

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANTONIO SHONTEL HINES,

Grievant,

v.

Docket No. 2020-0633-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,**

Respondent.

DISMISSAL ORDER

On November 21, 2019, Grievant filed a level one grievance against his employer, Respondent, Department of Health and Human Resources (DHHR), Bureau for Children and Families, stating as follows: “[t]he Grievant was disciplined with a written warning without Just Cause.” As relief sought, Grievant stated, “[t]o be made whole in every way, including, but not limited to, removal of the written warning from the grievant’s file.”

A level one conference was held on January 17, 2020. The grievance was denied by decision dated February 7, 2020. Grievant appealed to level two of the grievance process on February 12, 2020. A level two mediation was scheduled to be held on July 13, 2020. On July 20, 2020, Grievant perfected his appeal to level three. By Notice of Hearing issued on September 28, 2020, this grievance was scheduled for a level three hearing to be held on January 25, 2021. On November 30, 2020, Respondent, by counsel, filed a Motion to Dismiss this grievance as moot alleging that Grievant had resigned his employment. By email dated December 1, 2020, the Grievance Board informed Grievant, by representative, that “[s]hould you wish to respond to the pending motion, please do so, in writing, before close of business December 14, 2020. There will not be a hearing held on this motion. 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.”

On or about January 13, 2021, Grievant by his representative moved to continue the January 25, 2021, hearing. As there was no objection from Respondent, the Grievant’s motion to continue was granted. As of this date, Grievant has submitted no response to Respondent’s Motion to Dismiss. Grievant is represented by Gary DeLuke, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Katherine A. Campbell, Esquire, Assistant Attorney General. The Motion to Dismiss became mature for decision on December 14, 2020.

Synopsis

Grievant grieved a written warning he received while he was employed by Respondent. Grievant did not assert he had lost any pay as a result of the written warning. Following the filing of his grievance, but before the level three hearing, Grievant resigned. Respondent moved to dismiss the grievance asserting mootness due to Grievant’s resignation. Grievant did not object to the dismissal of the grievance and has not denied that he resigned his employment. Respondent proved the grievance is now 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 an Office Assistant 3.
2. Grievant grieved a written warning he received while he was employed by Respondent. Grievant did not assert he had lost any pay due to these issues.

3. A level one conference on the grievance was held on January 17, 2020.
4. Grievant appealed to level two of the grievance process on February 12, 2020.
5. A level two mediation was held on July 13, 2020.
6. Grievant appealed to level three on July 20, 2020.
7. Grievant resigned from employment with Respondent on an unknown date following the filing of his appeal to level three.
8. Grievant did not submit a response to the Respondent's Motion to Dismiss, nor did Grievant deny that he had resigned or object to the dismissal of his grievance.

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). “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. "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 (2018).

Respondent asserts that the grievance is moot because Grievant has now resigned and he did not suffer any loss of pay or benefits. Grievant has not denied that he resigned and did not object to the dismissal of the grievance.

"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]." *Baker v. Bd. of Directors*, Docket No. 97-BOD-

265 (Oct. 8, 1997) (citing *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993)).

Grievant's claims relate only to his employment with Respondent. Grievant has not alleged any loss of pay or benefits. As Grievant is apparently no longer employed by Respondent, any decision in this matter would merely be a declaration that one party is right or wrong, would have no substantive consequence, and would merely be advisory in nature. The grievance is moot.

Therefore, the Respondent's motion to dismiss is 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 (2018).

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); *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].” *Baker v. Bd. of Directors*, Docket No. 97-

BOD-265 (Oct. 8, 1997) (citing *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993)).

7. Respondent proved the grievance is now moot due to Grievant's resignation from employment.

Accordingly, this 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 (eff. July 7, 2018).

DATE: February 1, 2021.

Carrie H. LeFevre
Administrative Law Judge