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013).

6. “Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative.” *Komorowski v. Marshall County Bd. of Educ*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).

7. Respondent has proven the grievance is moot and must be dismissed due to Grievant’s voluntary resignation from employment.

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: June 14, 2017

Billie Thacker Catlett
Chief Administrative Law Judge