

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PATTY PERRINE,
Grievant,**

v.

Docket No. 2016-1706-DEP

**DEPARTMENT OF ENVIRONMENTAL PROTECTION/
DIVISION OF MINING AND RECLAMATION,
Respondent.**

DISMISSAL ORDER

Grievant, Patty Perrine, filed the instant grievance on May 28, 2016, stating, "Grievant has been subjected to unlawful discrimination including but not limited to allowed alternate work schedule and use of earned leave time." As relief Grievant requests, "To be made whole in every way including return to original AWS, ability to use earned leave & end to discrimination." A level one hearing was held on May 8, 2017, and an Order Adopting Recommended Decision was issued on September 22, 2017, denying the grievance at level one. Grievant appealed to level two on October 2, 2017, and a mediation session was held on April 2, 2018. Grievant appealed to level three of the grievance process on April 10, 2018. A level three hearing was scheduled on April 27, 2018, to be held on August 24, 2018.

On August 9, 2018, Respondent, by counsel, Anthony D. Eates II, Assistant Attorney General, filed a *Motion to Dismiss* alleging the grievance to be moot due to Grievant's resignation. On the same date, the Grievance Board notified Grievant by electronic mail that any response to the motion to dismiss must be made in writing by August 17, 2018, and that "[f]ailure to respond may result in the grievance being dismissed." Grievant, by representative, Gordon Simmons, UE Local 170, filed his

response on August 13, 2018. Respondent filed its Reply to Grievant's Response to Motion to Dismiss on August 17, 2018. This matter is ripe for decision.

Synopsis

Respondent moved to dismiss this grievance asserting mootness due to Grievant's resignation from employment. Respondent persuasively averred that there is no basis for this Board to entertain a grievance about changes to Grievant's work schedule at an agency for which Grievant no longer works. Respondent established 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, Department of Environmental Protection/Division of Mining and Reclamation as an Environmental Remediation Project Manager in the Office of Environment Remediation (OER).

2. Grievant filed the instant grievance on May 28, 2016, alleging unlawful discrimination. As relief, Grievant requested "to be made whole in every way including return to original AWS, ability to use earned leave & end to discrimination."

3. Prior to May 2016, beginning in 1995, OER project managers had been permitted to work alternative work schedules (AWS) that deviated from Respondent's standard work hours and were also permitted to work from home.

4. Respondent's alternative work schedules expressly provides that an employee's eligibility to participate in such is a privilege. Whether an employee is

permitted to have an alternative work schedule is at the discretion of the employee's supervisor.

5. In May 2016, Respondent implemented a new work schedule policy that eliminated the alternative work schedule option for all OER project managers and returned to the standard workweek under Respondent's Attendance and Overtime Policy.

6. On May 8, 2016, subsequent to the implementation of the new work schedule policy, Grievant submitted a request for an alternative work schedule. This request was denied on May 16, 2016.

7. Grievant claims that this denial is unlawful discrimination and filed the instant grievance stating the same. Grievant did not seek back pay or allege any monetary damages.

8. Grievant resigned from employment with Respondent effective August 31, 2017.

9. Grievant did not motion to amend the relief requested by her grievance statements filed on May 28, 2016.

10. On August 9, 2018, Respondent filed a Motion to Dismiss alleging the grievance to be moot.

11. On August 13, 2018, Grievant responded to Respondent's Motion to Dismiss. Respondent filed its Reply to Grievant's Response to Motion to Dismiss on August 17, 2018.

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). This 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’s response to Respondent’s motion to dismiss provides that there is available remedy to her, including back pay with interest. Respondent’s Reply to Grievant’s Response to Motion to Dismiss highlights that the only grievance statement that has been filed in this matter on August 17, 2018 does not request or reasonably infer a loss of past wages. Grievant’s requested “the return to original AWS, ability to use earned leave & end to discrimination.”

Grievant has not amended her grievance statement or requested leave to alter her request for relief.¹ Grievant’s grievance statement as filed and the September 22, 2017 level one decision do not infer or reasonably interject the contention that back pay was a relief in contention.

¹ Grievant did not motion to amend the relief requested by her grievance statements filed on May 28, 2016. Such motions can be made before level three and an administrative law judge has the discretion to approve or deny dependent upon several collective factors, citing 156 C.S.R. 1 § 6.2 (2018) granting administrative law judges the authority to take action considered appropriate consistent with WEST VIRGINIA CODE § 6C-1-1 et seq.

The Supreme Court has held that the grievance process is not to be a procedural quagmire where the merits of the cases are forgotten, *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). Further, the grievance process is clearly not intended to be a guessing game for Respondent or this Grievance Board. Requiring a grievant to file a cognizable claim is not an unreasonable procedural obstacle or trap. It is the most basic and simple of requirements to notify the nature of the grievance and the relief requested. *Smith v. Dept. of Health and Human Resources/Lakin Hospital*, Docket No. 2014-0320-DHHR (June 17, 2014). Without adequate understanding and knowledge of the grievance and the relief under consideration, the parties are generally not in the position to prepare for the grievance, nor to consider possible settlement options that may or may not be available at the various stages of the grievance proceedings.

Grievant, with the assistance of a representative, a veteran before this agency, did not request or infer back pay was a requested relief. The undersigned agrees with Respondent. Grievant filed a grievance that clearly challenged the change to her work schedule in 2016 and its effect on her ability to use annual leave while employed at the agency after such changes. W. VA. Code R. § 156-1-6.11 provides that 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.

“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 changes to Grievant's work schedule at an agency for which she is no longer employed. Grievant has resigned from employment with Respondent. Now that Grievant has left Respondent's employment, the change to her work schedule and related authorization for annual leave usage while working are 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.

Accordingly, Respondent's Motion to Dismiss is granted, and this grievance is 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 persuasively established by a preponderance of the evidence that the instant grievance is moot due to Grievant’s resignation.

Accordingly, this Grievance is **DISMISSED**. The level three hearing previously scheduled for August 24, 2018, is cancelled.

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.

Landon R. Brown
Deputy Chief Administrative Law Judge