

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**AIMME REYNOLDS,
Grievant,**

v.

Docket No. 2018-0279-DHHR

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

DISMISSAL ORDER

Grievant, Aimme Reynolds, is employed by Respondent, Department of Health and Human Resources (“DHHR”) as a Health Service Worker at Jackie Withrow Hospital. Ms. Reynolds filed an expedited grievance¹ dated August 22, 2017 alleging that she had been dismissed without good cause. Grievant seeks “to be made whole in every way including back pay with interest and benefits restored.” Respondent filed a motion to dismiss dated September 18, 2017 alleging that Grievant had failed to state a claim for which any relief could be granted. The Grievance Board notified Grievant of the motion and gave her until October 2, 2017, to file a response. No response has been received.² Grievant is represented by Gordon Simmons UE Local 170 and Respondent was represented by Michael E. Bevers, Assistant Attorney General.

Synopsis

Grievant alleges that she was dismissed without good cause and seeks to be reinstated to employment with back pay and interest. Respondent filed a motion to

¹ See W. VA. CODE § 6C-2-4(a)(4).

² This matter has been assigned by the Chief Administrative Law Judge for a ruling on the motion by the undersigned for administrative reasons.

dismiss alleging that grievant has not been dismissed and fails to state any claim for which Grievant may receive a remedy. Respondent provided sufficient documentarian evidence to prove that Grievant remains employed by Respondent.

Findings of Fact

1. Grievant is employed by the DHHR as a Health Service Worker at Jackie Withrow Hospital.

2. Grievant filed a grievance form dated August 22, 2017, alleging that she had been dismissed without good cause. Grievant seeks “to be made whole in every way including back pay with interest and benefits restored.”

3. On September 18, 2017, Respondent filed a Motion to Dismiss alleging that the grievance failed to state a claim for which any relief could be granted. Respondent attached a sworn affidavit to the motion dated September 15, 2017, and signed by Angela D. Booker, Chief Executive Officer of Jackie Withrow Hospital. In the affidavit, Ms. Booker stated *inter alia*:

Aimee Reynolds is a Health Service Worker at Jackie Withrow Hospital.

Ms. Reynolds is currently employed at Jackie Withrow Hospital. She has not been dismissed. She is on the schedule and is working today.

4. The Grievance Board sent a notice to Grievant on September 18, 2017 with a copy of the Motion to Dismiss and gave the grievant until October 2, 2017 to respond.

5. No response was received.

Discussion

Respondent raises an affirmative defense in its Motion to Dismiss. When the employer asserts an affirmative defense, it must be established by a preponderance of

the evidence. *See, Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally, Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

“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.” W. VA. CODE ST. R. § 156-1-6.2. Additionally, “[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.

Grievant’s only allegation is that she was dismissed from employment and the only remedy she seeks is to be reinstated with back pay and benefits. However, Respondent proved that Grievant has not been dismissed, and is still actively employed by at Jackie Withrow Hospital. Additionally, Grievant was given an opportunity to answer the motion and state that she was not employed at the hospital, but did not do so. Therefore, it is not possible to grant the relief Grievant seeks. The only remedy sought by Grievant is wholly unavailable. Accordingly, the grievance is DISMISSED.

Conclusions of Law

1. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See, Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan.

25, 1996). *See generally, Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

2. “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.” W. VA. CODE ST. R. § 156-1-6.2.

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.

4. The only remedy Grievant seeks is wholly unavailable because her employment has not been terminated.

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 19, 2017.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**