

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT EDGAR FOX,

Grievant,

v.

Docket No. 2018-0888-MAPS

**DIVISION OF CORRECTIONS/HUTTONSVILLE CORRECTIONAL
CENTER and DIVISION OF PERSONNEL,**

Respondents.

DISMISSAL ORDER

Grievant, Robert Fox, filed the instant grievance on January 19, 2018, stating that he had been denied the opportunity to interview for a promotion to the position of Correctional Program Specialist Senior and was told that he did not qualify for the position because he was short on “professional correctional experience.” On August 2, 2018, Respondent, by counsel, Karen O’Sullivan Thornton, Assistant Attorney General, filed a *Motion to Dismiss* alleging the grievance to be moot due to Grievant’s resignation. On August 8, 2018, the Grievance Board notified Grievant by electronic mail that any response to the motion to dismiss must be made in writing by August 14, 2018, and that “[f]ailure to respond may or may not result in the grievance being dismissed.” The Grievance Board attempted to notify Grievant multiple times by phone and was informed by his wife that he had another job and did not wish to pursue the grievance. Grievant did not otherwise file a response.

Synopsis

Respondent moved to dismiss this grievance, asserting mootness due to Grievant’s resignation from employment with the Respondent. Respondent persuasively asserted that there is no basis for this Board to entertain a grievance about denial of

consideration for a promotion at an agency for which Grievant no longer works. Grievant did not file a response. His wife did inform the Board by phone that Grievant is employed elsewhere and does not wish to pursue the grievance. Respondent established that the grievance is now moot in that Grievant resigned from employment with the agency. 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.
2. Grievant filed the instant grievance on January 19, 2018, alleging that he had been denied the opportunity to interview for a promotion to the position of Correctional Program Specialist Senior and was told that he did not qualify for the position because he was short on "professional correctional experience. As relief, Grievant requested that he "be qualified to interview for the Correctional Program Specialist Senior" position.
3. Grievant resigned from employment with Respondent effective February 15, 2018.
4. Grievant did not file a response to Respondent's motion to dismiss. His wife did inform the Board that Grievant has a new job and does not wish to pursue the grievance.

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 (2018). The issue before the undersigned is Respondent's motion to dismiss. The burden of proof is on the Respondent to demonstrate that the motion should be granted by a preponderance of the evidence.

Respondent asserts that the grievance is moot because Grievant has resigned from employment. Grievant did not file a response to Respondent's motion to dismiss. Grievant's wife did inform the Board that he had obtained new employment and did not wish to pursue the grievance.

"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).

As relief, Grievant seeks a remedy unavailable to a non-employee. There is no basis for this Board to entertain a grievance about Grievant's application for a promotion at an agency for which he is no longer employed. Grievant has now resigned from employment with Respondent. Now, that Grievant has left Respondent's employment, his disqualification from interviewing for the position of Correctional Program Specialist Senior is no longer a proper basis for a grievance. Therefore, any decision by the Grievance Board on this issue would now be advisory and have no practical effect, rendering the grievance moot.

Therefore, 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.*" Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2018).

2. "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).

3. 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).

4. Respondent proved the grievance is now moot due to Grievant's resignation.

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 (2018).

DATE: August 21, 2018.

Joshua Fraenkel
Administrative Law Judge