THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LYN COMPTON,

Grievant,

v. **Docket No. 2018-0275-DOT**

DIVISION OF MOTOR VEHICLES,

Respondent.

DISMISSAL ORDER

Grievant, Lyn Compton, filed a level one grievance against her employer, Respondent, Division of Motor Vehicles, on August 22, 2017,[1] stating, "Discipline without good cause." As relief sought, Grievant requests, "[t]o be made whole in every way including removal of discipline."

A level one conference was held on September 20, 2017. The grievance was denied by decision dated October 12, 2017. Grievant appealed to level two on October 17, 2017. The level two mediation was scheduled to be held on December 20, 2017, and a Notice of Mediation was issued on November 8, 2017. Thereafter, on or about December 1, 2017, Respondent filed a Motion to Dismiss alleging mootness. On December 5, 2017, the Grievance Board contacted Grievant's representative by electronic mail, attaching a copy of the motion, and informed him that if he wished to respond to the motion, he was to do so in writing before close of business December 14, 2017. Counsel for Respondent was copied on this email. Grievant submitted her written response to Respondent's Motion to Dismiss on December 7, 2017. By letter dated

[1] The signature on the grievance form is dated August 21, 2017, but its envelope is postmarked August 22, 2017. The grievance was received by the Grievance Board on August 23, 2017. As the form was mailed on August 22, 2017, such will be considered the filing date.

December 8, 2017, ALJ William B. McGinley informed counsel for the parties that he would proceed with the level two mediation without ruling on the motion to dismiss, and that if this matter was appealed to level three, Respondent could then request a ruling on the motion. A level two mediation was conducted on December 20, 2017. Grievant perfected her appeal to level three on December 26, 2017. Respondent appeared by counsel, Gretchen A. Murphy, Assistant Attorney General. On February 7, 2018, David E. Gilbert, Assistant Attorney General, filed a "Substitution of Counsel Notice of Appearance" informing the Grievance Board that he would now be representing the Respondent. Grievant appears by her representative, Gordon Simmons, US Local 170, West Virginia Public Workers Union.

Synopsis

Grievant was a probationary employee. She filed a grievance challenging a written reprimand she received from Respondent for poor work performance. While her grievance was pending at level two, approximately two months after receiving the written reprimand, Respondent dismissed Grievant due to unsatisfactory work performance. The issue of the written reprimand is now moot. Grievant did not file a grievance challenging her dismissal. Grievant asserts that it was not necessary for her to file a separate grievance to challenge her dismissal, and that she substantially complied with the grievance procedure. Grievant was required to file a separate grievance challenging her dismissal, and she did not substantially comply with the grievance procedure. Accordingly, this 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. At the times relevant herein, Grievant was employed by Respondent as a secretary. Grievant was a probationary employee who had been hired on May 1, 2017. Grievant's probationary employment period was scheduled to run from her hire date until November 1, 2017.

2. On August 10, 2017, Grievant's supervisor, Arlene Moore, issued Grievant an RL-544 "Notice to Employee" which stated, "[d]ue to poor work performance and multiple verbal counseling sessions if drastic improvements are not met within thirty (30) days job retention will not be recommended."[2]

3. Grievant met with Commissioner Patricia Reed on August 15, 2017, to discuss the RL-544 Notice to Employee. Grievant did not provide a statement in response on the form RL-546, "Employee Verification of Disciplinary Action," in response to the same.

4. DMV management made the decision to impose discipline on Grievant in the form of a written reprimand for her poor work performance. It is unclear if Respondent issued a written reprimand to Grievant or if the parties are referring to the RL-544 Notice to Employee as the written reprimand. No documents were attached to the level one decision even though it states that Respondent entered three documents into the record.[3] The parties do not appear to dispute the Respondent issued Grievant a written reprimand for poor work performance.

5. Grievant filed this grievance on August 22, 2017, grieving "[d]iscipline without good cause."

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[2] *See*, level one decision, pg. 2; Respondent's Motion to Dismiss.
[3] *See*, level one decision, pg. 2, paragraph number 7.

6. While this grievance was pending a level two mediation, Grievant was dismissed from her probationary employment for unsatisfactory work performance. Grievant was informed of her dismissal by letter dated October 6, 2017, which also stated that the effective date of her dismissal was October 22, 2017, prior to the end of her probationary period.

7. Grievant did not grieve her dismissal. The only grievance that she had filed was for her written reprimand. Grievant had not been suspended prior to her dismissal.

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*." W.VA. CODE ST. R. § 156-1-6.2 (2008). 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 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

The issue before the undersigned ALJ is Respondent's Motion to Dismiss. Respondent asserts that this matter is now moot because Grievant is no longer employed

by Respondent, and because Grievant did not grieve her dismissal from employment. Grievant argues that the reason for her written reprimand was the same as that for her dismissal; therefore, filing a second grievance for the dismissal was not necessary, and the two issues can be addressed under the one filed grievance. Accordingly, Grievant argues that the matter is not moot, and the motion to dismiss should be denied.

The Grievance Board will not hear issues that are moot. "'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 and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). "This Board has found that where a grievant is no longer an employee, '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)." *Nestor v. Dep't of Health and Human Res./Hopemont Hospital*, Docket No. 2012-0149-CONS (Dec. 4, 2012). This Grievance Board does not issue advisory opinions. *See 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 her grievance, Grievant challenges the written reprimand that she received, and asks to be made whole and for removal of the discipline. It is undisputed that Grievant was not suspended and lost no income as a result of the written reprimand. Nearly two

months after receiving the written reprimand, Grievant was dismissed from her employment. Therefore, the grievance, as filed, is moot, and issuing a decision on the same would be a meaningless exercise, and would merely constitute an advisory opinion. Grievant further attempts to include her subsequent dismissal in the instant grievance. Grievant did not file a grievance contesting her dismissal. Instead, Grievant argues for the expansion of the original grievance to include the dismissal.

"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)). The Grievance Board's authority is granted by W. VA. CODE § 6C-2-1, *et seq.* to resolve grievances, which are defined and limited by that statute.

In order to pursue a grievance, grievants are required to file a claim with the Grievance Board. An employee is required to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). The WEST VIRGINIA CODE further states as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1).

Grievant's statement of grievance reads, "[d]iscipline without good cause." As relief sought, Grievant requested "[t]o be made whole in every way including removal of discipline." Grievant argues that because the written reprimand, which was grieved, and the subsequent dismissal were based upon the same reasons, "poor work performance," it was not necessary that she file a second grievance for her dismissal. In support of her argument, Grievant relies on *Lough v. W. Va. Dep't of Health & Human Res.,* Docket No. 99-HHR-323 (Aug. 29, 2000), and *Keller v. W. Va. Division of Highways*, Docket No. 2009-1440-DOT (Sept. 8, 2010). Grievant further argues that she substantially complied with the requirements for filing grievances, and that to find otherwise would result in the process becoming a "procedural quagmire."

The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990). The Supreme Court has repeatedly instructed the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. *See Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for

relief as well as asserting defensive claims). Justice Starcher sums up the Court's philosophy in *Hale*:

> In *Spahr, supra*, we upheld a circuit court's determination that a grievance was timely filed several months after the challenged grievable event because the employees did not initially know of the actual facts relating to their grievance. *Spahr,* 182 W.Va. 726, 391 S.E.2d 739 (1990). *Spahr* and *Duryutta, supra* teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.

Hale, n.10, 199 W. Va. at 393, 484 S.E.2d at 646.

"In the spirit of a simple and expeditious process, the Grievance Board has previously allowed grievants to litigate their subsequent dismissal in grievances challenging a suspension when 'the facts giving rise' to the suspension were the same as the dismissal, with the dismissal only being 'the final discipline imposed.' *Lough v. Dep't of Health & Human Res*., Docket No. 99-HHR-323 (Aug. 29, 2000); *Messer v. Mingo County Bd. of Educ*., Docket No. 00-29-332 (May 16, 2001); *Keller v. Dept. of Transp./Div. of Highways*, Docket No. 2009-1440-DOT (Sept. 8, 2010)." *Smith v. Dep't of Health & Human Res./Lakin Hosp.,* Docket No. 2014-0320-DHHR (June 17, 2014). This line of cases does not apply to the instant grievance. In both *Lough* and *Keller*, the grievants had been suspended pending investigations into their conduct, and they were later dismissed from their positions based upon the outcome of those investigations. Thus, the underlying facts of the suspensions and the dismissals were the same, and their dismissals were merely the final discipline imposed. Also, the grievants in *Lough* and *Keller* were not probationary employees. In the instant matter, Grievant was never

suspended. Grievant was issued a written reprimand for her inability to perform the functions of her job in August 2017. Nearly two months later, during which time Grievant was working in that same position, Respondent made the decision to dismiss Grievant for unsatisfactory work performance before her probationary period ended. This is a very different situation than those presented in the cases of *Lough* and *Keller.*

Further, Grievant has not substantially complied with the grievance procedure in challenging her dismissal because she never attempted to file a grievance on that issue. This is not a mere technical error. "Requiring a grievant to actually file a claim is not an unreasonable procedural obstacle or trap. It is the most basic and simple of requirements to notify all of the nature of the grievance and the relief requested." *Smith v. Dep't of Health & Human Res./Lakin Hosp.,* Docket No. 2014-0320-DHHR (June 17, 2014). The written reprimand and the dismissal were two separate events that occurred months apart even if both were based upon unsatisfactory work performance issues. To find that the dismissal was included in the grievance filed to challenge the earlier written reprimand is not supported by *Spahr* and its progeny. Accordingly, the Respondent'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*." W.VA. CODE ST. R. § 156-1-6.2 (2008).

2. 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 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

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)). The Grievance Board's authority is granted by W. VA. CODE § 6C-2-1, *et seq.* to resolve grievances, which are defined and limited by that statute.

4. The Grievance Board will not hear issues that are moot. "'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 and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

5. "This Board has found that where a grievant is no longer an employee, '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)." *Nestor v. Dep't of Health and Human Res./Hopemont Hospital*, Docket No. 2012-0149-CONS (Dec. 4, 2012). This Grievance Board does not issue advisory opinions. *See 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. The issue of Grievant's written reprimand is moot as Grievant is no longer employed by Respondent, she suffered no loss of pay or benefits as a result of the same, and a decision on the merits of her claim would only result in an advisory opinion.

7. In order to pursue a grievance, grievants are required to file a claim with the Grievance Board. An employee is required to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). The WEST VIRGINIA CODE further states as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1).

8. The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990). The Supreme Court has repeatedly instructed the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. *See Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims). "[A] tribunal must apply . . . the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps." *Hale,* n.10, 199 W. Va. at 393, 484 S.E.2d at 646.

9 "In the spirit of a simple and expeditious process, the Grievance Board has previously allowed grievants to litigate their subsequent dismissal in grievances challenging a suspension when 'the facts giving rise' to the suspension were the same as the dismissal, with the dismissal only being 'the final discipline imposed.' *Lough v. Dep't of Health & Human Res*., Docket No. 99-HHR-323 (Aug. 29, 2000); *Messer v. Mingo County Bd. of Educ*., Docket No. 00-29-332 (May 16, 2001); *Keller v. Dept. of Transp./Div.*

of Highways, Docket No. 2009-1440-DOT (Sept. 8, 2010)." *Smith v. Dep't of Health & Human Res./Lakin Hosp.,* Docket No. 2014-0320-DHHR (June 17, 2014).

10. The exception to the filing requirement as set forth in *Lough v. Dep't of Health & Human Res*., Docket No. 99-HHR-323 (Aug. 29, 2000) and *Keller v. Dept. of Transp./Div. of Highways*, Docket No. 2009-1440-DOT (Sept. 8, 2010) does not apply in this matter as this is not a situation where an employee has been suspended pending investigation into his or her conduct, and dismissal is only the final discipline imposed for such conduct.

11. "Requiring a grievant to actually file a claim is not an unreasonable procedural obstacle or trap. It is the most basic and simple of requirements to notify all of the nature of the grievance and the relief requested." *Smith v. Dep't of Health & Human Res./Lakin Hosp.,* Docket No. 2014-0320-DHHR (June 17, 2014).

12. Grievant has not substantially complied with the grievance procedure in challenging her dismissal because she never attempted to file a grievance on that issue. This is not a mere technical error.

Accordingly, this 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 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 22, 2018.

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Carrie H. LeFevre
Administrative Law Judge