

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BENJAMIN F. RILEY,
Grievant,**

v.

Docket No. 2018-1067-DOC

**DIVISION OF NATURAL RESOURCES,
Respondent.**

DISMISSAL ORDER

Grievant, Benjamin F. Riley, was employed by Respondent, Division of Natural Resources. On March 16, 2018, while Grievant was still employed by Respondent, Grievant filed this grievance against Respondent stating,

The reprimand and counseling I received on 3-3-2018. The reprimand states that I violated State Law "CSR 58-31.2.2" and General Orders by taking ginseng from a State Park, "Watter Smith." Along with violating policy by leaving ginseng in temporary evidence locker. The approval to possess illegal ginseng and sell it to an illegal buyer was done through the chain of command. The same chain of command that issued the reprimand. Grievant was required to obtain ginseng in conjunction with conducting a reverse buy to a criminal suspect as part of an agency approved undercover operation. Further, Grievant is aware that numerous officers have engaged in the same exact activities without reprimand. Grievant is being singled out for reprimand in this matter as a pretext.

For relief, Grievant seeks as follows: "The noted reprimand should be removed from all Grievant's employment file[s and] all three reprimands shall be returned to this officer."

On October 19, 2018, Respondent, by counsel, filed its *Motion to Dismiss* asserting the grievance is moot as Grievant had resigned employment with Respondent. On October 29, 2018, Grievant, by counsel, filed *Grievant's Response to Motion to Dismiss* admitting he had left employment with Respondent but asserting the grievance is not

moot. Grievant is represented by counsel, Joe F. Shaffer, Shaffer Madia Law. Respondent is represented by counsel, Jane Charnock, Assistant Attorney General.

Synopsis

Grievant was employed by Respondent as a Natural Resources Police Officer. Grievant protests a counseling and reprimand. Following the filing of the grievance, Grievant voluntarily resigned from employment with Respondent. Respondent asserts the grievance is now moot. Grievant contends the grievance is not moot as Grievant may seek re-employment with Respondent in the future. Respondent has established that the grievance should be dismissed as moot. 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:

Findings of Fact

1. Grievant was employed by Respondent as a Natural Resources Police Officer.
2. On March 3, 2018, Grievant was counseled and reprimanded, which was memorialized in a written, signed statement. The statement indicates it was copied “[t]o D-1 File.”
3. On March 16, 2018, Grievant filed the instant grievance protesting the same.
4. Thereafter, Grievant voluntarily resigned from employment with Respondent. His last day of employment was June 30, 2018.
5. By letter dated August 24, 2018, Respondent’s counsel stated, “Both Colonel Jenkins and I have reviewed the personnel file maintained in the DNR

Headquarters. Neither he nor I could find any reference to the reprimands complained of in your client's grievance. . . I can assure you that the referenced reprimands are not in your client's employment file."¹

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 (2018). "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.

Respondent asserts the grievance is now moot because Grievant is no longer employed by Respondent and any decision would merely be advisory. Grievant asserts the grievance is not moot because, although he is no longer employed by Respondent,

a) his personnel file will still exist in perpetuity notwithstanding his separation from employment; b) he may seek to return to the employ of the Employer at some point and the content of

¹ Grievant attached a copy of the letter to *Grievant's Response to Motion to Dismiss*. The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

his personnel file maintained by Employer would be relevant to his efforts to return to his employ; and, c) a remedy exists in the event that Grievant prevails in his efforts to have the reprimand removed from his personnel file.

“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).

“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]. *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).” *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997). The Grievance Board will not decide matters that are “speculative or premature, or otherwise legally insufficient.” *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket

No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994).

As Grievant is no longer employed by Respondent, the counseling and reprimand have no practical consequences for Grievant, and a decision on this grievance would be merely advisory. Grievant's argument that the same would be relevant in the future should Grievant seek to be re-employed by Respondent is obviously speculative and is rendered even more speculative by the written confirmation of Respondent's counsel that the complained-of document does not appear in Grievant's personnel file. Accordingly, Respondent has established that the grievance should be dismissed as moot.

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 (2018). "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.

3. "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).

4. 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).

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

6. The Grievance Board will not decide matters that are “speculative or premature, or otherwise legally insufficient.” *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994).

7. Respondent has established that the grievance should be dismissed as 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 17, 2018

Billie Thacker Catlett
Chief Administrative Law Judge