

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD FLESHMAN II,
Grievant,

v.

Docket No. 2019-0587-DOA

GENERAL SERVICES DIVISION,
Respondent.

DISMISSAL ORDER

Grievant, Richard Fleshman II, is employed by Respondent, General Service Division ("Gsd"), in the classification of Facility Equipment Maintenance Technician ("FEMT"). Mr. Fleshman filed a grievance form dated November 13, 2018. Grievant alleged:

Sexual harassment, retaliation, failure to interview for a coordinator position that is still open, failure to properly investigate on-going reported acts of sexual harassment and retaliation.

As relief Grievant seeks:

Request an interview on open position of coordinator within General Services Division, open the investigation into sexual harassment at workplace, placed back on day shift.¹

A level one conference was conducted on December 4, 2018, and an Order denying the grievance was issued dated December 21, 2018. An appeal to level two was filed dated January 2, 2019. A mediation was conducted on February 26, 2019, and an order placing the matter in abeyance until April 30, 2019, was entered on March 5, 2019.

¹ Grievant was represented at level one by Melissa Roman, Esquire, Klie Law Offices, PLLC.

The parties reached a tentative agreement which was not finalized and Grievant filed an appeal to level three dated April 23, 2019, without assistance of counsel.²

Respondent filed a Motion to Dismiss dated August 22, 2019. Grievant was given two opportunities to respond to Respondent's motion, the last one ending on November 5, 2019. Grievant has not responded to the motion. This matter is now mature for a ruling on the Motion to Dismiss.

Synopsis

Respondent moves to dismiss this grievance because the parties reached an agreement. Even though the agreement has not been fully executed, Respondent also argues that the agency has implemented the agreement. The agency alleges this renders the grievance moot since there is no more relief Grievant could be granted under the grievance. Grievant has not responded to Respondent's arguments.

The parties reached a tentative agreement, but Grievant refused to sign the final draft. Because the agreement was not fully executed, it is not binding upon the parties. Respondent has demonstrated that there is no remaining relief Grievant may receive under this grievance which renders the matter moot.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Richard Fleshman II, is employed by Respondent, General Service Division, in the classification of Facility Equipment Maintenance Technician.

² Karl Kolenich, Esquire, moved to withdraw the Klie Law Firm from representation of Grievant on June 10, 2019, due to a breakdown in the working relationship and communications between the firm and Grievant. The motion was granted.

3. The parties entered into negotiations and reached a tentative agreement at the level two mediation.

4. In an effort to implement the tentative agreement Grievant and his supervisor signed a confirmation document stating that his permanent work schedule would be 8 am until 4 pm daily with Sunday and Monday off.

5. Grievant argued that the harassment and retaliation was occurring in his work group and by his supervisor Steve Adkins.

6. Grievant was assigned to a different work group and a different supervisor, Scott Pauley.

7. These changes went into effect on April 6, 2019.

8. Respondent executed the settlement agreement and forwarded it to Grievant's counsel. Grievant did not sign the agreement and Grievant's counsel withdrew from representation on June 10, 2019. See footnote 2, *supra*.

9. Grievant appealed to level three on April 23, 2019, and sought the same remedy he set out in his level one grievance form.

Discussion

"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." *Rules of Practice and Procedure of the West Virginia Public Employees Grievance*, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge's discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. See *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

Respondent alleges that the grievance is moot and that there is no longer any relief to be granted to Grievant by the Grievance Board. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See, *Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

The Grievance Board will not hear issues that are moot. "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. Dept. 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).

Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board:

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.

156 C.S.R. 1 § 6.11. In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. '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).” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Grievant seeks three things: 1) An interview for a coordinator position that was posted by the GSD. 2) An open investigation into sexual harassment in the workplace. And, 3) To be returned to dayshift. Grievant did not request to be placed in the coordinator position, but rather only sought to be interviewed. By this time the position is filled or abolished. Either way ordering an interview at this point would be a fruitless act since such an interview would not lead to Grievant being considered for the position. “Decisions of which would avail nothing in the determination of controverted rights of persons or property” are moot and will not be issued by the Grievance Board. *Bragg v. Dept. of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004).

Grievant asks for an open investigation into allegations of sexual harassment. The Grievance Board is charged with holding hearings to determine facts and render a decision. W. VA. CODE §6C-2-1 et seq. The Board has no jurisdiction to conduct investigation and has authority to order an investigation by an agency if the agency has a mandatory obligation to perform one and refused to do so. More importantly, there is no guarantee that Grievant would gain any true relief as a result of such investigation. The remedy available in such cases is to order the agency to take necessary actions to stop such harassment from occurring. In this matter, Respondent has removed Grievant from the work group and the supervisor where the alleged harassment took place. There is no indication that Grievant will suffer further sexual harassment as a result of this accommodation. This there is no more remedy which can be granted to Grievant on this issue.

Finally, Grievant seeks to be returned to day shift. Grievant received a permanent work schedule of 8 am until 4 pm daily with Sunday and Monday off, as of April 6, 2019. This is the remedy Grievant sought.

As stated above, in situations where “it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. ‘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).” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Since no further remedy is available to Grievant this matter is now moot and the Motion to Dismiss is **GRANTED**.

Conclusions of Law

1. “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.” *Rules of Practice and Procedure of the West Virginia Public Employees Grievance*, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge’s discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. See *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

2. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See, *Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep’t of Educ.*, Docket No. 96-DOE-130

(Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

3. The Grievance Board will not hear issues that are moot. "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. Dept. 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).

4. Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board:

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.

156 C.S.R. 1 § 6.11.

5. In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. '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)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

6. No further remedy is available to Grievant which renders this matter moot.

Accordingly, the Motion to Dismiss is **GRANTED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this 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* 156 C.S.R. 1 § 6.20 (2018).

DATE: December 23, 2019

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE