

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**NANCY A. HOLCOMB**

**Grievant,**

**v.**

**Docket No. 2020-1441-DHHR**

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

**Respondent,**

**and**

**TONA MURIN,**

**Intervenor.**

**DISMISSAL ORDER**

Grievant, Nancy A. Holcomb, filed a level one grievance against her employer, Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital, on April 29, 2020, which stated as follows: “[n]on-selection for promotion for Social Services Coordinator for Clay, Jackson, & Roane Counties.” As relief sought, Grievant seeks, “[t]o otherwise be made whole, including selection for promotion according to code and policy”.

This matter was scheduled for a level three hearing on March 1, 2022. On February 23, 2022, Respondent, by counsel, James “Jake” Wegman filed a Motion to Dismiss this grievance as moot, asserting that the position Grievant is seeking is being dissolved and it will not exist as of March 2022. By email that same date, Grievant’s representative, Chester W. Sprinkle, UE Local 170, emailed the Grievance Board, copying all parties, and stated that “Grievant through her Representative[,] does not object.” Also on February 24, 2022, Intervenor, *pro se*, emailed the Grievance Board,

copying all parties, and stated that she had no objection to the Motion to Dismiss. On February 24, 2022, Grievance Board staff sent an email to all parties informing them that the level three hearing had been cancelled.

### **Synopsis**

Grievant, Nancy A. Holcomb, was employed by Respondent, Department of Health and Human Resources. Respondent, by counsel, moved for this grievance to be dismissed as moot because the position Grievant seeks no longer exists. Grievant, by her representative, agrees that this grievance is moot, and that this grievance should be dismissed, as does Intervenor. Respondent's decision to dissolve and eliminate the position at issue has rendered this grievance moot. Accordingly, this Grievance must be **DISMISSED**.

The following Findings of Fact are made based on the documentation submitted by both parties.

### **Findings of Fact**

1. Grievant, Nancy A. Holcomb, was employed by Respondent, Department of Health and Human Resources as a CPS Crisis Worker.
2. On April 29, 2020, Grievant filed this grievance against Respondent at level one of the grievance procedure challenging her non-selection for the position of Social Services Coordinator.
3. Respondent, by counsel, filed a Motion to Dismiss on February 24, 2022, asserting this this grievance is moot because Respondent was dissolving the position at issue, Social Services Coordinator, and that the same would no longer exist by the end of March 2022.

4. By email dated February 24, 2022, Grievant, by her representative, informed the Grievance Board that she had no objection to Respondent's Motion to Dismiss.

### **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.*" W. VA. CODE ST. R. § 156-1-6.2 (2018). 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). Therefore, Respondent has the burden of proving its claims by a preponderance of the evidence. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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).

In situations where “it is not possible for any actual relief to be granted, any ruling issued by the undersigned 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).

The position Grievant sought in this grievance no longer exists. Therefore, there is no relief that can be granted. As such, this grievance is moot, and any decision issued on the merits of this matter would be an advisory opinion. Accordingly, this grievance must be **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.*” W. VA. CODE ST. R. § 156-1-6.2 (2018).

2. 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). Therefore, Respondent has the burden of proving its claims by a preponderance of the evidence. “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3. “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).

4. In situations where “it is not possible for any actual relief to be granted, any ruling issued by the undersigned 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).

5. The position at issue no longer exists; there is no relief that can be granted.

6. Respondent has proved by a preponderance of the evidence that this grievance is moot, and that any decision issued on the merits of this matter would be an advisory opinion.

Accordingly, this grievance must be **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* 156 C.S.R. 1 § 6.20 (2018).

**DATE: April 6, 2022.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**