

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SAMANTHA JO ASHBY,  
Grievant,**

**v.**

**Docket No. 2019-0737-PSCWVU**

**WEST VIRGINIA UNIVERSITY POTOMAC STATE COLLEGE,  
Respondent.**

**DISMISSAL ORDER**

Grievant filed the instant grievance on January 8, 2019, protesting a written warning and the extension of her probationary period and alleging harassment/hostile work environment. Grievant did not make a specific request for relief. On January 28, 2019, Grievant, by counsel, filed her *Notice of Intent to Enforce Default*. Following hearing, an *Order Denying Default* was entered by the Grievance Board on April 23, 2019, which denied the default and remanded the case back to level one. Following a level one hearing on March 12, 2019, a level one decision was entered denying the grievance. On June 10, 2019, Grievant, by counsel, filed an appeal to level two of the grievance process. On July 10, 2019, Respondent, by counsel, filed *Respondent's Motion to Dismiss Grievance* alleging the grievance to be moot as Grievant had resigned her employment. On July 25, 2019, Grievant, by counsel, filed *Grievant's Response in Opposition to Respondent's Motion to Dismiss and Grievant's Motion to Stay Grievance Board Proceedings*. Grievant appears by counsel, Aubrey Sparks, Mountain State Justice, Inc. Respondent appears by counsel, Samuel R. Spatafore, Assistant Attorney General.

**Synopsis**

Grievant filed this grievance protesting a written warning and the extension of her probationary period and alleging harassment/hostile work environment. Respondent moved to dismiss the grievance asserting mootness as Grievant had resigned from

employment. Relief for the allegation of harassment/hostile work environment is unavailable as the Grievance Board has no authority to award tort-like damages. Relief for the written warning is moot as Grievant suffered no loss of pay. 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 as an Administrative Associate.
2. Grievant filed this grievance protesting a written warning and the extension of her probationary period and alleging harassment/hostile work environment.
3. Grievant resigned from employment on June 12, 2019.
4. Grievant states in her motion to dismiss that she was constructively discharged, but Grievant has not filed a grievance protesting her constructive discharge or moved to amend the instant grievance to include the allegation of constructive discharge or whistleblowing.
5. Grievant has filed a civil action in the Circuit Court of Monongalia County alleging constructive discharge and noncompliance with W.VA. CODE § 6C-1-3, the Whistle-Blower Law.

### **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 moot because Grievant is no longer employed by Respondent. Grievant admits she is no longer employed by Respondent and that the relief sought is no longer available through the Grievance Board, but objects to the dismissal of the claim as she asserts under "the recent ruling in *Schade* [*v. W. Va. Univ.*, No. 18-0512 (W. Va. Supreme Court, June 7, 2019) (memorandum decision)] a dismissal of this claim could result in a forfeiture of his rights under the West Virginia Human Rights Act."

*Schade* in no way impacts the Grievance Board's ability to dismiss a grievance that is moot. *Schade* simply found that the failure to appeal an adverse Grievance Board decision to the circuit court is a failure to exhaust administrative remedies. *Schade* at 9. "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).

The Grievance Board has no authority to award 'tort-like' damages *Stalnaker v. Div. of Corr.*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); *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). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786, n. 11 (1995). Therefore, relief granted for proven harassment/hostile work environment does not involve the award of money, unless it is back pay from a disciplinary action motivated by the same that resulted in a loss of pay. In this case, Grievant only protests a written warning, which did not result in the loss of pay. Thus, any remedy regarding the alleged harassment/hostile work environment is no longer available as Grievant is no longer employed. As to the written warning itself, although the relief of the removal of the written warning would be available, as Grievant is no longer employed that relief would have no practical consequences and

would merely be a declaration of who was right and wrong. Therefore, the grievance should be dismissed as moot.

Grievant requested that the Grievance Board deny the motion to dismiss and stay the grievance to allow the parties to litigate the matter in Circuit Court due to her concern that the dismissal of the action could “rob” Grievant of both her administrative and civil remedies. "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).

Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W. Va. Code, 18-29-2 [now W.Va. Code § 6C-2-2]. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act. In fact, W. Va. Code, 5-11-10 (1994), W. Va. Code, 5-11-11 (1989), and W. Va. Code, 5-11-13 (1983), commit interpretation and enforcement of the Human Rights Act to the Human Rights Commission and to the courts of this State. *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 337 S.E.2d 913 (1985).

*Vest v. Bd. of Educ.*, 193 W. Va. 222, 225, 455 S.E.2d 781, 784 (1995).

Grievant is no longer employed by Respondent and is, therefore, no longer a public employee entitled to avail herself of the grievance process. Further, as explained above,

there is no grievance left to resolve because the relief sought related only to the conditions of Grievant's employment, which no longer exist. While Grievant asserts she is in a potential procedural quandary, the same cannot be remedied by allowing a moot grievance to continue forward.

Grievant also requests this order hold that "Grievant did not raise claims concerning her constructive discharge or whistle blowing in this forum." The Grievance Board only makes findings of fact and conclusions of law and issues appropriate orders relating to the same. A finding of fact has been made that Grievant did not allege these claims in her grievance filing. This order otherwise speaks for itself as a determination by the Grievance Board that the grievance must be dismissed as moot, which is a proper final disposition of the grievance under the Grievance Board's procedural rules. Therefore, Respondent's motion to dismiss should be granted, and this grievance, 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. "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.

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.

4. “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).

5. 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).

6. "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).

7. The Grievance Board has no authority to award 'tort-like' damages *Stalnaker v. Div. of Corr.*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); *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). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786, n. 11 (1995).

8. "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)).

9. "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).

Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W. Va. Code, 18-29-2 [now W.Va. Code § 6C-2-2]. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act. In fact, W. Va. Code, 5-11-10 (1994), W. Va. Code, 5-11-11 (1989), and W. Va. Code, 5-11-13 (1983), commit



interpretation and enforcement of the Human Rights Act to the Human Rights Commission and to the courts of this State. *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 337 S.E.2d 913 (1985).

*Vest v. Bd. of Educ.*, 193 W. Va. 222, 225, 455 S.E.2d 781, 784 (1995).

10. Respondent proved the grievance is now moot as Grievant is no longer an employee.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this final 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: September 4, 2019**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**