

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**LINDA JENKINS,
Grievant,**

v.

Docket No. 2019-0254-DHHR

**DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/MILDRED
MITCHELL-BATEMAN HOSPITAL,
Respondent.**

DISMISSAL ORDER

Grievant, Linda Jenkins, is employed by Respondent, Department of Health and Human Resources (“DHHR”), and assigned to Mildred Mitchell-Bateman Hospital. Ms. Jenkins filed an expedited grievance to Level Three¹ dated August 9, 2018, alleging that she was suspended without cause. Grievant seeks “to be made whole in every way including back pay with interest and all benefits restored.”

Respondent’s counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General, filed a Motion to Dismiss dated September 28, 2018, alleging that the matter is now moot and there is no remedy available to Grievant. The Grievance Board notified Grievant’s representative, Gordon Simmons, UE Local 170, WVPWU² that the motion had been filed and any response would have to be mailed no later than October 18, 2018. No response has been received and this matter is mature for a decision on the motion.

¹ See, W. VA. CODE § 6C-2-4(a)(4).

² West Virginia Public Workers Union.

SYNOPSIS

Grievant contested her suspension without pay while an investigation was conducted into an allegation of verbal abuse and neglect that was made against her. Before the scheduled Level Three hearing was held, Respondent finished the investigation and found that the allegations were unsubstantiated. Respondent restored all pay or leave that Grievant had lost during the suspension which renders the pending grievance moot.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Linda Jenkins, is employed by Respondent, Department of Health and Human Resources ("DHHR"), and assigned to Mildred Mitchell-Bateman Hospital.
2. On or before August 9, 2018, Grievant was suspended without pay while Respondent investigated an allegation that Grievant had committed verbal abuse and neglect of a patient.
3. Grievant elected to use her accumulated annual leave during the suspension rather than go without pay.
4. On August 9, 2018, Grievant filed an expedited grievance form contesting her suspension. The grievance is set for a hearing on December 13, 2018.
5. Subsequent to the filing of the grievance, Respondent concluded the investigation and found that the allegations against Grievant were unsubstantiated. Grievant was reinstated to her position and all of the annual leave she had utilized during the suspension was restored. Grievant suffered no loss of benefits.

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).

Respondent asserts as an affirmative defense that the grievance is moot because Grievant has been restored to employment and did not suffer any loss of pay or benefits. "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 (2018).

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. Dept. 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).

In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. '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)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

In this case Grievant was fully reinstated to her position prior to the Level Three hearing. Because she was able to utilize annual leave while on suspension, she did not lose pay while the investigation was conducted. All her annual leave has been restored and she has not suffered a loss of benefits. There is no remedy available to Grievant even if she were to prevail. "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]." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997) (citing *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993)).

Grievant has been reinstated to employment and all her benefits have been restored. There is no relief which can be awarded to Grievant even if she were to prevail on the merits. Accordingly, the grievance is moot and must be 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." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2018).

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 (2018).

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]." *Bragg v. Dept. 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).

4. In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. '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)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

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]." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997) (citing *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993)).

6. Respondent proved by a preponderance of the evidence that Grievant has suffered no loss of pay or benefits which renders this grievance moot.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: OCTOBER 24, 2018.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**