

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JAMES MATTHEW KOUNS,  
Grievant,**

**v.**

**Docket No. 2019-1552-CONS**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
MILDRED MITCHELL-BATEMAN HOSPITAL,  
Respondent.**

**DISMISSAL ORDER**

Grievant, James Matthew Kouns, was employed by Respondent, Department of Health and Human Resources at Mildred Mitchell-Bateman Hospital. Between March 2019 and September 2019 Grievant filed five separate grievances that were consolidated into the instant grievance. Docket number 2019-1214-DHHR has been severed and dismissed, leaving four active claims as follows: docket numbers 2019-1430-DHHR, 2020-0025-DHHR, and 2020-0367-DHHR protesting suspensions without good cause; and docket number 2019-1482-DHHR protesting “hostile work environment, workplace harassment, multiple unsubstantiated suspension, untimely payment, defamation of character, discrimination.” As relief, Grievant requested reinstatement, back pay, “monetary compensation for. . .stress and ruining my credit,” and that “the harassing individuals addressed & stopped.”

On December 7, 2020, Respondent, by counsel filed *Respondent’s Motion to Dismiss* asserting the grievance must be dismissed as moot due to Grievant’s resignation from employment and receipt of payment in full for the protested suspensions. By email of the same date, Grievance Board staff notified the parties that any response to the motion must be filed by December 21, 2020, that no hearing would be held on the motion, that the administrative law judge would rule based on the submissions of the parties, and

that “failure to respond may result in the grievance being dismissed.” Grievant has filed no response to the motion to dismiss. Grievant is represented by Gary DeLuke, UE Local 170, WV Public Workers Union. Respondent is represented by counsel, Katherine A. Campbell, Assistant Attorney General.

### **Synopsis**

Grievant was employed by Respondent as a Health Service Worker. Grievant has now resigned from employment. Respondent moved to dismiss the grievance as moot. As Grievant is retired, he is no longer subject to the conditions of employment he grieved and has been paid for the suspensions he grieved. All grievance claims are either moot or request relief wholly unavailable from the Grievance Board. 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 a Health Service Worker.
2. Grievant protested suspension without good cause, hostile work environment, workplace harassment, untimely payment, defamation of character, and discrimination.
3. Grievant resigned from employment on August 13, 2020.
4. Grievant has been paid for the grieved periods of suspension.

### **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 moot as Grievant has resigned, has been paid for the contested periods of suspension, and the only remaining claims relate to conditions of employment. In support of its motion, Respondent attached proof of Grievant's resignation and proof of payment for the grieved periods of suspension.<sup>1</sup> Grievant failed to respond to Respondent's motion to dismiss.

“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-

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<sup>1</sup> The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

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).” *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

The suspensions Grievant protested have all been reversed and Grievant has been paid for the periods of suspension, rendering those claims moot. Grievant’s claims of hostile work environment, harassment, and discrimination relate to conditions of employment to which Grievant is no longer subjected as he has resigned, rendering those claims moot.

Grievant’s remaining claim of defamation of character and request for the relief of “monetary compensation for. . .stress and ruining my credit” appear to be a request for tort-like damages. The Grievance Board is not authorized by statute to hear tort claims or award tort-like damages. *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 Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); *See Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995). Therefore, that claim must be dismissed as the relief requested is wholly unavailable.

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. “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.

2. “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). *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

3. The Grievance Board is not authorized by statute to hear tort claims or award tort-like damages. *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 Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

4. All grievance claims are either moot or request relief wholly unavailable from the Grievance Board.

5. 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: January 25, 2021**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**