

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DAVID L. MARSHALL,
Grievant,**

v.

Docket No. 2013-0122-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DISMISSAL ORDER

Grievant, David L. Marshall, was employed by Respondent, West Virginia University. On July 27, 2012, Grievant filed this grievance against Respondent protesting his nonselection for a Trade Specialist Lead II position. For relief, Grievant sought instatement into the position.

Following the February 21, 2013 level one hearing, a level one decision was rendered on April 23, 2013, denying the grievance. Grievant appealed to level two on April 29, 2013. Following mediation, Grievant appealed to level three of the grievance process on September 4, 2013.

A level three hearing was held in this matter on November 20, 2013 before Administrative Law Judge Brenda Gould. At that time, the parties informed the administrative law judge that they were aware that a grievance had been filed by another employee, Timothy Dewitt, regarding the same position. Grievant acknowledged that Mr. Dewitt had a superior claim to the position. Therefore, the parties agreed that this grievance should be held in abeyance pending the resolution of Mr. Dewitt's grievance. The parties further agreed that, should Mr. Dewitt prevail in his grievance, Grievant would withdraw the instant grievance and that, should Mr. Dewitt not prevail, the parties would agree to a date by which they would file written proposed

findings of fact and conclusions of law in the instant grievance. The administrative law judge accepted the parties' agreement and stated that the Grievance Board would notify the parties once a final decision was made in the Mr. Dewitt's grievance. No order reflecting the above was entered. No further action was taken by the parties. After a complicated and protracted litigation, *Dewitt v. West Virginia University*, Docket No. 2013-2262-CONS was dismissed by a published appealable dismissal order entered February 15, 2019.

By *Order* entered April 11, 2019, the parties in the instant grievance were ordered to either submit an agreed date by which they agreed to file written proposed findings of fact and conclusions of law, request a status conference, or for Grievant to withdraw his grievance in writing. On June 4, 2019, Respondent, by counsel, filed *Respondent's Motion to Dismiss* asserting the grievance must be dismissed as moot as Grievant had voluntarily retired from employment. By email dated June 28, 2019, Grievant, by counsel, opposed the dismissal of the grievance, admitting that Grievant had retired but asserting the matter was not moot due to the issue of back pay and that Grievant should not be penalized for the delay in the decision of Mr. Dewitt's grievance. Grievant is represented by Bader C. Giggenbach, Brewer & Giggenbach, PLLC. Respondent was represented by counsel, Samuel R. Spatafore, Assistant Attorney General.

Synopsis

At the time of the filing of the grievance, Grievant was employed by Respondent as a Trade Specialist I. Grievant grieved his nonselection for a Trade Specialist Lead II position. The grievance was held in abeyance at the agreed request of the parties to

allow a decision on the grievance of the employee who Grievant acknowledged had a superior claim to the position. Grievant voluntarily retired while that action was still pending. The grievance is moot due to Grievant's retirement because any relief that might be granted is speculative. 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. At the time of the filing of the grievance, Grievant was employed by Respondent as a Trade Specialist I.

2. Grievant applied for but was not selected for a Trade Specialist Lead II position and grieved his nonselection for the position.

3. Grievant admitted that another employee, Mr. Dewitt, who had filed a separate grievance, had a superior claim to the position.

4. The instant grievance was held in abeyance at the agreed request of the parties to allow a decision on Mr. Dewitt's grievance.

5. Mr. Dewitt's grievance had an unusually complex and protracted litigation, which did not conclude until the entry of a dismissal order on February 15, 2019.

6. Grievant voluntarily retired from employment in January 2018.

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 (2018).

Respondent, citing *Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision), asserts the grievance must be dismissed as moot. Grievant asserts the matter is not moot because of the issue of back pay and that “Grievant should not suffer adversely, merely because the Dewitt decision was delayed or otherwise was not decided on the merits.”

Grievant’s assertion regarding the delay of the *Dewitt* decision is without merit. After a full evidentiary hearing was conducted in this grievance, Grievant agreed and jointly requested that his grievance be held in abeyance pending a decision on *Dewitt*. But for the request for abeyance, this grievance would have been decided in 2013. Further, Grievant could have, at any time, moved to remove his grievance from abeyance but chose to take no action on his grievance in the four and a half years since it was held in abeyance.

Komorowski is controlling in this matter. Other than the abeyance, the facts are the same: Grievant was not selected for a position and then retired while his grievance was pending. The *Komorowski* Court explained its reasoning as follows:

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. Moreover, any belated claim that petitioner might return to full-time employment were he awarded the position would be unsupported by the record. "Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .' Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991)." Syl. Pt. 4, *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E.2d 585 (2011). "Courts will not ordinarily decide a moot question.' Syl. pt. 1, *Tynes v. Shore*, 117 W.Va. 355, 185 S.E. 845 (1936)." Syl. Pt. 4, *Bland v. State*, 230 W. Va. 263, 737 S.E.2d 291 (2012).

Komorowski at 3. While Grievant's assertion that *Komorowski* "does not discuss back pay" is technically true in that the words "back pay" are not used, *Komorowski* states that "any relief" would be speculative. Back pay is relief and was thus squarely addressed by *Komorowski*. Accordingly, the grievance must be dismissed.

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 (2018).

3. *Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision) is controlling in this matter and states:

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. Moreover, any belated claim that petitioner might return to full-time employment were he awarded the position would be unsupported by the record. "Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .' Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991)." Syl. Pt. 4, *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E.2d 585 (2011). "Courts will not ordinarily decide a moot question." Syl. pt. 1, *Tynes v. Shore*, 117 W.Va. 355, 185 S.E. 845 (1936)." Syl. Pt. 4, *Bland v. State*, 230 W. Va. 263, 737 S.E.2d 291 (2012).

4. Respondent proved the matter is moot as Grievant voluntarily retired from employment.

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:

Billie Thacker Catlett
Chief Administrative Law Judge