

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CLIFFORD GARNES,  
Grievant,**

**v.**

**Docket No. 2019-1211-DOA**

**GENERAL SERVICES DIVISION,  
Respondent.**

**DISMISSAL ORDER**

Grievant filed the instant grievance on March 7, 2019, alleging unsafe working conditions and the failure to accommodate Grievant's disability. As relief, Grievant requested to "make building environmentally safe with clean air to breath[e] and to accommodate my disability of COPD and let me do my job." Following a level one hearing on April 1, 2019, a level one decision was entered essentially finding that some of the relief requested by Grievant had already been provided, that additional accommodations were in progress, and that some relief should be denied. On April 29, 2019, Grievant filed an appeal to level two of the grievance process. On May 7, 2019, Respondent, by counsel, filed a *General Services Division's Motion to Dismiss Grievance* alleging the grievance to be moot as Grievant had resigned his employment. On July 3, 2019, Grievant, by counsel, filed *Grievant's Response in Opposition to Respondent's Motion to Dismiss and Grievant's Motion to Stay Grievance Board Proceedings*. On July 9, 2019, Respondent, by counsel, filed *General Services Division's Reply to Grievant's Opposition to Motion to Dismiss*. Grievant appears by counsel, Aubrey Sparks, Mountain State Justice, Inc. Respondent appears by counsel, Mark S. Weiler, Assistant Attorney General.

## **Synopsis**

Grievant grieved alleged unsafe working conditions and failure to accommodate his disability. Respondent moved to dismiss the grievance asserting mootness as Grievant was no longer an employee. As the grievance only involves conditions of employment, Respondent proved the grievance is now moot. Accordingly, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

The undersigned makes the following Findings of Fact:

### **Findings of Fact**

1. Grievant was employed by Respondent General Services Division as a Mechanic II.
2. Grievant filed this grievance alleging unsafe working conditions and failure to accommodate his disability. As relief, Grievant requested to "make building environmentally safe with clean air to breath[e] and to accommodate my disability of COPD and let me do my job."
3. Although there is factual dispute regarding the nature of Grievant's separation from employment, there is no dispute that Grievant is no longer employed by Respondent and did not file a grievance regarding his separation from employment.

### **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 moot because Grievant is no longer employed by Respondent. Grievant admits he is no longer employed by Respondent, although he asserts he was terminated from employment. Grievant admits he did not grieve his alleged discharge from employment. Grievant states he is required to exhaust all administrative remedies before he may pursue a civil action outside of the grievance process so, therefore, "only objects to the dismissal of this claim insofar as under the recent ruling in *Schade* [*v. W. Va. Univ.*, No. 18-0512 (W. Va. Supreme Court, June 7, 2019) (memorandum decision)] a dismissal of this claim could result in a forfeiture of his rights under the West Virginia Human Rights Act."

*Schade* in no way impacts the Grievance Board's ability to dismiss a grievance that is moot. *Schade* simply found that the failure to appeal an adverse Grievance Board decision to the circuit court is a failure to exhaust administrative remedies. *Schade* at 9. "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).

As Grievant is no longer employed and has not grieved his separation from employment, his requested relief to "make building environmentally safe with clean air to breath[e] and to accommodate my disability of COPD and let me do my job" is no longer available and a decision on the merits would be merely a declaration that one party was right or wrong or advisory. Therefore, the grievance should be dismissed as moot.

However, Grievant also cites *Allen v. State Human Right Comm'n*, 174 W.Va. 139, 324 S.E.2d 99 (1984), which discusses the importance of equal opportunity and the role of the West Virginia Human Rights Act in protecting this important public policy, stating, "It would run counter to these constitutional and moral principles to permit public employees to fall through the cracks of our State's Human Rights Act." Grievant therefore requested that the Grievance Board stay the grievance to allow the parties to litigate the

matter in Circuit Court while ensuring Grievant has the opportunity to bring his West Virginia Human Rights Act claim.

"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 purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a).

Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W. Va. Code, 18-29-2 [now W.Va. Code § 6C-2-2]. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act. In fact, W. Va. Code, 5-11-10 (1994), W. Va. Code, 5-11-11 (1989), and W. Va. Code, 5-11-13 (1983), commit interpretation and enforcement of the Human Rights Act to the Human Rights Commission and to the courts of this State. *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 337 S.E.2d 913 (1985).

*Vest v. Bd. of Educ.*, 193 W. Va. 222, 225, 455 S.E.2d 781, 784 (1995).

Grievant is no longer employed by Respondent and is, therefore, no longer a public employee entitled to avail himself of the grievance process. Further, as explained above, there is no grievance left to resolve because the relief sought related only to the conditions of Grievant's employment, which no longer exist. While Grievant asserts he is in a procedural quandary, the same cannot be remedied by allowing a moot grievance to

continue forward. Grievant also requests this order hold that “Grievant has fully exhausted his administrative remedies in this forum.” Such a “holding” would be meaningless as that is a matter of law to be decided by the courts. This order speaks for itself as a determination by the Grievance Board that the grievance must be dismissed as moot, which is a proper final disposition of the grievance under the Grievance Board’s procedural rules. Therefore, Respondent’s motion to dismiss is granted, and this grievance, dismissed.

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

### **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 (2008).

2. “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.

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.

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]." *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).

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), *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).

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).

7. "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)).

8. "The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a).

Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W. Va. Code, 18-29-2 [now W.Va. Code § 6C-2-2]. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act. In fact, W. Va. Code, 5-11-10 (1994), W. Va. Code, 5-11-11 (1989), and W. Va. Code, 5-11-13 (1983), commit interpretation and enforcement of the Human Rights Act to the Human Rights Commission and to the courts of this State. *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 337 S.E.2d 913 (1985).

*Vest v. Bd. of Educ.*, 193 W. Va. 222, 225, 455 S.E.2d 781, 784 (1995).

9. Respondent proved the grievance is now moot as Grievant is no longer an employee.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this final 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: August 20, 2019**

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**Billie Thacker Catlett  
Chief Administrative Law Judge**