

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KELLY LYNN KATONA,

Grievant,

v.

Docket No. 2018-0133-DHHR

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/LAKIN HOSPITAL,**

Respondent.

DISMISSAL ORDER

Grievant, Kelly Lynn Katona, submitted an expedited level three grievance dated July 17, 2017, against Respondent, Department of Health and Human Resources, Lakin Hospital (“DHHR”), challenging her dismissal and seeking reinstatement in her job.¹

A level three hearing was held on November 1, 2017, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, James “Jake” Wegman, Esquire, Assistant Attorney General. However, Grievant chose to leave in the middle of questioning a witness. Respondent then orally moved for dismissal asserting the Grievant abandoned her grievance. As reflected in the Order entered November 9, 2017, the ALJ then held the motion in abeyance as Grievant received no notice of the same, and continued the hearing. Respondent was ordered to submit its motion in writing and serve the same upon Grievant. Grievant was granted until November 27, 2017, to

¹ It is noted that Grievant left the statement of grievance section of her Grievance Form blank. In the relief sought section she wrote, “[g]etting my job back.” Respondent did not challenge this statement of grievance, and did not move for dismissal until the events occurring at the level three hearing.

file a response thereto. Respondent submitted a “Motion to Dismiss or in the Alternative Department’s Request for a Decision on the Record Before the Grievance Board” on November 8, 2017, and served the same upon the Grievant as ordered. Grievant filed no response to this motion. This matter is now mature for decision.

Synopsis

Grievant was employed by Respondent as a Housekeeper. Grievant was a probationary employee. Respondent dismissed Grievant from employment, and Grievant filed this grievance. The matter proceeded to a level three hearing. However, while questioning one of Respondent’s witnesses during the hearing, Grievant began to yell at the witness, then stormed out of the hearing, and left the premises. Thereafter, Respondent moved for dismissal based upon abandonment. Grievant filed no response to the motion, and ceased communicating with the Grievance Board. Respondent proved by a preponderance of the evidence that the grievance should be dismissed for abandonment. Therefore, the grievance is DISMISSED.

The following Findings of Fact are made based upon a complete and thorough review of the record created in this matter:

Findings of Fact

1. Grievant was employed by Respondent as a Housekeeper at Lakin Hospital. Grievant was a probationary employee.
2. On July 17, 2017, Grievant was dismissed from her employment.
3. On July 17, 2017, Grievant filed an expedited level three grievance challenging her dismissal.

4. This matter was scheduled for hearing on November 1, 2017. On that day, Grievant appeared in person, without counsel, at the Grievance Board's Charleston, West Virginia office. Respondent appeared by counsel.

5. Respondent called three witnesses at the hearing. Grievant declined the opportunity to question the first two. However, Grievant stated that she had questions for the third.

6. While questioning the third witness, Grievant became angry and began yelling at the witness and talking over her. Grievant ignored the ALJ's attempts to stop the disruption. Grievant then abruptly stood up, while still yelling, and left the hearing room. Grievant ignored the ALJ's attempts to stop her and speak to her. Grievant then left the premises.

7. At the time Grievant left the hearing, neither party had finished the presentation of evidence. Grievant had not even began presenting her case-in-chief.

8. Respondent moved for dismissal of this grievance asserting that Grievant abandoned her grievance. Grievant submitted no response to the motion.

9. The Grievance Board has received no communications from Grievant since the date of the level three hearing. No mail sent to Grievant has been returned to the Grievance Board as undeliverable.

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). 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent argues that this grievance should be dismissed for abandonment as Grievant abruptly left during the level three hearing. It is noted that the Grievance Board has received no communications from Grievant since the date of her level three hearing. Further, she has failed to respond in any way to Respondent's Motion to Dismiss. However, abandonment is not specifically listed as grounds for dismissal in the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board. See W. VA. CODE ST. R. § 156-1-1 (2008) *et seq.*

Respondent has provided no authority to support its position that abandonment is a proper ground for dismissal of a grievance. It is noted that failure to state a claim, failure to pursue, and failure to abide by an appropriate order of an administrative law judge are listed in the Rules as grounds for dismissal. The Grievance Board also routinely dismisses grievances on the basis of untimeliness, mootness, lack of jurisdiction, and when the remedy sought is wholly unavailable. However, none of these grounds apply to the instant matter. Respondent did not move to dismiss the grievance for any reason prior to the level three hearing, and now argues no grounds for dismissal other than abandonment. The scenario presented in this grievance is unique. Grievant appeared

at the hearing and evidence was taken. This is not a failure to appear or a failure to pursue situation. Grievant was pursuing her grievance, then just abruptly left in the middle of questioning one of Respondent's witnesses. Thereafter, she ceased all communications with the Grievance Board, despite the pending motion to dismiss. Also, technically, Grievant has not failed to abide by any Order issued in this matter. The Order issued in this matter after the November 1, 2017, hearing did not specifically require that Grievant respond to Respondent's motion to dismiss. The Order set forth the deadline for filing the response, and noted that failure to respond may result in the dismissal of this action.

Rules 6.19, 6.19.2, 6.19.3 offer some insight into whether a grievance can be dismissed for abandonment. "Final disposition—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. (2008). "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 (2008). "*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 (2008) (emphasis added).

Further, the term "abandon" is defined as follows:

[t]o desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest.

To give up or to cease to use. To give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert. It includes the intention, and the external act by which it is carried into effect.

BLACK'S LAW DICTIONARY 2 (6th ed. 1990). At the level three hearing, the parties informed the undersigned ALJ that Grievant was a probationary employee. However, there appeared to be some dispute as to which party had the burden of proof. The ALJ held that issue in abeyance to be ruled upon in the level three decision, and the parties proceeded with the presentation of evidence. As Respondent had submitted a lengthy witness list, and Grievant had no witnesses other than herself, the ALJ directed Respondent to go first in presenting its case in chief. There were no objections to the same.

Thereafter, Respondent called its first two witnesses, and presented their testimony. Grievant declined to question both of those witnesses. However, after counsel for Respondent had finished its third witness's direct examination, Grievant stated that she had questions for that witness. Grievant began her questioning of the third witness. However, within minutes, Grievant began to yell at the witness and to talk over her. The ALJ attempted to stop this disruption, but Grievant ignored the ALJ. Then Grievant abruptly stood up, all the while still yelling, and left the hearing room, ignoring the ALJ's attempts to stop her and speak to her. Upon information and belief, after Grievant exited the hearing room, she left the Grievance Board's office, and was seen by staff members getting into a vehicle that drove away. Upon information and belief, Grievant was yelling as she left the Grievance Board Office. While it is unclear what exactly she said as she

was leaving the office, Grievant is believed to have stated that she was either “done” or “gone,” and made accusations that people were lying about her.

After Grievant had left the hearing room, counsel for Respondent orally moved for the grievance to be dismissed for “abandonment.” As Grievant received no notice of this oral motion, and no opportunity to respond to the same, the ALJ ordered Respondent to put its motion in writing and serve the same on Grievant at her address of record. The ALJ then continued the hearing. Respondent filed its written “Motion to Dismiss or in the Alternative Department’s Request for a Decision on the Record Before the Grievance Board” on or about November 8, 2017, serving the same upon Grievant. The ALJ granted Grievant until November 27, 2017, to submit a written response to this motion. Grievant filed no response to Respondent’s Motion. Further, the Grievance Board has had no contact with Grievant since the November 1, 2017, hearing. It is noted that no mail sent to Grievant has been returned to the Grievance Board as undeliverable.

Grievant’s behavior at the November 1, 2017, hearing was unprofessional, disrespectful to all present, and entirely inappropriate. Grievant clearly deserted the hearing, and her behavior, as well as her inaction since that date, indicates that she has also deserted her claim. Grievant’s behavior, as described herein, also demonstrates that she has no intent to resume her grievance. Grievant has abandoned her grievance. Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, Rule 6.19.3, an ALJ may issue dismissal orders “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.” (emphasis added.) *Id.* Rule 6.19.3

allows for the possibility that other valid reasons warranting the issuance of an appealable dismissal order could arise. Abandoning a grievance, especially in the manner by which Grievant chose to abandon hers, is certainly a valid reason for dismissal. Accordingly, pursuant to Rule 6.19.3, 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. The burden of proof is on the Respondent to demonstrate that its motion to dismiss should be granted by a preponderance of the evidence. “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3. “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 (2008).

4. Abandoning a grievance is a valid reason for dismissal pursuant to W. VA. CODE ST. R. § 156-1-6.19.3 (2008).

5. Respondent proved by a preponderance of the evidence that its motion to dismiss should be granted.

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: January 16, 2018.

Carrie H. LeFevre
Administrative Law Judge