

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LEATHA G. WILLIAMS,**  
**Grievant,**

**v.**

**Docket No. 2019-0296-BraED**

**BRAXTON COUNTY BOARD OF EDUCATION,**  
**Respondent.**

## **DISMISSAL ORDER**

Grievant, Leatha Williams, is employed by Respondent, Braxton County Board of Education (“Board”), as the Director of Technology, Assessment, Accountability and Food Services. Ms. Williams filed a grievance dated August 23, 2018, requesting to proceed directly to level three. The grievance states:

Superintendent David Dilly has violated FMLA by harassing me and discriminating against me while on leave. He has also violated whistle blower law and the WV Ethics Code with actions.<sup>1</sup>

As relief, Grievant seek:

Board investigation of Superintendent David Dilly and appropriate actions according to law, removal of all disciplinary actions and letters from my personnel file related to this event, full restoration of my job and any pay missed as a result of his actions.

By Order dated September 6, 2018, it was found that the grievance did not meet the criteria set out in W. VA. CODE § 6C-2-4(a)(4) to be expedited directly to level three.

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<sup>1</sup> Grievant attached a document to the grievance setting forth factual allegations regarding the specific actions taken by the superintendent. This document is incorporated into the grievance form and is part of the record of this matter.

The grievance was transferred to level one with instructions for the parties to proceed at that level.

Grievant chose a level one conference and it was held on December 18, 2018. A level one decision denying the grievance was issued on December 27, 2018. Grievant filed a timely appeal to level two and a mediation was conducted on July 22, 2019, and Grievant appealed to level three on August 1, 2019.

Respondent filed a Motion to Dismiss which was received by the Grievance Board on August 15, 2019. Grievant's Response to Respondent's Motion to Dismiss was received on September 3, 2019. Respondent is represented by Rebecca M. Tinder, Esquire, Bowles Rice LLP. Grievant is represented by Erika Klie Kolenich, Esquire, Klie Law Offices. This matter is now mature for an order on the motion.

### **Synopsis**

Respondent moved to dismiss the present grievance because Grievant has suffered no actual employment harm rendering the remedies she seeks to be moot or unavailable. Respondent proved their allegations by a preponderance of the evidence. The grievance is dismissed.

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.

### **Findings of Fact**

1. Leatha Williams, Grievant, filed a grievance against her employer, Respondent, alleging that the Superintendent of Schools "violated FMLA by harassing me and discriminating against me while on leave. He has also violated whistle blower law and the WV Ethics Code with actions."

2. As relief, Ms. Williams seeks: 1) that the Board conduct an investigation into the superintendent's conduct and take appropriate actions based upon that investigation; 2) Removal of all disciplinary actions or letters from her file related to the superintendent's actions; and, 3) to be fully restored to her job with including any pay she may have lost.

3. Grievant was off work from July 18, 2018, through August 25, 2018, pursuant to the provisions of the Family and Medical Leave Act. Her leave was approved by the Board and no disciplinary action was taken against her while she was on leave.

4. Grievant has not been removed from her regular position with the Board and has not suffered any loss of pay due to any action taken by the superintendent or the Board.

5. Grievant has not been subjected to any disciplinary action and no disciplinary letters have been placed in her file by the superintendent.

6. The Board did not renew Superintendent Dilly's contract when it expired at the end of the 2018-19 school year. Superintendent Dilly's employment with the Board ended on June 30, 2019.

### **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 alleges that the grievance is moot and that there is no relief to be granted to Grievant by the Grievance Board. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See, *Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

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).

Grievant alleges that she has been harassed by Superintendent Dilly in violation of her rights to protection under the *Whistle Blower Law* as set out in W. VA. CODE § 6C-1-1 et seq. She also claims *inter alia* that the superintendent violated her FMLA rights by threatening her job and ordering her subordinates not to contact her while she was on leave. She requests three specific items of relief for those alleged misdeeds:

1. An investigation conducted by the Board into the superintendent’s conduct and appropriate actions by the Board based upon that investigation;
2. Removal of all disciplinary actions or letters from her file related to the superintendent’s actions; and,
3. Full restoration to her job with including any pay she may have lost.

Grievant also asks for general relief in the nature of a cessation of the harassment visited upon her by Superintendent Dilly.

Respondent argues that these remedies are not available to the Grievant because the matters are moot and at least one of the remedies is unavailable pursuant to the *Public Employees Grievance Procedure*. Grievant was allowed uninterrupted use of her FMLA leave, was issued no discipline, no derogatory letter and did not suffer any loss of pay. There is not controversy regarding these issues and to consider them further would “avail nothing in the determination of controverted rights of persons or property.” Accordingly, these issues are moot and must be dismissed.

Grievant’s counsel argues that an investigation into Superintendent Dilly’s conduct is necessary to restore Grievant’s reputation. Yet counsel cites no statute, policy, rule or

decision indicating that the Grievance Board has authority to order a board of education to conduct such an investigation in this instance.

"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). *Maloy v. West Virginia Military Authority*, Docket No. 2019-0553-MAPS (Jan. 10, 2019). The procedure for resolving those grievances is set out in WEST VIRGINIA CODE § 6C-2-4 which includes hearings conferences and mediations. That procedure does not include conducting independent investigations or requiring employers to do so.<sup>2</sup> Accordingly, this requested relief is wholly unavailable to Grievant and subject to dismissal. 156 C.S.R. 1 § 6.11.

Grievant also seeks "appropriate actions" to be taken against the Board at the conclusion of the investigation. This relief is moot because Superintendent Dilly is no longer employed by the Board. Additionally, it is a well-settled rule that the Grievance

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<sup>2</sup> There may be rare instances where it would be appropriate to order an employer to conduct an investigation; for instance, if an employer was required by law or policy to do so and refused. However, such is not the case here, nor has such a case arisen to the knowledge of the undersigned.

Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).

Finally, the general relief of a cessation of harassment by Superintendent Dilly has also been rendered moot by the nonrenewal of the superintendent's contract. Grievant did not allege that she was harassed or threatened by any other Board official or supervisor so the absence of Mr. Dilly negates any chance that Grievant will be harassed by him in an official capacity.

There are no available remedies for Grievant in this present matter because they have been rendered moot or are wholly unavailable. Accordingly, the Motion to Dismiss is GRANTED and the grievance is DISMISSED.

### **Conclusions of Law**

1. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See, *Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

2. 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).

3. 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.

4. 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).

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 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). *Maloy v. West Virginia Military Authority*, Docket No. 2019-0553-MAPS (Jan. 10, 2019).

6. Respondent proved by a preponderance of the evidence that all relief requested was either moot or wholly unavailable from the Grievance Board.

Accordingly, the Motion to Dismiss is GRANTED and 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: September 13, 2019**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**