

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEANNA ROMANO,

Grievant,

v.

Docket No. 2020-0556-SWCTC

SOUTHERN WEST VIRGINIA COMMUNITY AND TECHNICAL COLLEGE,

Respondent.

DISMISSAL ORDER

Grievant, Deanna Romano, was employed by Respondent, Southern West Virginia Community and Technical College. On November 5, 2019, Grievant filed this grievance against Respondent alleging she had been wrongfully terminated from her employment. For relief, Grievant sought to be reinstated to her position and for certain persons to be removed from their positions or, in the alternative, for monetary damages and attorney's fees to be awarded.¹

¹ “[A]n ALJ for the Grievance Board is not authorized by law to grant attorney’s fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep’t of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep’t*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep’t of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, ‘(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.’ W. VA. CODE § 6C-2-6.” *Stuart v. Div. of Juvenile Serv.* Docket No. 2011-0171-MAPS (Sept. 23, 2011). “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep’t of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).” *Stalnaker v. Div. of Corr.*, Docket No. 2013-1084-MAPS (Mar. 26, 2014). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786, n. 11 (1995).

Following the November 20, 2019 level one hearing, a recommended decision dismissing the grievance was issued on December 9, 2019, by Respondent's Grievance Evaluator. This recommended decision was adopted by Respondent's chief administrator by order entered December 17, 2019. Grievant appealed to level two on December 12, 2019, and filed an amended level two appeal on December 18, 2019.

On January 6, 2020, Respondent, by counsel, filed a motion to dismiss asserting that the grievance should be dismissed with prejudice as withdrawn. By email dated January 7, 2020, Grievant, by counsel, responded to the motion to dismiss admitting to the withdrawal of the grievance, but objecting to the dismissal of the grievance. Grievant is represented by counsel, Mark Toor, Esquire. Respondent is represented by counsel, Kristi A. McWhirter, Esquire, Assistant Attorney General.

Synopsis

Grievant withdrew her grievance at level one before the issuance of the level one decision. Nonetheless, the level one grievance evaluator did not dismiss the grievance as withdrawn, and instead denied the grievance for failure to state a claim. Grievant appealed the level one decision seeking a retraction and revision of the level one decision to reflect that the grievance was withdrawn, but also seeks a level three evidentiary hearing so that she can build a record upon which to seek professional discipline against the level one grievance evaluator. As Grievant withdrew her grievance at level one and has not sought reinstatement, or to pursue the merits of her claim, this matter is hereby **DISMISSED AS WITHDRAWN**.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the times relevant to the grievance, Grievant was employed by Respondent.

2. It is undisputed that Respondent dismissed Grievant from employment in October 2019, and Grievant filed this grievance challenging the same.

3. A level one hearing was convened on November 20, 2019. However, it was continued to November 26, 2019, at the request of Grievant. Based upon the level one decision, it does not appear that the hearing was reconvened.

4. On December 9, 2019, Grievant, by counsel, sent an email to the level one grievance evaluator and counsel for Respondent withdrawing her grievance.

5. Despite having received Grievant's request to withdraw her grievance, and acknowledging the same in the level one decision, the level one grievance evaluator issued a decision dismissing the grievance for "failure to state a claim."

6. Grievant appealed the level one decision on December 18, 2019, alleging that,

[t]he grounds for the appeal include the inappropriate advisory ruling(s) issued by the Hearing Examiner and the Hearing Examiner's issuance of a substantive ruling following the grievant's request to withdraw the grievance. The ruling is also irreconcilably and internally inconsistent in that it recognizes the grievant's withdrawal of the grievance yet goes on to issue a decision on the merits. These issues reflect on the neutrality of the Hearing Examiner and the tainted due process that infects the decision.²

7. It is undisputed that Grievant asked to withdraw her grievance at level one before the decision was issued.

² See, Grievant's level two appeal letter dated 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.

In this case, Grievant argues that the level one grievance evaluator improperly dismissed the grievance for cause, when Grievant had withdrawn her grievance. Grievant has appealed the level one decision, in part, to correct this error. Respondent moves for the grievance to be dismissed “with prejudice” as withdrawn.³ Grievant objects to the dismissal of the grievance as withdrawn arguing that “[t]he recommended decision of the hearing examiner must be revised to retract any substantive findings or rulings if the grievance was, in fact, withdrawn. I intend to address this issue in a Level III hearing on the record in order to reverse the inappropriate basis stated for the dismissal and to build a record for appropriate professional discipline against the hearing examiner.”⁴

³ Given the provisions of W. VA. CODE 6C-2-1, *et seq.*, with respect to the filing of grievances, finality, and appeal rights, the Grievance Board does not issue rulings on motions “with prejudice” or “without prejudice.”

⁴ See, Grievant’s response to Respondent’s Motion to Dismiss as contained in the email dated January 7, 2020.

“An employee may withdraw a grievance at any time by filing a written notice of withdrawal with the chief administrator or the administrative law judge. The grievance may not be reinstated by the grievant unless reinstatement is granted by the chief administrator or the administrative law judge.” W. VA. CODE § 6C-2-3(d). At level one, Grievant filed written notice of her decision to withdraw her grievance, which is acknowledged in the level one decision. Despite this, the level one grievance evaluator issued a level one decision that dismissed the grievance on the grounds of failure to state a claim. West Virginia Code § 6C-2-3(d) clearly grants a grievant the right to withdraw a grievance at any time by filing written notice, and Grievant did so. The record provides no explanation as to why the level one grievance evaluator issued a ruling on the grievance instead of dismissing it as withdrawn. As Grievant was entitled to withdraw her grievance and as she properly requested withdrawal, the dismissal of the grievance at level one for any other reason was in error.

This situation could easily be remedied by the Grievance Board entering a proper dismissal order that dismisses the grievance based upon Grievant’s withdrawal, and such would appear to grant Grievant the remedy she seeks in her first objection to the motion to dismiss. However, Grievant objects to dismissal arguing that a level three evidentiary hearing is required in order “to retract any substantive findings and rulings” made by the level one grievance evaluator and “to reverse the inappropriate basis stated for the dismissal.” In the grievance procedure, a level three decision does not act to reverse or affirm a level one decision. Level three grievance hearings are *de novo*, meaning, “[t]rying [the] matter anew the same as if it had not been heard before and as if no decision had

been previously rendered.”⁵ Therefore, Grievant’s argument that the level one decision must be reversed by a level three evidentiary hearing fails.

Grievant also objects to dismissal asserting she needs a level three hearing to “build a record for appropriate professional discipline against the hearing examiner” is not a proper objection to the dismissal. Grievant is not arguing that she wishes to go forward on the merits of her grievance; she argues that she wants to use the grievance process to seek professional discipline against the hearing examiner. This is not an appropriate use of the grievance procedure. With respect to the grievance procedure, West Virginia Code § 6C-2-1, “Purpose,” states, in part, as follows:

(a) The purpose of this article 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.

(b) Resolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia.

Id. The grievance procedure is not designed to be used as a vehicle by which to seek professional discipline against a level one grievance evaluator and the Grievance Board has no authority over such matters.

When there is no case in controversy, the Grievance Board will not issue advisory opinions. See *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003). “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-

⁵ BLACK’S LAW DICTIONARY 721 (6th ed. 1990).

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). As Grievant withdrew her grievance, there are no remaining issues the Grievance Board has the authority to decide and no actual relief to be granted. This grievance is now moot. Accordingly, this grievance is dismissed.

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. “An employee may withdraw a grievance at any time by filing a written notice of withdrawal with the chief administrator or the administrative law judge. The grievance may not be reinstated by the grievant unless reinstatement is granted by the chief administrator or the administrative law judge.” W. VA. CODE § 6C-2-3(d).

3. “(a) The purpose of this article 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. (b) Resolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia. . . .” W. VA. CODE § 6C-2-1.

4. When there is no case in controversy, the Grievance Board will not issue advisory opinions. See *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003). “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); *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).

Accordingly, the grievance is **DISMISSED AS WITHDRAWN**.

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).

February 20, 2020.

Carrie H. LeFevre
Administrative Law Judge