

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**AARON WHITE,
Grievant,**

v.

Docket No. 2018-0035-MAPS

**DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent.**

DISMISSAL ORDER

Grievant, Aaron White, was employed by Respondent, Division of Corrections at Mount Olive Correctional Complex. On July 17, 2017, Grievant filed this grievance against Respondent stating:

Harassment – Hostile Working Environment and Retaliation. On 15 July 2017 I was issued a Mid Term EPA with [d]oes not meet expectations and Attendance being the reason [f]or this. The 13 unsupported absences, I was not on no restricted leave and I was within Policy. I did not go over the two days. On May 02, 2017 I was placed on 60 day Improvement Period by Major Robert Rhodes and LT. Darryl Simpson in which I was instructed i[f] I called o[ff] submit a Doctor's Excuse. I submitted a Doctor's Excuse every time I called o[ff] or had to leave [f]rom work and all were [e]mergency [r]oom [v]isit except for a couple that were appointments. I followed [p]olicy and [v]erbal [d]irection and on 15 July 2017 I was a [r]equest for [d]iscipline is submitted. According to LT. Simpson its not by him but ordered by AWS Jonathon Frame. All because I file [g]rievances and I don't allow AWS Frame to [m]anipulate [m]e to his advantage. I'm getting punished for [f]ollowing [r]ules. Attached are the EPA's and special APA's.

For relief, Grievant seeks "1) Monetary [d]amages in the amount of \$200,000.00. 2) Progressive Discipline against AWS Jonathon Frame."

By undated letter received by the Grievance Board on August 28, 2017, Acting Commissioner Loita Butcher accepted the recommended decision of the level one administrative hearing examiner denying the grievance. Grievant appealed to level two

of the grievance process on August 29, 2017. Following unsuccessful mediation, Grievant appealed to level three on January 23, 2018. For his appeal, Grievant submitted a copy of the grievance form he originally filed at level one and attached a cover letter in which he states that he had taken a new job in another city and that all his paperwork had been lost in the move. On February 28, 2018, Respondent, by counsel, filed *Respondent's Motion to Dismiss* alleging the grievance must be dismissed as Grievant seeks remedies wholly unavailable. By email on March 1, 2018, the Grievance Board notified Grievant he had until close of business March 15, 2018, to respond to the motion in writing, and that no hearing would be held on the motion. By letter dated March 1, 2018, Grievant responded to the motion stating:

I, Aaron L. White, do not want Grievances 2018-0208, 2018-0035 and 2018-0171¹ dismissed. Absutley [sic] not. The D.O.C. needs to be held accountable [f]or their [a]ctions and I want to [be] heard. These [a]ctions against me goes [sic] against [l]abor [l]aws and the complete disrespect towards me. I say again Sir/Mam [sic], my voice must be heard and the D.O.C. held [a]ccountable.

Grievant appears *pro se*². Respondent was represented by counsel, John H. Boothroyd, Assistant Attorney General.

Synopsis

Grievant filed the instant grievance alleging harassment, hostile working environment, and retaliation. For relief, Grievant sought only money damages and for

¹ Grievant has three pending grievances in which Respondent had filed motions to dismiss. Grievant responded to the motions to dismiss with the same letter.

² For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

discipline to be imposed upon another employee for retaliation against Grievant. Respondent moved to dismiss the grievance alleging Grievant seeks remedies that are wholly unavailable through the grievance process. The Grievance Board does not have the authority to award “tort-like” damages. The remedy of discipline against another employee for retaliation is not wholly unavailable, however, as Grievant is no longer employed and he grieved only conditions of his employment, the grievance is 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, Aaron White, was employed by Respondent, Division of Corrections at Mount Olive Correctional Complex.

2. Grievant filed this grievance alleging harassment, hostile working environment, and retaliation. Grievant protested his employee performance evaluation and his placement on an improvement plan, alleging these negative employment actions were taken by Associate Warden Jonathan Frame in retaliation for Grievant filing prior grievances.

3. For relief, Grievant seeks unspecified money damages of \$200,000 and progressive discipline against Associate Warden Frame.

4. In a cover letter to his level three appeal, Grievant stated that he had moved to Martinsburg, West Virginia, to take a job at the Martinsburg VA Hospital.

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. “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. “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.” W. VA. CODE ST. R. § 156-1-6.11. “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 (2008).

Respondent asserts this grievance must be dismissed as Grievant seeks remedies that are wholly unavailable. Grievant opposes the dismissal of his grievance, stating that he needs to be heard and Respondent “held accountable.”

Part of the remedy sought by Grievant is money damages, which would be considered “tort-like” damages. “Tort” is a legal term that means “A private or civil wrong or injury. . .for which the court will provide a remedy in the form of an action for damages.” BLACK’S LAW DICTIONARY 1489 (6th ed. 1990). The Grievance Board is an administrative agency and not a court. “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 Grievance Board is not authorized by statute to hear tort claims or award damages other than restoration of lost wages. “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep’t of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).” *Stalnaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995). Grievant’s request for money damages is wholly unavailable from the Grievance Board.

Respondent also argues that the Grievance Board does not have the authority to order Mr. Frame to be disciplined, also rendering that relief unavailable to Grievant. Grievant specifically alleged retaliation and states that Mr. Frame had ordered Grievant’s performance evaluation to be changed “[a]ll because I file Grievances.” Grievant appears to request the relief that Mr. Frame be disciplined for retaliating against Grievant for his participation in the grievance process. “No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any

person held responsible is subject to disciplinary action for insubordination.” W. VA. CODE § 6C-2-3(h). Generally, the Grievance Board has found it does not have the authority to order that another employee be disciplined. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996). However, in the case of reprisal, the Grievance Board has ordered that a supervisor, who had been found to have committed reprisal, be disciplined. *Grant & Grant v. Cabell Cnty. Bd. of Educ.*, Docket No. 06-06-012 (Oct. 17, 2006). Recently, the Grievance Board has recognized this case as an exception to the general rule that the Grievance Board has no authority to order another employee be disciplined. *Jarrells v. Div. of Highways*, Docket No. 2017-2163-DOR (Sept. 29, 2017). Therefore, Grievant’s requested remedy that Mr. Frame be disciplined is not wholly unavailable to Grievant.

However, Grievant is no longer employed by Respondent. The grievance process is intended to provide a forum for public employees to address grievances with their employers. W. VA. CODE § 6C-2-1(a). Ordering discipline against Mr. Frame would have no practical consequences for Grievant as he is no longer subject to Mr. Frame’s supervision. “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].” *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). The allegation that Mr. Frame retaliated against Grievant is moot as Grievant is no longer employed by Respondent.

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. “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. “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.” W. VA. CODE ST. R. § 156-1-6.11.

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 (2008).

4. “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)).

5. “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep’t of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).” *Stalnaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

6. Grievant’s request for money damages is wholly unavailable from the Grievance Board.

7. “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].” *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

8. The allegation that Mr. Frame retaliated against Grievant is moot as Grievant is no longer employed by Respondent.

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 *a/so* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: April 19, 2018

Billie Thacker Catlett
Chief Administrative Law Judge