

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SUSAN DANIEL,
Grievant,**

v.

Docket No. 2019-1535-DHHR

**DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
HOPEMONT HOSPITAL,
Respondent.**

DISMISSAL ORDER

Grievant, Susan Daniel, is employed by Respondent, Department of Health and Human Resources (“DHHR”), as the Director of Quality for Health Facilities. Ms. Daniel filed a level one grievance form dated April 29, 2019, alleging, “Hostile Work Environment.” As relief, Grievant wrote “To be otherwise made whole.” Pursuant to W. VA. CODE § 6C-4-1(a)(4), Grievant and Respondent agreed to waive the lower levels and submit this Grievant to level three. A level three hearing was held at the Charleston Office of the West Virginia Public Employees Grievance Board over two days; February 25, 2020, and October 1, 2020.¹ Grievant was represented by Gordon Simmons and Respondent was represented by Stephen Compton, Deputy Attorney General.

¹ The long time between the two days of hearing was due to the severe outbreak of COVID 19. DHHR, and specifically Grievant, were challenged with implementing procedures to protect the patients and staff in the State health facilities. Additionally, the Grievance Board had to implement procedures for protecting staff and participants in the grievance process.

Synopsis

Grievant filed a claim of a hostile work environment without specifying the relief she sought. Grievant revealed the relief she was seeking during her testimony. Respondent demonstrated that all specific relief Grievant was seeking was provided rendering this matter moot.

Following the hearing Respondent filed a Motion to Dismiss dated November 6, 2020. Grievant submitted a Response to the Motion to Dismiss dated November 9, 2020. The matter is now mature for a ruling on the motion.

Findings of Fact

1. Grievant, Susan Daniel, is employed by Respondent, Department of Health and Human Resources (“DHHR”), as the Director of Quality for Health Facilities.

2. As part of her duties, Grievant she travels to various State health facilities, including Hopemont Hospital, to help them implement plans that ensure the facilities stay in compliance with State and Federal laws rules and regulations.

3. In the spring of 2018, Grievant visited Hopemont Hospital to make a specific presentation. The meeting was cancelled and Grievant felt she had been treated disrespectfully by the management of the hospital. Other incidents occurred through out the summer to escalate the tensions between Grievant and Hopemont Hospital management.

4. Eventually, Hopemont Hospital was removed from Grievant’s assigned facilities and she lost access to the CareVue database system. She also received some

criticism in her Employee Performance Appraisal 3 “(EPA 3)” regarding her working relationships.²

5. Grievant filed this action without setting out any specific remedy sought. When asked during the level three hearing what specific relief she was seeking, Grievant stated that she wanted Hopemont Hospital returned as a facility she was responsible for reviewing and to have access to the CareVue restored. Grievant also wanted all negative comments removed from her EPA 3 for the rating period of 9/1/18 to 8/31/19.

6. At the second day of the level three hearing, it was revealed that Grievant’s access to the CareVue database was restored and working with Hopemont Hospital was restored to her duties. Additionally, Respondent has agreed to remove the EPA 3 for the rating period of 9/1/18 to 8/31/19 from her personnel records.

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

² This brief and general description of the incidents involved in this situation is not intended to diminish the serious nature of Grievant’s allegation.

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).

In this matter, all the specific relief which Grievant seeks has been provided. Hopemont Hospital has been returned to her assignment, her access to CareVue has been restored, and the offending EPA has been removed.³ At this point, a decision would only serve to assign blame and not provide any tangible relief. Accordingly, the grievance is moot and the Motion to Dismiss must be **GRANTED**.

Conclusion 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

³ Grievant also received a promotion between the first and second day of hearings at level three.

(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. Respondent proved by a preponderance of the evidence that all relief requested has been provided rendering this matter moot.

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: December 28, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE