

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MICHAEL BURCH,
GRIEVANT,**

V.

DOCKET NO. 2019-0862- RoaED

**ROANE COUNTY BOARD OF EDUCATION,
RESPONDENT.**

DISMISSAL ORDER

Grievant, Michael Burch, was employed by Respondent, Roane County Board of Education as a teacher. On February 4, 2019, Grievant filed this grievance against Respondent alleging he was terminated without just cause in a discriminatory manner and was not given proper notice. Grievant requested as relief reinstatement, back pay, interest, and having his record cleared.

Following the February 12, 2019 level one conference, a level one decision was rendered on March 1, 2019, denying the grievance. Grievant appealed to level two on March 14, 2019. On May 6, 2019, Respondent, by counsel, filed Respondent's *Motion to Dismiss* asserting the grievance should be dismissed for lack of standing and mootness as Grievant's teaching certificates had been suspended by the State Board of Education. On May 20, 2019, Grievant, by counsel, filed Grievant's Response to *Motion to Dismiss* admitting that his teaching certificates had been suspended and that he did not object to the dismissal of his grievance on that ground. Grievant appears by counsel, Andrew J. Katz, The Katz Working Families Law Firm, LC. Respondent appears by counsel, Rebecca M. Tinder, Bowles Rice LLP.

Synopsis

Grievant was employed by Respondent Roane County Board of Education as a teacher. Grievant protests the termination of his employment. Respondent moved to dismiss asserting the grievance should be dismissed for lack of standing and mootness as Grievant's teaching certificates had been suspended by the State Board of Education. Grievant admits his teaching certificates have been suspended for other misconduct but disputes the allegations of misconduct that were the subject of this grievance. The remedy requested, to be reinstated to his teaching position, is wholly unavailable and moot as Grievant no longer possesses the required teaching certificates. 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, including the transcript of the level one hearing:

Findings of Fact

1. Grievant was employed by Respondent Roane County Board of Education as a teacher.
2. By Order of the State Superintendent of Schools entered December 13, 2018, Grievant's Professional Teaching Certificates were suspended for a period of one year effective January 2, 2019. The suspension was based on conduct from a prior period not the subject of the instant grievance.
3. Grievant admits his teaching certificates have been suspended for other misconduct but disputes the allegations of misconduct that were the subject of this grievance.

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. “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 the grievance should be dismissed for lack of standing and mootness as Grievant's teaching certificates had been suspended by the State Board of Education. Grievant admits his teaching certificates have been suspended for other misconduct but disputes the allegations of misconduct that were the subject of this grievance. Grievant does not oppose the dismissal of the grievance on the grounds that he no longer holds the certificates required to teach but opposes the dismissal on any other ground if such would be an admission of the allegations.

“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. “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)). 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). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

The Grievant requests relief that is wholly unavailable and is clearly moot. The Grievance Board cannot order Grievant’s reinstatement to his teaching position when he no longer possesses the certification required to teach.

Any professional educator, as defined in article one [§§ 18A-1-1 et seq.] of this chapter, who is employed within the public school system of the state shall hold a valid teaching certificate licensing him or her to teach in the specializations and grade levels as shown on the certificate for the period of his or her employment.

W. VA. CODE § 18A-3-2. The dismissal of the grievance on this ground is not an admission by Grievant of the allegations of misconduct which are the subject of the grievance.

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. “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).

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.

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].” *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)).

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).

6. The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

7. Any professional educator, as defined in article one [§§ 18A-1-1 et seq.] of this chapter, who is employed within the public school system of the state shall hold a valid teaching certificate licensing him or her to teach in the specializations and grade levels as shown on the certificate for the period of his or her employment. W. VA. CODE § 18A-3-2.

8. The remedy requested, to be reinstated to his teaching position, is wholly unavailable and moot as Grievant no longer possesses the required teaching certificates.

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: July 12, 2019

Billie Thacker Catlett
Chief Administrative Law Judge