

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT LEE MOORE,
Grievant,**

v.

Docket No. 2017-0131-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DISMISSAL ORDER

Grievant, Robert Lee Moore, was employed by Respondent, Division of Highways. On July 6, 2016, Grievant filed this grievance against Respondent attaching a lengthy two-page statement. Grievant essentially alleged he has been subjected to a hostile work environment and inappropriate restriction of duties. For relief, Grievant seeks:

- Complete restoration of all job duties as Project Inspector in District 1 Construction division including State Vehicle Driving Authorization.
- A thoroughly impartial Personnel Evaluation of my 2015 job performance of 2015 conducted by some one who had directly supervised me for more than 3 months.
- The 2015 Personnel Evaluation by Mr. Brian Tackman and all related documents be forever expunged from my personnel record with a letter of confirmation supplied to grievant.
- A complete and through independent investigation of this incident by an agency independent of the Department of Highways; including a comprehensive review of the conduct of principals involved with recommendations for corrective measure and disciplinary action, if any.
- A written apology from all principals tendered to me with a copy placed in my Personnel File.
- Transfer away from the supervision of Gary Mullins to a similar Construction Division field position in an adjacent District.
- To be made whole.

Following the July 6, 2016 level one conference, a level one decision was rendered on August 10, 2016, denying the grievance. Grievant appealed to level two on August

23, 2016. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on October 13, 2016. A level three hearing was scheduled to be conducted on January 9, 2017. On January 4, 2017, Respondent, by counsel, filed a *Motion to Dismiss* asserting the grievance was moot due to Grievant's retirement and Grievant's failure to state a claim upon which relief can be granted. The undersigned cancelled the level three hearing to provide Grievant an opportunity to respond to the motion. Grievant responded to the motion by email on January 19, 2017, admitting that he had retired, which removed a few issues in the grievance, but disputed that the issues regarding his personnel evaluation, request for investigation, and request for apology were moot. Grievant appears *pro se*. Respondent appears by counsel, Jesseca R. Church.

Synopsis

Grievant was employed by Respondent as a Transportation Engineering Technician – Associate. Grievant alleged he had been subjected to a hostile work environment and inappropriate restriction of duties. After filing his grievance, Grievant retired. Respondent asserts the grievance is now moot because Grievant retired and failed to state a claim upon which relief can be granted. Respondent proved Grievant's claims are either moot due to his retirement or request relief that is unavailable from the Grievance Board. 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 Transportation Engineering Technician – Associate. Grievant's working title was Project Inspector, and Grievant was within the District 1 Construction Division.

2. Grievant alleged he had been subjected to a hostile work environment and inappropriate restriction of duties.

3. Grievant retired effective December 30, 2016.

4. Grievant admitted that a portion of his grievance was now moot due to his retirement, but asserts that issues regarding his personnel evaluation, request for investigation, and request for apology are not moot.

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. "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.” W. VA. CODE ST. R. § 156-1-6.11 (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).

Respondent asserts the grievance is now moot due to Grievant's retirement and as Grievant failed to state a claim upon which relief can be granted. Grievant admitted that a portion of his grievance is now moot due to his retirement, but asserts that issues regarding his personnel evaluation, request for investigation, and request for apology are not moot.

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

Grievant asks for an apology. "The remedy of a public apology is not available as relief from this Grievance Board." *Lawrence v. Bluefield State Coll.*, Docket No. 2008-0666-BSC (June 19, 2008); *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990).

Grievant asks for "[a] complete and through independent investigation of this incident by an agency independent of the Department of Highways; including a comprehensive review of the conduct of principals involved with recommendations for corrective measure and disciplinary action, if any." A grievance is "a claim by an

employee alleging a violation, a misapplication or a misinterpretation of the statutes policies, rules or writing agreements applicable to the employee.” W. VA. CODE § 6C-2-2(l)(1). The Grievance Board’s role is to determine if such violation, misapplication, or misinterpretation has occurred based on the evidence presented by the parties and to provide relief if proven. The grievance procedure statute does not confer investigatory powers upon the Grievance Board itself or provide the Grievance Board authority to order an investigation by an outside agency. Grievant’s request for an outside investigation is unavailable from the Grievance Board.

Grievant last asks for his 2015 personnel evaluation to be expunged from his record and a new personnel evaluation conducted. “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). “Relief which entails

declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

Performance evaluations are used in determining salary advancements and in making promotions, demotions, and dismissals. W. VA. CODE ST. R. § 143-1-15. Grievant did not allege that the performance evaluation had impacted his salary, prevented a promotion, or resulted in a demotion. Grievant only asserted that the performance evaluation maligned his reputation. As Grievant is now retired, his performance evaluation is of no practical consequence. A determination regarding the propriety of the performance evaluation would be nothing more than a declaration that either Respondent or Grievant was wrong. Therefore, the issues regarding Grievant's performance evaluation are moot.

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. “Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).]

4. “The remedy of a public apology is not available as relief from this Grievance Board.” *Lawrence v. Bluefield State Coll.*, Docket No. 2008-0666-BSC (June 19, 2008); *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990).

5. A grievance is “a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes policies, rules or writing agreements applicable to the employee.” W. VA. CODE § 6C-2-2(I)(1).

6. “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).

7. 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).

8. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

9. Respondent has proven Grievant's claims are moot because Grievant retired and failed to state a claim upon which relief can be granted.

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: March 9, 2017

Billie Thacker Catlett
Chief Administrative Law Judge