

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RAMHAZZ K. CORLEY,
Grievant,

v.

Docket No. 2019-0532-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,**
Respondent.

DECISION

Grievant, Ramhazz K. Corley, was employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On October 26, 2018, Grievant filed this grievance against Respondent challenging his suspension pending investigation. For relief, Grievant sought reinstatement, compensation for lost wages, and restoration of benefits. The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held on March 4, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and *pro se*¹. Respondent appeared by representative, Michael Hale, and by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on April 3, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was previously employed by Respondent as a Social Service Worker III. Following his arrest on misdemeanor charges, Grievant was suspended pending investigation. Although the criminal charges were later dismissed, Grievant had already

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

resigned from his position. Respondent filed a motion to dismiss alleging the Grievance Board lacked jurisdiction and that the matter was moot due to Grievant's resignation. The Grievance Board does not lack jurisdiction as Grievant was still an employee at the time of his resignation. The grievance is not moot as back pay would be available if Grievant should prevail. The Division of Personnel's administrative rules permit the unpaid suspension of an employee while criminal charges are pending and does not provide for the payment of back wages if the employee resigns prior to the resolution of the criminal charges. Grievant failed to prove his suspension pending the resolution of his criminal charges was improper or that he was entitled to back pay or restoration of leave when he resigned prior to the dismissal of the criminal charges. Accordingly, the motion to dismiss and grievance are denied.

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 previously employed by Respondent as a Social Service Worker III.
2. On October 7, 2018, Grievant was arrested and charged with misdemeanor domestic violence and removal, injury to, or destruction of property.
3. By letter dated October 11, 2018, Deputy Commissioner, Tina A. Mitchell, suspended Grievant without pay stating that she had received allegations that Grievant had been arrested on charges of "Domestic Battery and Destruction of Property" and Grievant would be suspended pending investigation into the allegations.

4. By email dated December 26, 2018, Grievant forwarded to Michael Hale, Community Services Manager (“CSM”), his resignation letter, which was back-dated to October 25, 2018.

5. CSM Hale accepted Grievant’s resignation by letter that was also back-dated to October 25, 2018.

6. On February 12, 2019, the criminal charges against Grievant were dismissed.

Discussion

On February 12, 2019, Respondent, by counsel, filed *Department’s Motion to Dismiss* asserting Grievant had voluntarily resigned on October 25, 2018, the day before he filed the grievance, which resignation was accepted the same day. Respondent asserts that Grievant’s resignation was accepted effective October 12, 2018, the day after Grievant was suspended without pay, and that Grievant was paid all leave owed to him. Respondent argues the Grievance Board lacks jurisdiction to hear the grievance as Grievant was not an employee when the grievance was filed or alternatively that the grievance is moot because there is no back pay or benefits that would need to be addressed. Grievant, by email of the same date, opposed the motion to dismiss. The motion to dismiss was addressed at the beginning of the level three hearing on March 4, 2019.

“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.

“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).

The Grievance Board does not lack jurisdiction nor is the grievance moot. As

found above, the resignation and acceptance letters were back-dated. Grievant was clearly an employee when he filed the grievance and the Grievance Board retains jurisdiction. The grievance is not moot because, although Grievant later resigned rendering the remedy of reinstatement and restoration of benefits unavailable, Grievant also requested pay for lost wages. Grievant was suspended effective October 11, 2018 and his resignation was made effective October 25, 2018, and would be entitled to back pay for that time-period should he prevail. Therefore, the motion to dismiss is denied and the grievance must be decided on the merits.

The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013). 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.*

Grievant argues that the suspension was improper because Respondent failed to investigate the allegations, the charges were unrelated to his job duties, and the

charges did not result in any absence from work.² Respondent asserts the suspension was proper under the Division of Personnel's administrative rule and that Grievant is not entitled to back pay.

"An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding." W. VA. CODE ST. R. § 143-1-12.3.b. Grievant argues Respondent acted improperly when it failed to investigate the criminal charges against him. Grievant was understandably confused by the language in the suspension letter, as the letter did state there would be an investigation. However, the administrative rule does not require Respondent to independently investigate criminal charges against an employee. The administrative rule allows for suspension for an investigation **or** when an employee is the subject of an indictment or other criminal proceeding. Despite the reference to an investigation, the letter also clearly states that the suspension was due to the allegations that Grievant had been arrested and charged criminally, and that was the true basis of the suspension. Grievant had been charged with a misdemeanor at the time of his suspension and the criminal charges were pending during the entire period of his suspension. Therefore,

² Grievant also makes argument based on the alleged statements of the administrative law judge who conducted Grievant's unemployment compensation hearing. These statements were not considered as unemployment compensation decisions are not binding upon the Grievance Board. The findings and conclusions made by an administrative law judge in an unemployment compensation proceeding are not binding on the Grievance Board and they do not have the effect of *res judicata*. *Maxey v. West Virginia Department of Health and Human Resources*, Docket No. 93-HHR-007 (Feb. 28, 1995), *aff'd*, Wyoming Cnty. Cir. Ct. Docket No 95-C-110 (Mar. 4, 1997), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 971494 (Dec. 3, 1997).

the suspension was proper.

Grievant is not entitled to back pay per the administrative rule because, although the criminal charges against Grievant were later dismissed, Grievant resigned prior to the charges being dismissed. “Upon completion of the investigation or criminal proceeding, the appointing authority shall: . . . *unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding*, provide retroactive wages or restore annual leave for the period of suspension” W. VA. CODE ST. R. § 143-1-12.3.b, 12.3.b.2 (emphasis added).

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.

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). 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).

4. The motion to dismiss must be denied as the Grievance Board does not lack jurisdiction and the grievance is not moot.

5. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg’l Jail and Corr. Facility Auth./W. Reg’l Jail*, Docket No. 2013-1005-CONS (June 4, 2013).

6. 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.*

7. “An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding.” W. VA. CODE ST. R. § 143-1-12.3.b.

8. “Upon completion of the investigation or criminal proceeding, the appointing authority shall: . . . unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension” W. VA. CODE ST. R. § 143-1-12.3.b, 12.3.b.2.

9. Grievant failed to prove his suspension pending the resolution of his criminal charges was improper or that he was entitled to back pay or restoration of leave when he resigned prior to the dismissal of the criminal charges.

Accordingly, motion to dismiss and grievance are **DENIED**.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: May 7, 2019

Billie Thacker Catlett
Chief Administrative Law Judge