

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**STEVEN RAY MESSER,
GRIEVANT,**

V.

DOCKET NO. 2018-0935-CONS

**DIVISION OF HIGHWAYS,
RESPONDENT,**

DISMISSAL ORDER

Grievant was employed by Respondent as a Transportation Worker II. On August 11, 2017, Grievant filed docket number 2018-0219-DOT against Respondent alleging hostile work environment. As relief, Grievant requested payment for doctor bills and travel, for Respondent to create a non-hostile workplace, and 2.5 million dollars for lifetime doctor bills. On August 28, 2017, Grievant filed docket number 2018-0303-DOT protesting a retaliatory "write up." As relief, Grievant requested the removal of "all false write ups" and for the retaliation to cease.

Docket number 2018-0219-DOT was dismissed at level one by order entered September 19, 2017. Docket number 2018-0303-DOT was denied at level one by decision entered October 27, 2017. Grievant appealed to level two in docket number 2018-0219-DOT on October 2, 2017, and in docket number 2018-0303-DOT on October 31, 2017. Following mediation, Grievant appealed to level three in docket number 2018-0219-DOT on November 29, 2017, and in docket number 2018-0303-DOT on January 5, 2018. The grievances were consolidated into the above action by order entered February 8, 2018.

Due to litigation regarding discovery issues and multiple continuances requested by Grievant, a level three hearing could not be held until April 18, 2019. Grievant failed

to appear for the April 18, 2019 hearing due to his counsel's failure to request a continuance. By order entered May 20, 2019, Grievant was found to have demonstrated good cause for his failure to appear and the matter was ordered to be rescheduled.

By email dated June 7, 2019, Grievant's counsel confirmed Grievant had resigned from employment effective May 29, 2019, but stated 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 and that the grievance fails to state a claim upon which relief can be granted. 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 an alleged hostile work environment and retaliation. Respondent moved to dismiss the grievance as moot due to Grievant's resignation from employment. Respondent has proven the grievance must be dismissed as moot and as the remaining relief is wholly unavailable. 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 filed the instant grievance alleging hostile work environment and retaliation.
3. As relief, Grievant requested payment for doctor bills and travel, for Respondent to create a non-hostile workplace, 2.5 million dollars for lifetime doctor bills, the removal of "all false write ups," and for the retaliation to cease.
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 and that the grievance fails to state a claim upon which relief can be granted.
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 and because Grievant fails to state a claim upon which relief may be granted. 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).

Money damages for harassment or emotional distress are “tort-like” damages. “Tort” is a legal term that means “A private or civil wrong or injury. . .for which the court will provide a remedy in the form of an action for damages.” BLACK’S LAW DICTIONARY 1489 (6th ed. 1990). The Grievance Board is an administrative agency and not a court. “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 damages for emotional distress. “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *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).

Therefore, relief granted for proven harassment/hostile work environment does not involve the award of money, unless it is back pay from a disciplinary action motivated by the same that resulted in a loss of pay. In this case, Grievant only protests “write ups,” which were not alleged to have involved a loss of pay. Grievant’s requested remedies for the payment of medical expenses and a lump sum of money are tort-like and unavailable. Thus, any remedy regarding the alleged harassment/hostile work environment is no longer available as Grievant is no longer employed. As to the written warning itself, although the relief of the removal of the written warning would be available, as Grievant is no longer employed that relief would have no practical consequences and would merely be a declaration of who was right and wrong. Therefore, the grievance should be dismissed as moot and as the remaining relief is wholly unavailable.

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. "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. “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 damages for emotional distress.

6. “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *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).

7. Respondent has proven the grievance must be dismissed as moot and as the remaining relief is wholly unavailable.

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: September 11, 2019

Billie Thacker Catlett
Chief Administrative Law Judge