

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MUHAMMAD AMJAD,  
Grievant,**

**v.**

**Docket No. 2022-0151-MU**

**MARSHALL UNIVERSITY,  
Respondent.**

## **DISMISSAL ORDER**

Dr. Muhammad Amjad, Grievant, was employed by Respondent Marshall University as an Associate Professor in the Department of Clinical Lab Science. He filed two grievances. The first grievance was given the docket number 2022-0005-MU. That grievance contested the termination of Dr. Amjad's employment by Marshall University. The second grievance is the one at issue with the docket number 2022-0151-MU as set out above. In this grievance, Dr. Amjad alleges *inter alia* that he has been systematically denied a promotion to the rank of professor since 2013. Grievant requested that the two grievances be handled separately.

On October 26, 2021, Respondent filed a *Motion to Dismiss* this grievance alleging that it is now moot because Grievant withdrew his grievance related to the termination of his employment. Grievant filed a response to the motion by email dated October 28, 2021. He insists that the matters are separate and this grievance should not be dismissed. This matter is now mature for a decision on the motion.

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.

## **Synopsis**

Grievant seeks to have the denial of a promotion to the rank of Professor reversed. Grievant had also been dismissed from employment and filed a grievance contesting that action. Grievant withdrew the grievance contesting his dismissal prior to the resolution of the grievance related to the promotion. There is no remedy available in the promotion grievance since Grievant is no longer employed by Respondent. Any decision would be advisory, and the Grievance Board does not issue advisory opinions. This matter is moot.

## **Findings of Fact**

1. Dr. Muhammad Amjad, Grievant, was employed by Respondent Marshall University as an Associate Professor in the Department of Clinical Lab Science in May 2009.

2. Grievant applied for a promotion to the rank of Professor for the 2021 academic year. He had previously applied for the promotion and it had been denied.

3. By form dated July 1, 2021, Grievant filed a grievance contesting the termination of his employment.

4. Grievant filed a second grievance dated August 21, 2021, alleging that he has been systematically denied a promotion to the rank of professor since 2013. The grievance was filed directly to level three. Because it did not meet the requirements for an expedited grievance<sup>1</sup> it was transferred to level one of the grievance process.

5. On October 13, 2021 Grievant withdrew his grievance docketed as 2022-0005-MU, in which he contested the termination of his employment.<sup>2</sup> An order was

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<sup>1</sup> See W.VA. CODE § 6C-2-4(a)(4).

entered on October 19, 2021, dismissing the grievance and striking it from the docket.

6. Dr. Amjad is no longer employed by Marshall University.

### **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);

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<sup>2</sup> In his October 28, 2021, response to the motion to dismiss Grievant reiterated that he had withdrawn his prior grievance contesting his dismissal.

*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.

Grievant does not deny that he withdrew his grievance contesting the termination of his employment with Marshall University. He argues that the grievance contesting his denial of promotion is a separate issue and should be heard notwithstanding the fact that he withdrew the prior grievance and is no longer employed by Respondent. The two grievances undoubtedly deal with different issues. However, the resolution of the first one has a substantial impact on the viability of the remaining grievance.

Because Grievant withdrew his grievance contesting his dismissal, he is clearly not employed by Marshall University and there is no matter pending before the Grievance Board through which he might be reinstated to such employment. Consequently, the issue of his promotion is no longer relevant. Even if the hearing was held and Grievant proved his allegations, the remedy would be to order that he be promoted to the rank of professor. Since he is no longer employed by Marshall University that remedy is no longer available. Such a ruling would be advisory at best.

The West Virginia Supreme Court of Appeals has addressed the issue of an employee's severance of employment while a grievance was pending in the case of

*Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision). In *Komorowski* the grievant applied for a position as principal in a public school system. Had he received the position it would have raised his salary. Mr. Komorowski filed a grievance contesting his non-selection for the principles position, and the grievance procedure through a level three hearing. Subsequent to the hearing, Mr. Komorowski retired. In dealing with the issue of whether Mr. Komorowski's retirement rendered the grievance moot the Supreme Court wrote the following:

The grievance system provides a procedure for public employees to resolve grievances with regard to their employment. W.Va. Code § 6C2-1(a). Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative . . . “ ‘Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .’ Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).” Syl. Pt. 4, *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E.2d 585 (2011). “ ‘Courts will not ordinarily decide a moot question.’ Syl. pt. 1, *Tynes v. Shore*, 117 W.Va. 355, 185 S.E. 845 (1936).” Syl. Pt. 4, *Bland v. State*, Nos. 11– 0746, 11–0747, 11–1146, 2012 WL 5898071 (W.Va. 2012).

Just as in *Komorowski*, any relief that might have been available to Grievant had he not been dismissed, and had he prevailed before the grievance board on the promotion issue, is now purely speculative. As the Supreme Court noted, “Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .” Syl. pt. 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).” *supra*.

As in *Komorowski*, the Grievance Board has consistently held, in situations where “it is not possible for any actual relief to be granted, any ruling issued 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).

Accordingly, the motion 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 on the issues 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. “The grievance system provides a procedure for public employees to resolve grievances with regard to their employment. W.Va. Code § 6C2-1(a). . . Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .’ Syl. pt. 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).” Syl. Pt. 4, *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E.2d 585 (2011). “ ‘Courts will not ordinarily decide a moot question.’ Syl. pt. 1, *Tynes v. Shore*, 117 W.Va. 355, 185 S.E. 845 (1936).” Syl. Pt. 4, *Bland v. State*, Nos. 11– 0746, 11–0747, 11–1146, 2012 WL 5898071 (W.Va. 2012).” *Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).

6. Respondent proved by a preponderance of the evidence that no relief is available to Grievant, and this matter is 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, 2021**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**