

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BEVERLY CREWS,

Grievant,

v.

Docket No. 2017-0806-DVA

DEPARTMENT OF VETERANS ASSISTANCE,

Respondent.

DISMISSAL ORDER

Grievant, Beverly Crews, filed a level one grievance against her employer, Respondent, Department of Veterans Assistance, dated August 25, 2016, stating as follows: “[i]mproper directive given by the administrator of the WV Veterans Home to not notify a physician with anything that could be an issue or problem concerning residents.” As relief, Grievant asked “[t]o be made whole in every way including withdrawal of improper directive.”

A level one hearing was conducted on September 16, 2016. This grievance was denied at level one by letter dated September 20, 2016. Grievant appealed to level two on September 24, 2016. A level two mediation was conducted on January 19, 2017. Grievant appealed to level three on January 20, 2017. Thereafter, as reflected in the Notice of Hearing entered February 16, 2017, the matter was scheduled for a level three hearing to be held on June 7, 2017. On or about April 29, 2017, Grievant filed a second grievance directly to level three of the grievance procedure, challenging her dismissal from her employment. This grievance was assigned docket number 2017-2120-DVA.

By an email dated May 22, 2017, counsel for Respondent moved to have the instant grievance placed in abeyance until the Grievant’s dismissal grievance had been

decided, because such had the potential of render the instant grievance moot. Grievant's representative objected to the same. For good cause shown, this matter was placed in abeyance by Order entered May 25, 2017, pending the outcome in Grievant's dismissal grievance, *Crews v. Dep't of Veterans Assistance*, Docket No. 2017-2120-DVA. Administrative Law Judge, William B. McGinley, issued a decision denying Grievant's dismissal grievance on April 26, 2018. By email dated May 11, 2018, counsel for Respondent moved to dismiss this grievance as moot in light of the April 26, 2018, decision. By email dated May 17, 2018, the Grievance Board informed Grievant, by representative, that if he wished to file a response, such was to be in writing and submitted no later than May 22, 2018. Grievant submitted no response. Grievant appeared by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Mark S. Weiler, Assistant Attorney General.

Synopsis

Grievant was employed by Respondent as the Director of Nursing. Grievant filed this action alleging she had been given an improper directive and sought its withdrawal. While this grievance was pending, Grievant was dismissed from her employment and she grieved the same. This matter was placed in abeyance pending the outcome of her separate dismissal grievance. The Grievance Board issued a decision denying Grievant's dismissal grievance on April 26, 2018. As Grievant is no longer employed by Respondent, any decision on the issue of the alleged improper directive would merely be a declaration that one party is right or wrong, would have no substantive consequence, and would

merely be advisory in nature. Therefore, grievance is now moot. Accordingly, this grievance is DISMISSED.

Findings of Fact

1. Grievant, Beverly Crews, was employed by Respondent as the Director of Nursing at the West Virginia Veterans Home.

2. Grievant filed the instant grievance on August 25, 2016, alleging that she had been issued an improper directive, and sought the withdrawal of the same.

3. Grievant was dismissed from her employment with Respondent on or about April 27, 2017. Grievant filed a grievance on or about April 29, 2017, challenging her dismissal.

4. Respondent's decision to terminate Grievant's employment was upheld by a Decision issued on April 26, 2018, in the grievance styled *Crews v. Dep't of Veterans Assistance*, Docket No. 2017-2120-DVA.

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). "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.

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].” *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). 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). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012). “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). *De minimus* relief is also

unavailable. *Carney v. W. Va. Div. of Rehab. Services*, Docket No. VR-88-055 (Mar. 28, 1989).” *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

Grievant’s claim in this matter relates only to her employment with Respondent. Grievant has not alleged any loss of pay or benefits. As Grievant is no longer employed by Respondent, and as her termination grievance has been fully litigated, any decision on the issue of the alleged improper directive would merely be a declaration that one party is right or wrong, would have no substantive consequence, and would merely be advisory in nature. Therefore, this grievance is now moot. Accordingly, this grievance is dismissed.

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. “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. “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].” *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

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). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

5. “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). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Services*, Docket No. VR-88-055 (Mar. 28, 1989).” *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

6. This grievance is now moot as any decision on the issue of the alleged improper directive would merely be a declaration that one party is right or wrong, would have no substantive consequence, and would merely be advisory in nature.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

DATE: May 30, 2018.

Carrie H. LeFevre
Administrative Law Judge