

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAULA M. CUNNINGHAM,
Grievant,

v.

Docket No. 2018-0642-DOT

DIVISION OF MOTOR VEHICLES,
Respondent,

and

CECIL LLOYD,
Intervenor.

DISMISSAL ORDER

Grievant, Paula M. Cunningham, was employed by Respondent, Division of Motor Vehicles. On October 25, 2017, Grievant filed this grievance against Respondent protesting her non-selection for a position as a Transportation Systems Director II.

On November 13, 2017, Cecil Lloyd filed to intervene and was granted intervenor status at level one. On June 1, 2018, Respondent, by counsel, filed a *Motion to Dismiss* asserting the grievance had been rendered moot by Grievant's termination from employment. Respondent certifies the motion was mailed to Grievant by first class mail to her last known address on the same date. By letter dated June 7, 2018, the Grievance Board notified Grievant's that any response to the motion to dismiss must be made in writing by June 22, 2018, 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. Respondent appears by counsel, Gretchen A. Murphy, Assistant Attorney General. Grievant and Intervenor appear *pro se*¹.

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Synopsis

Grievant was employed by Respondent as a Customer Service Representative. Grievant protests her non-selection for the position of Transportation Systems Director II. Respondent moved to dismiss the grievance as moot due to Grievant's termination from employment. Respondent has proven the grievance is moot and must be dismissed due to Grievant's termination from employment. 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 Customer Service Representative.
2. Grievant applied for the position of Transportation Systems Director II but was not selected for the position.
3. Grievant filed the instant grievance protesting her non-selection.
4. By letter dated April 10, 2018, Grievant was terminated from her employment for job abandonment.
5. Grievant did not grieve her termination from employment, and the time-period for filing a grievance has passed.
6. Respondent moved to dismiss the grievance as moot due to Grievant's termination from employment.
7. Despite notice and opportunity to be heard, Grievant failed to respond to Respondent's motion to dismiss.

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. “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 must be dismissed as moot because Grievant was terminated from employment, from which Grievant did not file a grievance, and the time-period in which to do so has expired. As proof of its assertion, Respondent provided a copy of the letter terminated Grievant from her position. Despite notice and opportunity to be heard, Grievant failed to respond to Respondent's motion to dismiss to dispute this assertion.

“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).

In *Beckett v. Dep't of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013), the grievant protested her non-selection for a position. After the grievant resigned from employment while the grievance was pending, the respondent moved to dismiss. The Grievance Board dismissed the grievance stating, "When a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, '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); *Wright v. Div. [of] Motor Vehicles & Div. of Pers.*, Docket No. 2013-0714-DOT (Jul. 14, 2014); *Komorowski [v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).]" *Beckett v. Dep't of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013). The decision was based primarily on *Komorowski*, wherein the Supreme Court of Appeals affirmed the dismissal of a non-selection grievance when

the grievant had retired while the grievance was pending stating, “Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative.” Although, in this case Grievant was terminated from her employment rather than resigned, because Grievant did not grieve her termination there is no difference in the reasoning that a grievance challenging non-selection would be moot because the grievant was no longer employed.

Respondent asserted Grievant was terminated from her employment, providing a copy of the termination letter as an exhibit to the motion to dismiss, and Grievant failed to respond to dispute this assertion. The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). Therefore, Respondent has proven this grievance is moot and the grievance must be dismissed.

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. “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).

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). “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).

5. “When a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, ‘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); *Wright v. Div. [of] Motor*

Vehicles & Div. of Pers., Docket No. 2013-0714-DOT (Jul. 14, 2014)[. See] *Komorowski v. Marshall County Bd. of Educ*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).]” *Beckett v. Dep’t of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013).

6. “Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative.” *Komorowski v. Marshall County Bd. of Educ*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).

7. The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

8. Respondent has proven the grievance is moot and must be dismissed due to Grievant’s termination from employment.

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: July 25, 2018

Billie Thacker Catlett
Chief Administrative Law Judge