

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CLEOPHUS BOOTH, JR.,
GRIEVANT,**

V.

DOCKET NO. 2019-0086-DOA

**GENERAL SERVICES DIVISION,
RESPONDENT,**

DISMISSAL ORDER

On July 17, 2018, Grievant filed the instant grievance against Respondent stating, “My boss John Cummings is attempting to make me act in a hostile manner or make me quit (he’s targeting me). My witnesses are Chuck Long + Tom Hackney. He’s been on me every (sic) since I started on grounds crew.” As relief, Grievant requested “[f]or the harassment to stop.”

On January 15, 2019, Grievant filed a second grievance regarding his separation from employment, assigned docket number 2019-0757-DOA. By order entered March 6, 2019, the instant grievance was held in abeyance at the motion of Respondent, with no objection by Grievant, to allow a final decision on docket number 2019-0757-DOA. By order entered July 17, 2019, docket number 2019-0757-DOA was dismissed as withdrawn. On August 16, 2019, Respondent, by counsel, filed *General Services Division’s Motion to Dismiss* asserting the grievance had been rendered moot by Grievant’s resignation from employment and withdraw of the grievance protesting his separation from employment. By email of the same date, the Grievance Board notified Grievant’s representative that any response to the motion to dismiss must be made in writing by August 30, 2019, and that failure to respond may result in the grievance being dismissed. Grievant did not file a response. Grievant is represented by Gordon

Simmons, UE Local 170, West Virginia Public Workers Union. Respondent is represented by counsel, Mark S. Weiler, Assistant Attorney General.

Synopsis

Grievant was employed by Respondent in an unspecified position. Grievant alleges harassment by his supervisor and requests that the harassment cease. Respondent moved to dismiss the grievance as moot as Grievant is no longer employed by Respondent and has withdrawn his grievance protesting his separation from employment. Respondent has proven the grievance must be dismissed as 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 was employed by Respondent in an unspecified position.
2. Grievant filed the instant grievance alleging harassment by his supervisor.
3. Grievant is no longer employed by Respondent and has withdrawn the grievance he filed protesting his separation from employment.
4. Grievant did not respond to Respondent's motion to dismiss.

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 must be dismissed as moot because Grievant is no longer employed by Respondent and has withdrawn the grievance he filed protesting his separation from employment. Grievant did not respond to Respondent's motion to dismiss.

"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); *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).

In the instant grievance, Grievant protests only the conditions of his employment and requests only that the harassment stop. As Grievant is no longer employed by Respondent and has withdrawn his grievance protesting his separation from employment, the grievance is moot as a determination on the issue of harassment would merely be a declaration of which party was right or wrong with no practical consequences. 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 (2018).

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); *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. Respondent has proven the grievance must be dismissed as moot as Grievant is no longer employed by Respondent and has withdrawn his grievance protesting his separation from employment.

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: October 8, 2019

Billie Thacker Catlett
Chief Administrative Law Judge