

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ERIN S. THOMAS,
Grievant,**

v.

Docket No. 2015-0431-BerED

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

DISMISSAL ORDER

On October 13, 2014, Grievant filed this action against the Berkeley County Board of Education directly to Level Three. Grievant states that he is challenging his termination of employment as set forth in a letter from the superintendent dated October 7, 2014. This case was placed in abeyance pending the final outcome of criminal charges against the Grievant. Respondent filed a Motion to Dismiss this grievance on or about December 8, 2017, on the grounds that the case is moot. Grievant was provided an opportunity to respond to the motion and did so on January 8, 2018. Respondent appeared by its counsel, Howard E. Suefer, Jr. and Kimberly S. Croyle, Bowles Rice, LLP. Grievant appeared by his counsel, Susan E. Thompson. This matter became mature for consideration upon the receipt of the parties' last pleadings on January 8, 2018.

Synopsis

Grievant, a teacher, was convicted of the felony offense of sexual abuse by a person in a position of trust following a jury trial in Berkeley County Circuit Court. Grievant sought alternative sentencing by agreeing not to pursue or accept any employment in a teaching capacity where minors are present. In addition, Grievant's teaching certificate

and endorsement were permanently revoked by an Order issued by the State Superintendent of Schools. When Grievant engaged in a voluntary act that removed him from possible employment, any subsequent decision on the merits is a meaningless exercise, and constitutes an advisory opinion. Accordingly, this grievance is dismissed.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed as a teacher with the Berkeley County Board of Education.

2. On July 5, 2014, Grievant was arrested for allegedly committing crimes involving children.

3. On July 7, 2014, following Grievant's arrest for allegedly committing crimes involving children, Respondent provided Grievant with a Notice of Suspension without pay during Respondent's investigation into the matter. Respondent then conducted its own investigation.

4. On August 4, 2014, Respondent's Superintendent, Manny P. Arvon, provided Grievant with a Notice of Recommendation to Terminate Grievant's employment based on an inappropriate relationship with a minor female student and making threats against the female student's boyfriend. The notice further alleged that the relationship with the minor female student was sexual in nature.

5. A hearing regarding Grievant's termination was held on September 22, 2014, and September 30, 2014. At the hearing, Grievant was represented by his counsel, Susan Thompson. Following the conclusion of the hearing on September 30, 2014, Respondent voted to terminate Grievant's contract and ratify the suspension.

6. On October 1, 2014, Respondent notified the State Superintendent of Schools regarding Grievant's misconduct in accordance with WEST VIRGINIA CODE § 18A-3-6.

7. On June 23, 2015, after trial in the Circuit Court of Berkeley County, a jury found Grievant guilty of the felony offense of Sexual Abuse by a Parent, Guardian, Custodian or Person in a Position of Trust in violation of WEST VIRGINIA CODE § 61-8D-5(a).

8. On November 13, 2015, the Berkeley County Circuit Court sentenced Grievant to not less than 10 years nor more than 20 years in prison. At the Grievant's request, the court granted an alternative sentence, which allowed Grievant to serve his sentence under home confinement. The alternative sentence further sentenced Grievant to 15 years of supervised release, subject to an "Agreement to Comply with Rules of Supervision and CDA Monitoring Services Participant Agreement" and "Terms and Conditions of Supervised Release."

9. These agreements contained the following terms and conditions:

"Will not seek or accept a teaching position in any way that involves minors."

"Will not pursue any employment in teaching capacity where minors are present."

10. Following his conviction, Grievant initiated a series of appeals beginning with the West Virginia Supreme Court of Appeals.

11. The West Virginia Supreme Court of Appeals unanimously upheld the Grievant's conviction by Memorandum Decision filed on November 18, 2016.

12. Grievant then sought an appeal to the United States Supreme Court, which was ultimately denied. By letter dated October 30, 2017, Grievant notified the Grievance Board of his unsuccessful appeal to the United States Supreme Court, and requested that his grievance proceed.

13. Grievant remains subject to the terms and conditions set forth in the “Agreement to Comply with Rules of Supervision and CDA Monitoring Services Participant Agreement” and “Terms and Conditions of Supervised Release.” These agreements prohibit him from seeking, accepting or even pursuing a teaching position that would place him in contact with minors.

14. On July 24, 2017, Grievant’s teaching certificate and endorsement were permanently revoked by an Order issued by the State Superintendent of Schools.

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 (2008). 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.

“When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In

addition, 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. 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 and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

Grievant seeks reinstatement to a teaching position, back pay, and all damages available under the law. Grievant, a convicted felon, voluntarily agreed not to seek, pursue, or accept a teaching position involving minors in order to avoid incarceration. When a grievant engages in a voluntary act that removes the grievant from possible employment, any subsequent decision on the merits is a meaningless exercise, and constitutes an advisory opinion. *See generally Marcum v. Mingo County Bd. of Educ.*, Docket No. 2017-1502-MinED (June 24, 2017); *Backett v. Dep't of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013).

In addition, Grievant is a convicted felon and his teaching certificate and endorsements have been permanently revoked. Grievant is ineligible for employment with any county board of education in West Virginia and it is impossible for the undersigned to reinstate him to his position. As such, any decision issued by the undersigned would be advisory in nature, and the Grievance Board does not issue advisory opinion.

Concerning the request for back pay, a board of education may suspend an employee without pay while criminal proceedings are conducted, so long as some

particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial). *Adkins v. Cabell Count Bd. of Educ.*, Docket No. 2012-0085-CabED (April 26, 2012). As Grievant's arrest led to his felony conviction, any request for back pay regarding his suspension should be 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 (2008).

2. The Grievance Board will not issue advisory opinions. W. VA. CODE ST. R. § 156-1-6.21 (July 7, 2008), *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

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. 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 and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

4. Grievant's felony conviction, sentencing agreement and revocation of his teaching certificate has rendered this matter 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 (2008).

DATE: February 2, 2018

**RONALD L. REECE
ADMINISTRATIVE LAW JUDGE**