

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BRIAN SCOTT,
Grievant,**

v.

Docket No. 2017-2505-CONS

**MASON COUNTY BOARD OF EDUCATION,
Respondent.**

DISMISSAL ORDER

Grievant, Brian Scott, is employed by Respondent, Mason County Board of Education. On June 2, 2017, Grievant filed a grievance against Respondent asserting his principal, Dr. Karen Oldham, had “an ongoing pattern and practice” of treating him “in an unfair manner and differently than a similarly situated employee.” For relief, Grievant sought that “Mason County Schools be directed to take whatever steps are necessary, including disciplinary measures, to correct the inappropriate and unprofessional conduct of Dr. Karen Oldham, Principal, Hannan High School.” On June 22, 2017, Grievant filed a grievance against Respondent asserting the same allegation against his principal, Dr. Karen Oldham, based on a new allegation that she changed or caused to be changed a student’s grade in violation of policy and requesting the same relief plus the additional relief that Respondent be directed to follow law and policy “in all matters of student grading.”

On an unspecified date, level one conferences were held on the grievances, and level one decisions were rendered on both grievances on October 6, 2017, denying the grievances. Grievant appealed to level two in both grievances on October 24, 2017. On November 14, 2017, Grievant moved to consolidate the two grievances. The grievances

were consolidated by order entered November 17, 2017. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on March 7, 2018.

On July 24, 2018, Respondent, by counsel, filed *Respondent's Motion to Dismiss*, asserting the grievance is moot due to Grievant's resignation from employment. On August 14, 2018, Grievant, by counsel, filed *Grievant's Response in Opposition to Respondent's Motion to Dismiss* admitting the Grievant had resigned, but asserting the grievance was not moot. On the same date, Grievant, by counsel, filed his *Motion to Consolidate* the instant grievance with a subsequent grievance filed by Grievant, docket number 2018-1010-MasED, in which he alleged reprisal, harassment, and hostile work environment. Grievant is represented by counsel, Abraham J. Saad, Saad Dixon Law Offices PLLC. Respondent is represented by counsel, Leslie K. Tyree, Esquire.

Synopsis

Grievant was employed by Respondent as a Teacher and Coach. Grievant filed consolidated grievances protesting the alleged improper conduct of his school principal. Grievant resigned his employment and is now employed by another county school board. Respondent moved to dismiss the grievance as moot. Grievant asserted the grievance was not moot as he alleged his former school principal has continued to make negative comments about Grievant to employees of his current employer. Grievant cannot pursue allegations against his former principal for her current conduct in making negative comments to Grievant's new employer through this grievance against Respondent as he is no longer an employee of Respondent. The grievance is moot due to Grievant's resignation from employment and must be dismissed. 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 Teacher and Coach.
2. Grievant alleged that his school principal, Dr. Oldham, was repeatedly texting Grievant's wife, also a school employee, following Grievant's athletic practices, which upset her, that Dr. Oldham refused to allow Grievant to tend to the athletic field in favor of another coach, that the locks on the coach's office were changed, and that Dr. Oldham "changed or caused to have changed, a specific student's grade without consultation with or agreement from" Grievant.
3. Grievant resigned from his employment effective June 22, 2018, which resignation was accepted by Respondent at a meeting on July 10, 2018.
4. Grievant is now employed by the Cabell County Board of Education.

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 as Grievant has resigned from employment with Respondent and the grievance relates only to Grievant's supervision by Dr. Oldham, a decision upon which would be advisory in nature. Grievant admits he has resigned from employment with Respondent but asserts the grievance is not moot because Dr. Oldham has continued to make negative comments about Grievant to employees of his current employer.

"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), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *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 specific allegations in the consolidated grievances are that Dr. Oldham was repeatedly texting Grievant’s wife, also a school employee, following Grievant’s athletic practices, which upset her, that Dr. Oldham refused to allow Grievant to tend to the athletic field in favor of another coach, that the locks on the coach’s office were changed, and that Dr. Oldham “changed or caused to have changed, a specific student’s grade without consultation with or agreement from” Grievant. These issues are clearly now moot. Grievant is no longer subject to Dr. Oldham’s supervision, and a decision on these issues would merely be a declaration that one party was right or wrong.

As to Grievant’s contention that the grievance is not moot due to Dr. Oldham’s alleged negative comments to employees of Grievant’s current employer, those allegations were not part of the original grievance filing and cannot be addressed in a grievance against Respondent now as Grievant is no longer an employee of Respondent. “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)). “The purpose of [the grievance statute]

is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “‘Employee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). “‘Employer’ means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.” W. VA. CODE § 6C-2-2(g).

Grievant is still an employee for purposes of the grievance procedure, because he is still employed by a county board of education, but Respondent is no longer his employer. If Grievant’s current employer takes action against him based on the alleged statements of Dr. Oldham, Grievant would have the right to file a grievance against his current employer at that time and could still subpoena whatever witnesses were relevant in that action. Otherwise, the conduct of Dr. Oldham, as the employee of a public employer not Grievant’s own, is outside the grievance procedure.

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), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *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. “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. “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a).

8. “‘Employee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). “‘Employer’ means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.” W. VA. CODE § 6C-2-2(g).

9. Grievant cannot pursue allegations against his former principal for her current conduct in making negative comments to Grievant's new employer through this grievance against Respondent as he is no longer an employee of Respondent.

10. The grievance is moot due to Grievant's resignation from employment and must be dismissed.

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: September 17, 2018

Billie Thacker Catlett
Chief Administrative Law Judge