

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ERICA SIZEMORE,
Grievant,

v.

Docket No. 2017-0947-DHHR

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

DISMISSAL ORDER

Grievant, Erica Sizemore, filed the instant grievance on September 2, 2016, stating, "Unpaid suspension, removal from regular assignment, refusal to pay for required physical examination, retaliation for absence arising from workers compensation injury and discriminatory refusal to make reasonable accommodations." As relief Grievant requests, "To be made whole in every way including back pay with interest and reversal of all retaliatory and discriminatory adverse actions including but not limited to assignments and payment for required physicals." Grievant was permitted to file directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4), as she had alleged she had been suspended from employment. The grievance was scheduled for level three hearing on March 14, 2017. On January 24, 2017, Respondent, by counsel, filed and served upon Grievant *Department's Motion to Dismiss* alleging the grievance to be moot due to Grievant's voluntary resignation from employment. On the same day, the Grievance Board notified Grievant by representative by electronic mail that any response to the motion to dismiss must be made in writing by February 7, 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 to dismiss. Grievant is represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union.

Respondent is represented by counsel, James "Jake" Wegman, Assistant Attorney General.

Synopsis

Grievant alleged Respondent suspended her from employment, refused to pay for a required physical examination, removed her from her regular assignment, retaliated against her for absence arising from a workers compensation injury, and refused to make reasonable accommodations. Respondent moved to dismiss the grievance asserting mootness due to Grievant's voluntary resignation from employment. Respondent asserted Grievant had not been suspended and had not been charged for the required physical examination. Despite notice and opportunity to be heard, Grievant did not respond to the motion to dismiss. Respondent proved the grievance is now moot due to Grievant's voluntary resignation. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant was employed by Respondent at Jackie Withrow Hospital as a License Practical Nurse.
2. Grievant filed the instant grievance on September 2, 2016, alleging Respondent had suspended her from employment, removed her from her regular assignment, refused to pay for a required physical examination, retaliated against her for absence arising from a workers compensation injury, and refused to make reasonable accommodations.

3. Grievant resigned from employment with Respondent on September 23, 2016, and her last day of work was September 9, 2016.

4. Grievant was not suspended from employment, but had only been served with a notice of predetermination conference on August 29, 2016.

5. Grievant's physical examination was performed without charge.

6. Despite notice and opportunity, Grievant did not respond to Respondent's motion to dismiss.

Discussion

"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." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008). "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 that the grievance is moot because Grievant has now voluntarily ceased employment and she did not suffer disciplinary action or financial harm. Grievant did not respond to Respondent's motion to dismiss to object to the dismissal of her claim, despite notice and opportunity, and the Grievance Board's instruction that "[f]ailure to respond may result in the grievance being dismissed."

"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).

Grievant's claims that Respondent removed her from her regular assignment, retaliated against her for absence arising from a workers compensation injury, and

refused to make reasonable accommodations all relate to conditions of employment which no longer affect Grievant as she voluntarily ceased her employment. These issues are now moot as a decision on the issues would have no practical effect and would merely be advisory in nature.

Grievant's allegations that Respondent suspended her from employment and refused to pay for a required physical examination would have financial consequences for grievant that would not be moot. However, Respondent asserted in its motion that Grievant had not been suspended or required to pay for her physical examination. In support, Respondent attached a copy of the predetermination conference notice dated August 29, 2016. Despite notice and opportunity, and the Grievance Board's instruction that "[f]ailure to respond may result in the grievance being dismissed," Grievant failed to respond to the motion to dispute these factual allegations.

Therefore, the Respondent's *Department's Motion to Dismiss* is granted, and this grievance, dismissed.

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

Conclusions of Law

1. "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." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008).

2. "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.

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).

4. “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).

5. 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).

6. Respondent proved the grievance is now moot due to Grievant’s voluntary resignation from employment.

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 *also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: February 17, 2017

Billie Thacker Catlett
Chief Administrative Law Judge