

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ERNEST GREEN,
Grievant,**

v.

Docket No. 2017-2506-CONS

**GENERAL SERVICES DIVISION,
Respondent.**

DISMISSAL ORDER

Grievant, Ernest Green, was employed by Respondent, General Services Division. On March 15, 2017, Grievant filed a grievance against Respondent stating, "Dave Parsons singleing [sic] me out / manipulating his authority – belittling comment / pervasive harassment." This grievance was assigned docket number 2017-1960-DOA. On May 12, 2017, Grievant filed a second grievance stating, "Retaliation + Bullying," which was assigned docket number 2017-2170-DOA. The section of the form for the relief sought was left blank on both grievances.

By decision dated May 8, 2017, docket number 2017-1960-DOA was denied at level one. Grievant appealed that decision to level two on May 18, 2017. By decision dated June 19, 2017, docket number 2017-2170-DOA was denied at level one. Grievant appealed that decision to level two on June 29, 2017. Following separate mediation sessions, Grievant appealed to level three on August 1, 2017, in docket number 2017-1960-DOA, and on September 7, 2017, in docket number 2017-2170-DOA. By order entered January 11, 2018, the two grievances were consolidated into the above-styled action.

A level three hearing in the consolidated action was partially held on April 11, 2018. During the hearing, Grievant stated he needed to leave the hearing due to a medical

condition. When Grievant did not return, the hearing was terminated. Grievant was permitted to reschedule the hearing, which was held on January 30, 2019. Grievant failed to appear for the hearing and an *Order to Show Cause* was issued on January 31, 2019. Grievant responded to the *Order to Show Cause* stating he had been in a car accident. By order entered March 13, 2019, the undersigned found Grievant had shown good cause for his previous failure to appear for hearing and ordered the parties to provide dates to reschedule the hearing.

On March 26, 2019, Respondent, by counsel, filed *General Services Division's Motion to Reconsider Order Entered March 13, 2019 and Motion to Dismiss Grievance or Hold in Abeyance*, asserting that the undersigned erred for failing to require Grievant to provide documentation of the accident Grievant claimed prevented his attendance at the hearing and that, as Grievant's employment had since been terminated, the grievance should be dismissed or held in abeyance. By *Order of Abeyance* entered May 10, 2019, the consolidated grievance was held in abeyance pending a final decision from the Grievance Board in docket number 2019-0788-DOA, the grievance filed protesting Grievant's termination from employment. The order stated that the instant grievance would be dismissed as moot if the termination grievance were denied. A final decision was rendered in docket number 2019-0788-DOA on December 18, 2019, denying the grievance. On January 3, 2020, Respondent, by counsel, filed *General Services Division's Motion for Dismissal Order*.

Grievant appears *pro se*¹. Respondent appears by counsel, Mark S. Weiler, Assistant Attorney General.

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Synopsis

Grievant was employed by Respondent as HVAC Technician. Grievant filed the instant consolidated grievance alleging harassment, bullying, and retaliation by Grievant's supervisor. The grievance does also protest a written warning, but no loss of pay accompanied that discipline. Subsequent to the filing of the instant grievance, Respondent terminated Grievant's employment and the grievance protesting the termination has now been denied. Respondent proved the grievance is now moot as Grievant is no longer an employee. 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 an HVAC Technician.
2. Grievant filed the instant consolidated grievances alleging harassment, bullying, and retaliation by Grievant's supervisor. The grievances contain no allegation of improper disciplinary action involving a loss of pay.
3. Respondent terminated Grievant's employment effective January 3, 2019, for failing to return to work after an extended leave of absence had expired.
4. Grievant protested the termination of his employment in docket number 2019-0788-DOA.
5. The grievance protesting his termination from employment was denied by a decision entered December 18, 2019.

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.

“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). “Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board].” *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

In this case, Grievant alleges harassment, bullying, and retaliation by Grievant’s supervisor. The only allegation of improper discipline made was of a written warning, which would not involve a loss of pay. Any remedy regarding the alleged harassment and retaliation is no longer available as Grievant is no longer employed and the grievance protesting his termination has been denied. 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.

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.

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. “Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board].” *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

6. Respondent proved the grievance is now moot as Grievant is no longer an employee.

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: February 4, 2020

Billie Thacker Catlett
Chief Administrative Law Judge