

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TIMOTHY DEAN DEWITT,  
Grievant,**

**v.**

**Docket No. 2013-2262-CONS**

**WEST VIRGINIA UNIVERSITY,  
Respondent.**

**DISMISSAL ORDER**

Grievant was employed by Respondent, West Virginia University. The instant grievance involves two consolidated grievances in which Grievant protests his non-selection for a position and alleges Equal Employment Opportunity Act violations, retaliation for filing an Equal Employment Opportunity Act complaint, harassment, hostile work environment, age discrimination, constructive discharge, violation of civil rights, and failure to respond to Freedom of Information Act requests.

The procedural history of this case is complex and will not be recited in full but involves both a *Writ of Mandamus* and a separate civil action filed by Grievant before the Monongalia County Circuit Court, which were both dismissed, and numerous motions in the grievance proceeding over the span of six years. Only the most recent and pertinent procedural history will be discussed further.

While the instant grievance was in abeyance at level three of the grievance process, per Grievant's request, Grievant resigned from employment. By email dated January 4, 2017, Respondent, by counsel, informed the Grievance Board of Grievant's resignation and moved for all the instant grievances to be dismissed. By email dated January 5, 2017, Grievant, by representative, opposed the dismissal of the grievance. On January 12, 2017, the administrative law judge conducted a telephone conference on

the issue of dismissal of the instant grievance. During the telephone conference the administrative law judge instructed the parties to provide written argument on the issue of constructive discharge and the motion to dismiss.

On January 13, 2017, Grievant, by representative, filed another grievance, assigned docket number 2017-1503-WVU, alleging constructive discharge. On January 27, 2017, Respondent, by counsel, filed *Respondent's Motion to Dismiss All Pending Grievances* alleging Grievant had voluntarily resigned, rendering all issues moot. On the same date, Grievant, by representative, filed *Motion to Deconsolidate Docket No. 2013-2262-CONS which Said Docket is comprised of Docket No. 2013-0107-WVU AND 2015-0940-WVU AND ALJ Swartz Order of a Response by all parties of the Motion to Dismiss As submitted by West Virginia University In View of the Fact that Grievant has Resigned Per Telephonic Conference Call Dated January 12, 2017 2:00 p.m.*<sup>1</sup> By Order entered February 10, 2017, the administrative law judge held the instant grievance in abeyance, finding that a decision on Grievant's claim of constructive discharge in docket number 2017-1503-WVU could render the instant grievance moot and that a ruling on Respondent's motion to dismiss would be premature, as there was a factual dispute regarding whether the resignation was voluntary.

Thereafter, the level one grievance administrator's repeated attempts to schedule a level one hearing in docket number 2017-1503-WVU were unsuccessful and complicated by the filing of another motion by Grievant's representative. The resolution of the grievance was again delayed when Grievant, by representative, filed his civil suit

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<sup>1</sup> The title of the document is reproduced as written.

against Respondent and the Grievance Board. The civil suit was dismissed on December 1, 2017.

On March 2, 2018, in response to the undersigned's February 16, 2018 *Status Order*, Grievant, by representative announced his intention to pursue a claim of default in docket number 2017-1503-WVU. Following hearing, an *Order Denying Default* was entered on June 29, 2018, denying Grievant's default claim and remanding the matter to level one of the grievance process for hearing to be scheduled within fifteen working days of receipt of the order.

On August 3, 2018, the Chief Grievance Administrator at level one dismissed docket number 2017-1503-WVU. The Chief Grievance Administrator found that Grievant's representative had failed to provide dates for the level one hearing as ordered by the Grievance Board, that the parties were properly notified of the scheduled level one hearing, and that Grievant's representative's request to hold the grievance in abeyance indefinitely was denied pursuant to the Grievance Board's order to conduct the hearing within fifteen days. When neither Grievant nor his representative appeared for the hearing, the Chief Grievance Administrator directed them to provide dates to reschedule the hearing and that failure to provide dates to reschedule or appear at the hearing would result in the grievance being dismissed. Neither provided dates to reschedule the level one hearing and docket number 2017-1503-WVU was dismissed. The *Dismissal Order* properly informed Grievant and his representative of the right to appeal to level two of the grievance process within ten days of the order.

On July 19, 2018, after the Chief Grievance Administrator denied his request to reschedule the level one hearing, Grievant's representative filed a motion to consolidate

docket number 2017-1503-WVU into the instant action. By order entered August 9, 2018, the undersigned denied the motion to consolidate, finding that the motion appeared to be an attempt to circumvent the level one hearing and that consolidation was not proper because the grievances did not involve substantially similar issues and the instant grievance would be moot if Grievant failed to prevail in docket number 2017-1503-WVU. The undersigned reiterated that Grievant had ten days from receipt of the level one dismissal order to appeal to level two of the grievance process should he wish to do so.

Grievant failed to appeal the dismissal of docket number 2017-1503-WVU. The dismissal of that grievance is now final. The motion to dismiss the instant grievance was previously held in abeyance pending the final resolution of docket number 2017-1503-WVU. Therefore, the motion to dismiss is now ripe for decision. Grievant is represented by Robert G. Glover. Respondent is represented by counsel, Samuel R. Spatafore, Assistant Attorney General.

### **Synopsis**

Grievant was previously employed by Respondent but resigned his employment. Respondent moved to dismiss the grievance as moot. As Grievant is no longer employed, his claim relating to his non-selection for a position is moot. The remainder of Grievant's claims relate to conditions of his employment, which are also moot as Grievant is no longer employed. The relief requested for some claims, which may be available in other forums, is unavailable within the grievance process. 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 as a Trade Specialist 1.
2. Grievant grieved his non-selection for a position and alleged Equal Employment Opportunity Act violations, retaliation for filing an Equal Employment Opportunity Act complaint, harassment, hostile work environment, age discrimination, constructive discharge, violation of civil rights, and failure to respond to Freedom of Information Act requests
3. Although Grievant asserted constructive discharge in his March 28, 2015 statement of grievance, Grievant remained employed by Respondent until his resignation on January 3, 2017, and grieved his resignation as a constructive discharge in a separate grievance, docket number 2017-1503-WVU.
4. Grievant's constructive discharge grievance in docket number 2017-1503-WVU was dismissed at level one and Grievant did not appeal the dismissal of his 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 (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 as Grievant has resigned from employment with Respondent. Grievant admitted he had resigned but alleged that his resignation was as a result of constructive discharge. Grievant did not respond to Respondent’s assertion that the grievance was moot, instead making additional allegations regarding to the administration of the grievance and discovery issues, arguing the merits of the grievances, and asserting that the matter “is not ripe to be dismissed” because the administrative law judge “barred this matter to be given a fair, expeditious hearing.”

“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), *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). “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 allegations in the instant grievance all relate to Grievant’s non-selection for a position and various conditions of Grievant’s employment. As Grievant is no longer employed by Respondent and his grievance challenging his resignation as a constructive discharge has been dismissed, the instant grievance is moot. A grievance for non-selection is moot once a grievant resigns because “[w]hen a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, ‘a decision on the merits of her grievance would be a meaningless exercise, and would merely constitute an advisory opinion.’ *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997); *Wright v. Div. [of] Motor Vehicles & Div. of Pers.*, Docket No. 2013-0714-DOT (Jul. 14, 2014); *Komorowski [v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).]” *Marcum v. Mingo County Bd. of Educ.*, Docket No. 2017-1502-MinED (June 14, 2017) (citing *Beckett v. Dep't of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013)). “Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative.” *Komorowski* at 3.

Grievances regarding only the conditions of employment are moot when a grievant leaves employment. *Stanley v. Div. of Highways*, Docket No. 2013-0758-CONS (May 2, 2014); *Sizemore v. Dep't of Health & Human Res.*, Docket No. 2017-0947-DHHR (Feb. 17, 2017); *Hutchinson v. Div. of Highways*, Docket No. 2018-0804-DOT (Mar. 14, 2018). Grievant's remaining claims, as follows, all relate to conditions of his employment: Equal Employment Opportunity Act violations, retaliation for filing an Equal Employment Opportunity Act complaint, harassment, hostile work environment, age discrimination, constructive discharge, violation of civil rights, and failure to respond to Freedom of Information Act requests. As Grievant is no longer employed, those claims are moot.

Further, the relief requested for some of the claims, which may be available in other forums, is unavailable within the grievance process. "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 (2018). "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). The Grievance Board is not authorized by statute to hear tort claims or award tort-like damages. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004);



*Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).”  
*Stalaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995). For Grievant’s claims relating to civil right violations and the Freedom of Information Act, Grievant requests \$350,000. This is a request for tort-like damages that is unavailable from the Grievance Board. Grievant also requested \$30,000 for his representative’s time and out-of-pocket expenses. This relief is also unavailable from the Grievance Board: “Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses.” W. VA. CODE § 6C-2-6(a) (2018).

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).

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), *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). “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. “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).

6. A grievance for non-selection is moot once a grievant resigns because “[w]hen a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, ‘a decision on the merits of her grievance would be a meaningless

exercise, and would merely constitute an advisory opinion.’ *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997); *Wright v. Div. [of] Motor Vehicles & Div. of Pers.*, Docket No. 2013-0714-DOT (Jul. 14, 2014); *Komorowski [v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).]” *Marcum v. Mingo County Bd. of Educ.*, Docket No. 2017-1502-MinED (June 14, 2017) (citing *Beckett v. Dep’t of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013)). “Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative.” *Komorowski* at 3.

7. As Grievant is no longer employed, his claim relating to his non-selection for a position is moot.

8. Grievances regarding only the conditions of employment are moot when a grievant leaves employment. *Stanley v. Div. of Highways*, Docket No. 2013-0758-CONS (May 2, 2014); *Sizemore v. Dep’t of Health & Human Res.*, Docket No. 2017-0947-DHHR (Feb. 17, 2017); *Hutchinson v. Div. of Highways*, Docket No. 2018-0804-DOT (Mar. 14, 2018).

9. The remainder of Grievant’s claims relate to conditions of his employment, which are also moot as Grievant is no longer employed.

10. “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 (2018).

11. “Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that

they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

12. The Grievance Board is not authorized by statute to hear tort claims or award tort-like damages. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997)." *Stalnaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

13. "Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses." W. VA. CODE § 6C-2-6(a) (2018).

14. The grievance must be dismissed as Grievant's resignation from employment renders all issues moot and the relief requested for some claims is unavailable within the grievance process.

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: February 15, 2019**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**