

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**STEVEN RAY MESSER,
GRIEVANT,**

V.

DOCKET NO. 2018-0436-DOT

**DIVISION OF HIGHWAYS,
RESPONDENT,**

and

**AARON STROUD AND ALAN MIDKIFF,
INTERVENORS.**

DISMISSAL ORDER

Grievant was employed by Respondent as a Transportation Worker II. On January 20, 2017, Grievant filed this grievance against Respondent protesting his non-selection for a crew chief position. For relief, Grievant sought instatement into the position.

A level one decision was rendered on October 27, 2017, denying the grievance. By order of the same date, Aaron Stroud was granted intervenor status. Grievant appealed to level two on October 31, 2017. By order entered November 17, 2017, Alan Midkiff was granted intervenor status. Following mediation, Grievant appealed to level three on January 5, 2018. A level three hearing was held on February 25, 2019. During the hearing, Respondent introduced evidence of a sensitive nature and Grievant requested the hearing be continued to allow him an opportunity to retain counsel, which request was granted. Counsel for Grievant filed a notice of appearance on March 8, 2019.

A telephone conference was held on April 2, 2019. By email dated June 7, 2019, Grievant's counsel confirmed Grievant had resigned from employment effective May 29, 2019, but that the matters within his pending grievances contributed to his resignation and he feared for his safety. On June 17, 2019, Respondent, by counsel, filed

Respondent's Motion to Dismiss asserting the grievance had been rendered moot by Grievant's resignation from employment. By email of the same date, the Grievance Board notified Grievant's counsel by electronic mail that any response to the motion to dismiss must be made in writing by July 2, 2019, and that failure to respond may result in the grievance being dismissed. By email dated July 1, 2019, Grievant's counsel stated that he had forwarded the motion to dismiss to Grievant and was waiting to hear back from Grievant before responding. After receiving nothing further from Grievant, by email dated July 30, 2019, the Grievance Board requested the status of Grievant's response. By email dated July 31, 2019, Grievant's counsel stated, "We forwarded the motions to the Grievant. I am not planning to file a response, but I did inform him of his option to do so. I have not received any communication or direction from the Grievant since that time." Grievant is represented by counsel, George B. Morrone III, General Counsel, West Virginia School Service Personnel Association. Respondent is represented by counsel, Keith Cox.

Synopsis

Grievant was employed by Respondent as a Transportation Worker II. Grievant protests his non-selection for a crew chief position. Respondent moved to dismiss the grievance as moot due to Grievant's resignation from employment. Respondent has proven the grievance is moot and must be dismissed due to Grievant's resignation from employment. 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 Transportation Worker II.
2. Grievant applied for a crew chief position but was not selected for the position.
3. Grievant filed the instant grievance protesting his non-selection and seeking reinstatement into the position.
4. Thereafter, Grievant resigned from employment with Respondent effective May 29, 2019.
5. Respondent moved to dismiss the grievance as moot due to Grievant's resignation from employment.
6. Grievant has not filed a grievance regarding his resignation 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 must be dismissed as moot because Grievant has resigned from employment. Grievant admits he resigned from employment effective May 29, 2019. Grievant has not filed a grievance regarding his resignation from employment.

"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).

In *Beckett v. Dep't of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013), the grievant protested her non-selection for a position and sought instatement into the position. After the grievant resigned from employment while

the grievance was pending, the respondent moved to dismiss. The Grievance Board dismissed the grievance stating, “When 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).]” *Beckett v. Dep’t of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013). The decision was based primarily on *Komorowski*, wherein the Supreme Court of Appeals affirmed the dismissal of a non-selection grievance when the grievant had retired while the grievance was pending stating, “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.”

Although Grievant may assert his resignation was not voluntary, as he states he feared for his safety, Grievant did not file a grievance alleging constructive discharge. As Grievant’s separation from employment is final, the relief is speculative and the grievance is moot.

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 (2008).

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); *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. “When 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)[. See] *Komorowski [v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).]” *Beckett v. Dep’t of Health & Human Res., & Div. of Pers.*, Docket No. 2013-0078-DHHR (Aug. 20, 2013).

6. “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 v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).

7. Respondent has proven the grievance is moot and must be dismissed due to Grievant’s resignation 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 *a/so* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 9, 2019

Billie Thacker Catlett
Chief Administrative Law Judge