

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CARL FRANKLIN BEARD,  
Grievant,**

**v.**

**Docket No. 2018-1289-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

## **DISMISSAL ORDER**

Carl Franklin Beard, Grievant, filed this grievance against his employer the Division of Highways ("DOH"), Respondent, protesting his job classification and salary. The original statement of grievance was filed on March 17, 2018, which provides,

Misclassified Job and/or pay grade, during recent salary adjustments for Highway Administrator and Supervisors, after being left out for whatever reasons. I have discovered many issues with current job classification and pay grade. Highways currently has 2 Administrators in other Districts performing same job.

The relief sought states,

I'm requesting to be immediate reclassified to (8344) Administrator1 (PG16) or (9729) Building and Grounds Manager (PG15) to properly represent and compensate for current level of responsibilities of job performed.

A conference was held at level one on June 11, 2018. On August 3, 2018 a level one Conference Order was entered that denied the relief requested, but with a qualification.

The Order made the following relevant findings:

DOH argues that they have not made a final determination for the classification for the position that Grievant currently occupies. There are 10 districts with similar positions that require a comparable review by HR and the review is ongoing. Additionally, the DOH has not completed the review of the PDF and supporting documents that were submitted by the district on behalf of the Grievant. HR is in the process of reviewing the paperwork along with the entire classification for consistency statewide.

However, SB 2003 only went into effect on December 1, 2017, and HR is in the process of reviewing each classification. Classification reviews are painstaking and very time consuming. The DOH has approximately 125 different classifications to review for correctness and to determine if changes are necessary.

After setting out the above findings, the Order made the following conditional denial of relief to the Grievant.

Based on a complete review of the record, the Grievant has not proven that a statutory rule violation occurred, or that discrimination was involved in the determination of the classification for the position he currently occupies. However, he did establish that an on-site job audit has not been completed. Therefore, I am recommending that in order to properly make determination regarding the position Grievant occupies, a job audit must be completed by subject matter experts. A final determination cannot be issued until all aspects of the position review have been completed. Therefore, the relief is denied but further action is recommended to be taken by the DOH HR Division.

See Level One Order

Sometime after the August 3, 2018 Order was issued, Respondent reclassified Grievant to the position of Building and Grounds Manager, pay grade 15; with an effective date of September 29, 2018. Grievant appealed to level two on August 13, 2018. A mediation session was held on October 19, 2018. Grievant was aware and informed that the relief he sought had been granted. Nevertheless, Grievant did not dismiss the grievance. Grievant appealed to level three on October 26, 2018. A level three hearing was held before the undersigned Administrative Law Judge on March 26, 2019, at the Grievance Board's Beckley facilities. Grievant appeared *pro se*.<sup>1</sup> Respondent

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<sup>1</sup> "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258

appeared by Natasha White, Assistant Director of Human Resources and was represented by counsel Xueyan Palmer, Esquire, DOH Legal Division. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. No request was received requesting an extension for submission of Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision shortly after April 19, 2019, the assigned mailing date for the submission of the parties' fact/law proposals. Grievant did not submit a written fact/law proposal.

### **Synopsis**

Grievant filed a grievance protesting his job classification and salary. Subsequent to newly established authority, see Senate Bill 2003, Respondent is able to make certain determinations regarding classification, pay, and qualifications of Division of Highways employees independent of Division of Personnel, the entity of WV State government traditionally charged with making classification determinations.

Respondent issued a Pay Plan Policy dated May 1, 2018, including new Hourly and Salary Pay Grade Schedules dated June 27, 2018. Respondent reclassified Grievant to the position of Building and Grounds Manager, pay grade 15; with an effective date of September 29, 2018. Grievant's interpretation of past events is perplexing and convoluted, nevertheless, the relevant issue of his assigned classification is moot. Respondent has provided Grievant the relief requested. Grievant was provided repeated opportunity but fails to establish a viable grievance. Respondent has established that this grievance should be dismissed as moot. Accordingly, this grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Carl Franklin Beard, Grievant, is currently employed by Respondent as a Building and Grounds Manager, pay grade 15. Grievant has been employed with Respondent since May 16, 2011.

2. Senate Bill 2003 transferred authority from the Division of Personnel to the Commissioner of Highways to make determinations regarding pay, classification, and qualifications of DOH employees. Based upon Bill 2003, DOH issued a Pay Plan Policy dated May 1, 2018, including new Hourly and Salary Pay Grade Schedules dated June 27, 2018.

3. Classifications reviews are time consuming and DOH had reportedly 125 different classifications to review for correctness, accuracy and consistency statewide.

4. At the time of filing this grievance on May 17, 2018, Grievant was classified as Building Maintenance Supervisor, pay grade 11.

5. At the level one hearing, Respondent had not made a final determination for the classification for the position that Grievant occupies. There were 10 districts with similar positions that required a comparable review by Human Resources and the review was on going. More specifically, at the time of the level one conference of the instant matter, Respondent had not completed the review of Grievant's position description form(s) and the paperwork associated with the entire classification.

6. Sometime after the August 3, 2108, level one decision of the instant grievance, Grievant has been reclassified to one of the identified classifications at the pay grade Grievant requested as relief.

7. Respondent reclassified the position that Grievant is employed as Building and Grounds Manager, pay grade 15; with an effective date of September 29, 2018. R  
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8. Grievant's salary has increased by approximately 19%. Grievant's salary was increased from \$19.94 per hour to \$23.73 per hour. (Monthly from \$3,457.53 to \$4,114.43). Grievant's annual salary is now in excess of Forty-Nine Thousand Dollars.

9. Classification reviews are painstaking and very time consuming. SB 2003 only went into effect on December 1, 2017, reportedly. Respondent has approximately 125 different classifications to review for correctness and to determine if changes are necessary.

10. The classification review for the position Grievant occupies resulted in Grievant receiving a noticeable increase in salary. Grievant is currently employed with one of the job classifications he indicated he desired.

11. Prior to the implementation of Senate Bill 2003, Respondent was not empowered to make determinations regarding classification, pay, and qualifications of Division of Highways employees independent of Division of Personnel, the entity of WV State government traditionally charged with making classification determinations.

## Discussion

This grievance does not challenge a disciplinary action, so Grievant bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant requested reclassification and ultimately was reclassified to one of the classifications, he in fact requested, at the pay grade he had identified. At the level three hearing Respondent presented testimony from Natasha White, Assistant Director of Human Resources. Ms. White testified that Grievant was reclassified and reallocated to Building and Grounds Manager, pay grade 15. Ms. White also testified generally about the Respondent's policies and procedures in reclassifying employees pursuant to the authority granted in Senate Bill 2003.<sup>2</sup> Grievant was aware that the relief he sought had

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<sup>2</sup> Senate Bill 2003 transferred authority from the Division of Personnel to the Commissioner of Highways to make determinations regarding pay, classification, and qualifications of DOH employees.

been granted. Even though Respondent had provided Grievant the relief that he sought, via newly authorized administrative authority Grievant did not withdraw his grievance.<sup>3</sup>

“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. “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.*

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<sup>3</sup> It is not clear, whether Grievant didn’t trust Respondent, the new administrative process or believed he was exposing corruption or untimely procedures. Grievant’s position was reclassified to be Building and Grounds Manager, pay grade 15; with an effective date of September 29, 2018. Grievant failed to establish unlawful activity by Respondent or entitlement to some type of back pay, prior to DOH issued Pay Plan Policy.

*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).

Respondent reclassified the position that Grievant is employed as Building and Grounds Manager, pay grade 15; with an effective date of September 29, 2018. R Ex 2 Grievant has been provided the relief requested in his grievance prior to his appeal to level three on October 26, 2018. The issue of Grievant's position classification and its pay grade was settled prior to the commencement of the level three hearing before the



undersigned Administrative Law Judge on March 26, 2019. Further, Grievant did not demonstrate or prove by a preponderance of the evidence that Respondent is or should be required to provide back pay for any time period prior Respondent's empowered to make determinations regarding classification. Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences is not proper before this agency. 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. This Grievance Board does not issue advisory opinions. *Citations omitted.*

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. "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).

3. “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.

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); *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).” *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

7. Grievant did not prove by a preponderance of the evidence that Respondent is required to provide back pay for a reclassification determination which became effective on September 29, 2018.

8. Respondent has established that this grievance should be dismissed as moot.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this dismissal to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. 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 (2018).

**Date: May 2, 2019**

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**Landon R. Brown**  
**Deputy Chief Administrative Law Judge**