

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL A. PORTERFIELD,
Grievant,

v.

Docket No. 2021-0285-MCTC

MOUNTWEST COMMUNITY AND TECHNICAL COLLEGE,
Respondent.

DISMISSAL ORDER

Grievant filed the instant grievance on August 31, 2020, alleging harassment and requesting termination or removal from position of the alleged harasser. A level one decision was entered denying the grievance on September 22, 2020. On October 12, 2020, Grievant filed an appeal to level two of the grievance process. On October 29, 2020, Respondent, by counsel, filed *Motion to Dismiss for Failure to State a Claim* alleging untimeliness and failure to state a claim upon which relief may be granted. By email dated October 30, 2020, Grievance Board staff directed Grievant to respond to the motion by November 17, 2020. Grievant did not respond to the motion. Grievant appears *pro se*¹. Respondent appears by counsel, Dawn E. George, Assistant Attorney General.

Synopsis

Grievant filed this grievance alleging harassment and requesting termination or removal from position of the alleged harasser. Respondent moved to dismiss the grievance asserting Grievant had resigned from his position and that the grievance was untimely and had failed to state a claim upon which relief may be granted. As Grievant grieved only a condition of employment and has now resigned from his employment the

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

grievance is moot. Accordingly, Respondent's motion to dismiss should be granted and this grievance dismissed.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant was employed by Respondent as a Maintenance Worker II.
2. Grievant filed this grievance alleging harassment and requesting termination or removal from position of the alleged harasser.
3. Grievant resigned from employment.
4. Grievant was given until November 17, 2020 to respond to the motion to dismiss and was informed, "The administrative law judge will decide whether to dismiss the grievance based on the submissions of the parties and will not hold a hearing on the motion. Failure to respond may result in the grievance being dismissed."
5. Grievant failed to respond to the motion to dismiss.

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 untimely and for failure to state a claim upon which relief may be granted. Respondent provided no argument why the grievance was untimely. As Grievant has resigned from employment, the grievance is 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. 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), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *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).

Grievant grieved a condition of his employment and did not allege an entitlement to money. As Grievant is no longer employed by Respondent, the conditions of his former employment are moot. Although Grievant stated a claim upon which relief could be granted as the Grievance Board has the authority to address claims of harassment, the Grievance Board lacks the authority to grant Grievant's requested relief of disciplinary action against another employee as he did not allege reprisal. *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) (Grievance Board lacks the authority to order other employees be disciplined); *Jarrells v. Div. of Highways*, Docket No. 2017-2163-DOT (Sept. 29, 2017) (Grievance Board may only order another employee be disciplined if the employee has engaged in reprisal). Therefore, Respondent's motion to dismiss should be granted and this grievance dismissed.

The following Conclusions of Law support the dismissal of this grievance:

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. "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. "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.

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.

4. "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).

5. 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), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *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).

6. "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).

7. The grievance is moot as Grievant has resigned from employment.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this final 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 11, 2020

Billie Thacker Catlett
Chief Administrative Law Judge