

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES PATTERSON,
Grievant,

v.

Docket No. 2019-0408-DHHR

**DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/OFFICE OF
INSPECTOR GENERAL,**
Respondent.

DISMISSAL ORDER

James Patterson, Grievant, is employed by Respondent, Department of Health Resources, ("DHHR"), as a Surveyor 2 in the Office of Health Facility Licensure and Certification ("OHFLAC").¹ Mr. Patterson filed a level one grievance form dated September 25, 2018, alleging that he was owed travel reimbursement in the amount of \$2,462.09 which had been outstanding for over thirty days. As relief, Grievant seeks "reimbursement for travel forms that are outstanding for over 30 days with interest. All future travel to be paid in 30 days. All travel to be entered into VISTA, in a manner that employees may see them, within three days of receipt of employee travel form."

A level one hearing was held on October 15, 2018, and a decision denying the grievance was issued on November 2, 2018. Grievant appealed to level two on the same day. A mediation was conducted on February 13, 2019, and an Order Placing the Grievance in Abeyance until April 15, 2019, was issued.² An Order of Unsuccessful Mediation was entered on May 3, 2019. Grievant appealed to level three on May 10, 2019.

¹ OHFLAC is within the DHHR Office of Inspector General.

² The parties sought additional time to explore settlement.

On May 21, 2019, Respondent filed a Motion to Dismiss alleging that all travel expenses had been paid and DHHR has no control over VISTA to ensure when matters were posted and available for Grievant's perusal. Grievant responded on May 22, 2019, that the delay in payment was continuing and Grievant had not been paid interest on the previous reimbursements. On June 3, 2019, Grievant additionally replied that he was unreasonably and continually delayed in travel reimbursements and requested that the grievance not be dismissed. Grievant is represented by Gordon Simmons, UE Local 170, and Respondent is represented by Katherine A. Campbell, Assistant Attorney General. The matter is now mature for a ruling on the motion.³

Synopsis

Grievant seeks payment for travel expenses which have not be paid for more than thirty days after he submitted them for reimbursement. He also seeks that all travel expense requests to be entered in the VISTA system operated by the State Auditor's Office within three days of submission so that Grievant can track the payments. Respondent repaid all amounts owed to Grievant for travel expenses by the day after the filing of the grievance and has no control of the operation of VISTA posting times controlled by the Auditor's office. Accordingly, there is no remaining remedy which can be granted, and this grievance must be dismissed as 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.

³ This matter was assigned to the undersigned on July 10, 2019, for a ruling on Respondent's Motion to Dismiss.

Findings of Fact

1. James Patterson, Grievant, is employed by Respondent, Department of Health Resources, ("DHHR"), as a Surveyor 2 in the Office of Health Facility Licensure and Certification ("OHFLAC"). He has worked in that capacity for approximately twelve years and was previously employed by Respondent for several years in other positions.

2. Employees in the Surveyor 2 classification are often required to travel to various health facilities to perform their jobs.

3. OHFLAC employs sixty-eight surveyors who travel every week. The agency provides all Surveyors with state-issued Purchase Cards⁴ for travel expenses. However, Grievant and one other Surveyor prefer to pay the expenses up front and be reimbursed.

4. At the time the grievance was filed on September 25, 2018, Grievant had one outstanding reimbursement request dated June 2, 2018, for \$498.98, and three others dated August 6, 13, and 27, 2018. The total owed Grievant for all these expense forms was \$2,426.09.

5. Grievant received travel reimbursement checks for all the outstanding requests no later than September 26, 2018.

6. Two Administrative Service Assistants are assigned to process all travel expense requests for OHFLAC employees. They are expected to process OHFLAC's portion of the reimbursement process within five days of receipt of the requests, but during particularly busy times the processing takes longer.⁵

⁴ Commonly referred to as P-Cards.

⁵ The Supervisor for the reimbursement process testified at level one that the delay in processing the June 2, 2018, request was an anomaly and she had not determined why it was delayed.

7. Because Grievant and another Surveyor pay their expenses out of pocket, their reimbursement requests are processed ahead of Surveyors using a P-Card.

8. The OFLAC staff enter the expense requests into the OASIS computer system and they are scanned to the DHHR Accounts Payable unit which approves the requests and sends them to DHHR Finance for another approval. Once the requests are sent to DHHR Accounts payable, they should be available for viewing on VISTA.

9. DHHR has no control over the OASIS and VISTA programs which are operated by the State Auditor's office.

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 asserts as an affirmative defense that the grievance is moot because Grievant was paid all travel expenses due to him within a day of the filing of the grievance. Respondent also asserts that it has no control over the VISTA program allowing Grievant to track expense requests. 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).

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).

In this case, Grievant has been reimbursed for all of the outstanding travel expenses he alleged to be in arrears. Additionally, Respondent has initiated a practice of processing Grievant's expense claims, and those of one other Surveyor, ahead of other Surveyors with the goal of having all expense claims entered into the OASIS system within five days of receiving them. More to the point, Respondent has no control regarding when the request forms appear on the VISTA program after they are entered in the OASIS

program. Grievant has received all remedies available to him pursuant to his grievance. Accordingly, the grievance is **DISMISSED** as moot.

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).

2. 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).

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. 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. Grievant has received all remedies available to him pursuant to his grievance, which renders this matter moot.

Accordingly, the grievance is **DISMISSED**.

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: July 22, 2019

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE