

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PAUL FREDERICK HICKS, JR.,
Grievant,**

v.

Docket No. 2018-0824-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DISMISSAL ORDER

Grievant, Paul Frederick Hicks, Jr., is employed by Respondent, Division of Highways. On December 29, 2017, Grievant filed this grievance against Respondent stating:

On 4 Dec[.], 2017, it was announced that Mr[.] Adams was appointed as the District 6 Maintenance Engineer. On 8 Dec 2017, Mr[.] Adams was no longer reporting to work. The information to prevent the expenditure of the State in this matter was known by the District Engineer. This information was discussed [on] several occasions, and who did not fully investigate the situation prior to the selection. This is a clear violation of employee protection from a hostile work environment, and inappropriate actions by District leadership.

For relief, Grievant sought “[a] full investigation into the actions by District and State personnel involved in the hiring of Mr[.] Adams, and equality in the process of the results of these investigations.”

Following the January 3, 2018 level one hearing, a level one decision was rendered on January 25, 2018, dismissing the grievance as moot. Grievant appealed to level two on February 7, 2018, stating:

I am not being allowed to bid on any position of promotion within District 6. I feel that I am now being discriminated against because of a previous disciplinary action, which I have served. Level 1 was denied, so I am appealing to Level 2. Denial letter was received on January 27, 2018 via certified mail.

At the time of this filing, Grievant had several grievances pending. Although the email to which the grievance form was attached identified it as a level two appeal of the instant grievance, this grievance form was clearly intended as an appeal to another grievance, docket number 2018-0771-DOT, as the relief requested and the first portion of the statement of grievance are identical to the statement of grievance filed in that number on December 1, 2017. Despite this clear error, the document was accepted as a level two appeal in the instant grievance. Therefore, it will be considered an appeal based on the original statement of grievance and relief requested filed in this matter on December 29, 2017.

On April 10, 2018, Respondent, by counsel, filed Respondent's Motion to Dismiss asserting the grievance should be dismissed as "moot, untimely, and/or because the relief sought is vague and cannot be granted." By email dated April 16, 2018, Grievant opposed the motion to dismiss. Grievant appears *pro se*.¹ Respondent appears by counsel, Keith A. Cox.

Synopsis

Grievant is employed by Respondent as a Highway Engineer Associate. Grievant protests Respondent's decision to rehire an employee Grievant alleges engaged in misconduct while that employee was previously employed by Respondent. As relief, Grievant requests an investigation be conducted. Respondent moved to dismiss asserting the grievance was moot, untimely, and "because the relief sought is vague and cannot be granted." Grievant opposed the dismissal of the grievance. The grievance is

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

moot in that it protests Respondent's actions in rehiring an employee who is no longer employed. The remedy requested, that an investigation be conducted, is wholly unavailable as the Grievance Board has no independent investigatory power or statutory authority to order an investigation be conducted. 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, including the transcript of the level one hearing:

Findings of Fact

1. Grievant is employed by Respondent as a Highway Engineer Associate.
2. In December 2017, Lloyd Adams, who had previously retired from employment with Respondent, was rehired as a Highway Engineer in District 6.
3. Grievant opposed the rehiring of Mr. Adams and, prior to the decision to rehire Mr. Adams, had discussed his concerns with the District Engineer.
4. Mr. Adams worked for four days in the position and then resigned.
5. Mr. Adams is not currently employed by Respondent.

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 should be dismissed as “moot, untimely, and/or because the relief sought is vague and cannot be granted.” Respondent asserts the grievance is moot because Mr. Adams is no longer employed by Respondent, the grievance is untimely as it relates to any argument Grievant may make regarding his own demotion, and relief is unavailable because it is vague and speculative. Although Grievant brought up his own demotion in his level one hearing, he also clarified that he had filed a separate grievance over his demotion, and Grievant did not argue in his response to the motion to dismiss that he was requesting relief in this grievance regarding his demotion. Therefore, timeliness will not be further addressed. Grievant argues the relief requested is not vague, stating, “the application of the investigation by the DOH was not all inclusive to the charges that led to the investigation, as all personnel involved or who had knowledge of the incident was not interviewed.” Although Grievant states the grievance is not moot, he does not explain in his response why the grievance would not be moot.

“A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11. “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)). 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).

The Grievant requests relief that is wholly unavailable and is clearly moot. Grievant asserts Mr. Adams should not have been hired because of misconduct Grievant alleges occurred during Mr. Adams' previous employment with Respondent. Whether Mr. Adams should have been rehired is completely moot as he worked only four days and is no longer employed by Respondent. Any decision regarding whether Respondent erred in rehiring Mr. Adams would be merely advisory and have no practical effect as Mr. Adams is no longer employed.

Further, the relief Grievant requests, a full investigation into Respondent's action in the hiring of Mr. Adams, is wholly unavailable. "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)). A grievance is “a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes policies, rules or writing agreements applicable to the employee.” W. VA. CODE § 6C-2-2(I)(1). The Grievance Board’s role is to determine if such violation, misapplication, or misinterpretation has occurred based on the evidence presented by the parties and to provide relief if proven. The grievance procedure statute does not confer investigatory powers upon the Grievance Board itself or provide the Grievance Board authority to order an investigation be conducted.

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. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11.

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].” *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)). 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. 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. “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)).

7. A grievance is "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes policies, rules or writing agreements applicable to the employee." W. VA. CODE § 6C-2-2(I)(1).

8. The grievance is moot in that it protests Respondent's actions in rehiring an employee who is no longer employed.

9. The remedy requested, that an investigation be conducted, is wholly unavailable as the Grievance Board has no independent investigatory power or statutory authority to order an investigation be conducted.

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: May 30, 2018

Billie Thacker Catlett
Chief Administrative Law Judge