THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRANDI COLE,

Grievant,

v. **Docket No. 2017-1686-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES and DIVISION OF PERSONNEL,

Respondents.

DISMISSAL ORDER

Grievant, Brandi Cole, filed the instant grievance dated February 14, 2017, against her employer, Respondent, Department of Health and Human Resources ("DHHR"), stating as follows: "Grievant's selection for ESW was not resubmitted as promised to DOP for reconsideration." As the relief, Grievant seeks, "[t]o be made whole in every way including submission of Grievant's selection, plus back pay with interest from date originally informed that she was selected (12/8/2016).

A level one hearing was conducted on August 11, 2017, at which time, the parties agreed to waive this grievance to level three. At that time, only Grievant and Respondent DHHR were parties to this matter. According to the transcript of this brief hearing, the parties agreed on the record that the Division of Personnel ("DOP") should be joined as a party to the grievance. However, no order joining DOP was entered. Thereafter, this matter was scheduled for a level three hearing on January 17, 2018. By email dated December 29, 2017, counsel for Respondent DHHR submitted the level one transcript to the Grievance Board, copying Grievant's representative and counsel for DOP, informing the Board that at level one both parties and the hearing examiner had agreed that DOP

needed to be joined as a party to this matter. No one objected to, or disagreed with, counsel's representations. As such, by Order entered January 4, 2018, DOP was joined as a party to this action and the January 17, 2018, level three hearing was continued to allow Respondent DOP time to prepare. The matter was rescheduled for a level three hearing on May 9, 2018.

Respondent DHHR filed a Motion to Dismiss the grievance on May 1, 2018, asserting that the grievance was untimely, Grievant's claim does not meet the definition of a grievance, and for failure to state a claim upon which relief can be granted pursuant to W. VA. CODE ST. R. § 156-1-6.11 (2008). On that same date, the Grievance Board emailed Grievant's Representative and counsel for Respondent DOP, copying counsel for Respondent DHHR, and informed them that should they wish to respond to the Motion to Dismiss, they were to do so in writing before the close of business May 4, 2018, as the level three hearing was scheduled for May 9, 2018. In response, Grievant, by her representative, requested a continuance of the level three hearing because of an illness in Grievant's family and to allow Grievant more time to respond to the motion.

The ALJ granted Grievant's request to continue the hearing, and the parties were informed of such on May 1, 2018, in an email from the Grievance Board staff. The email further informed the parties that the level three hearing scheduled for May 9, 2018, was canceled, and that the deadline to submit written responses to the motion to dismiss was May 18, 2018. The email advised the parties that they were not required to submit dates for rescheduling because the level three hearing would not be rescheduled until a ruling was made on the motion to dismiss. Further, the email stated that there would be no hearing on the motion, and that the ALJ would issue a ruling based upon the submissions

of the parties. Both Grievant and Respondent DOP submitted responses to Respondent DHHR's Motion to Dismiss. By Order entered July 3, 2018, this ALJ denied Respondent's Motion to Dismiss.

A level three hearing was held on January 4, 2019, at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DHHR appeared by counsel, Katherine A. Campbell, Esquire, Assistant Attorney General. Respondent DOP appeared by counsel, Karen O'Sullivan Thornton, Esquire, Assistant Attorney General.

Synopsis

Grievant was employed be Respondent DHHR as an Office Assistant II ("OA II") in its Summers County Office. Grievant applied for and was selected to fill an Economic Service Worker ("ESW") position also in that office. However, Respondent DOP rejected Grievant as the successful applicant finding that she did not meet the minimum qualifications for the position. Grievant filed this grievance ultimately seeking instatement into the position, plus back pay and interest. Grievant's testimony that she no longer wants the relief she had sought has rendered this grievance moot. Any decision on the merits of the claim would be illusory, or would result in an advisory opinion. Grievant raised a claim of bad faith against Respondent DHHR in her post-hearing submissions. Grievant failed to prove her claim of bad faith. Therefore, this 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. At the times relevant herein, Grievant, Brandi Cole, is employed by Respondent DHHR as an OA II in its Summers County office. Grievant began in this position in or about December 2012. Since the filing of this grievance, Grievant applied for and was awarded an OA III position. She has been working in the OA III position since on or about August 2018.

2. Russell Fridley is the DHHR Community Services Manager for Monroe, Summers, Pocahontas, and Greenbrier counties.

3. At the times relevant herein, Gayla Adkins was employed by DHHR as a Family Support Supervisor in the Summers County DHHR office. Ms. Adkins has since retired. She was not called as a witness, and no one suggested that she was unavailable to appear at the level three hearing.

4. In or about November or December 2016, Grievant applied for a posted ESW position in the Summers County office. Grievant was interviewed that same month. It is unclear who interviewed Grievant for the position. However, Ms. Adkins was the supervisor for that vacant position.

5. On or about December 6, 2016, Ms. Adkins informed Grievant that she had been selected as the successful applicant for the ESW position. Thereafter, Ms. Adkins made arrangements for Grievant to obtain training required for the position.

6. On or about January 23, 2017, Mr. Fridley and Ms. Adkins were informed that DOP had rejected Grievant to fill the ESW position because she lacked the minimum qualifications for the position.

7. Ms. Adkins informed Grievant about DOP's rejection on February 3, 2017. Mr. Fridley and Ms. Adkins had waited to inform Grievant of the rejection because they were communicating with DOP about the rejection and qualifications in hopes of finding a way for Grievant to be approved to fill the position. Also, on February 3, 2017, Ms. Adkins and/or Mr. Fridley informed Grievant that they might be able to resubmit her application for reconsideration.

8. On February 14, 2017, DOP informed Mr. Fridley that Grievant lacked one year and one month qualifying experience needed to meet the minimum qualifications of the ESW position. DOP did not count much of what Grievant included on her application as qualifying experience. Ms. Adkins delivered the news to Grievant. Earlier that same day, Grievant had called DOP to check the status of her application that was resubmitted for reconsideration, and was told it had not been resubmitted.

9. At Mr. Fridley's direction, Ms. Adkins had most of the direct communications with Grievant about the ESW position.

10. Grievant gained no additional qualifying experience between January 2017 and February 14, 2017.

11. Grievant is satisfied with her current OA III position, and no longer seeks instatement in the ESW position at issue in this grievance.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3 (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. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

During the level three hearing, Grievant testified that she no longer wanted the ESW position at issue in this grievance and that she was satisfied with her current OA III position. As her relief sought, Grievant asked for her ESW application be submitted to DOP, plus back pay and interest from December 8, 2016. While she does not specifically state this, Grievant was seeking instatement into the ESW position. She was seeking her application to be submitted so that she could be placed in the position. There would be no other reason for her application to be submitted to DOP. Respondents did not move to dismiss this grievance as moot. Grievant argued in her proposed Findings of Fact and Conclusions of Law only that Respondent DHHR should be found to have "acted in bad faith by its initial concealment of—and failure to seek promised reconsideration of-–Grievant's disqualification from an economic service worker, and should remedy such bad faith with back pay for the period of Grievant's initial application to her selection as an office assistant 3." Grievant did not raise the issue of bad faith prior to this. Further, Grievant had not amended her stated relief sought before the submission of her proposed Findings of Fact and Conclusions of Law.

"The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of a hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. VA. CODE § 6C-2-4(6). Grievant presented no evidence of bad faith in this matter. What Grievant depicts as bad faith, is more akin to complications in dealing with

bureaucracy, miscommunications, and misunderstandings. Further, nothing in this statute grants the Grievance Board the authority to award back pay or instatement as relief for bad faith.

"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*." W. VA. CODE ST. R. § 156-1-6.2 (2008). "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), *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). 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).

"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). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Services,* Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997). Grievant testified that she no longer wanted the ESW position and was satisfied with her OA III position. As such, this grievance is now moot. Any decision on the merits of the claim would be illusory, or would result in an advisory opinion. Therefore, this grievance is DISMISSED.

The following Conclusions of Law support the Dismissal of this grievance:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of a hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. VA. CODE § 6C-2-4(6).

3. Grievant failed to prove her claim of bad faith. Further, nothing in WEST VIRGINIA CODE § 6C-2-4(6) grants the Grievance Board the authority to award back pay or instatement as relief for a finding of bad faith.

4. “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*.” W. VA. CODE ST. R. § 156-1-6.2 (2008).

5. “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), ***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). 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).

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). *De minimus* relief is also unavailable. *Carney v. W. Va.*

Div. of Rehab. Services, Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

7. Grievant's testimony that she no longer wants the relief she had sought has rendered this grievance moot. Any decision on the merits of the claim would be illusory, or would result in an advisory opinion.

Therefore, this grievance is DISMISSED.

Any party may appeal this Decision 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 (eff. July 7, 2018).

DATE: March 22, 2019.

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Carrie H. LeFevre
Administrative Law Judge