

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ASHLEY SIMMONS,
Grievant,

v.

Docket No. 2021-1050-DHHR

**DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU
FOR PUBLIC HEALTH,**
Respondent.

DISMISSAL ORDER

Grievant, Ashley Simmons, is employed by Respondent Department of Health and Human Resources (“DHHR”) and assigned to the Bureau for Public Health (“BPH”). Ms. Simmons filed a level one grievance form dated October 16, 2020, alleging “Nondiscriminatory Hostile Workplace Harassment and Retaliation.”¹ As relief, Grievant seeks, “a change of supervisors as soon as possible.” This is the only remedy sought in the grievance. Ms. Simmons filed a separate grievance with the docket number 2021-2534-DHHR which is now pending before a different Administrative Law Judge (“ALJ”). In that action, Grievant seeks the removal of a written reprimand from her file. Even though these grievances involve the same parties and overlapping facts, the actions are separate and discrete.

A level one conference was held on October 30, 2020, and a decision denying the grievance was dated November 24, 2020. Grievant appealed to level two on November

¹ The allegation is set out herein as it appears on the grievance form. Grievant attached a separate detailed statement to the form as well as a plethora of documents in support thereof, all of which is part of the record.

28, 2020. A mediation was conducted on March 23, 2021, and Grievant appealed to level three on March 31, 2021.

A level three hearing was convened on August 10, 2021. Grievant appeared *pro se*² and Respondent was represented by Brittany Ryers-Hindbaugh, Assistant Attorney General. Grievant reiterated that the only remedy she was seeking in this matter was a change of supervisor. The parties engaged in a discussion, and it became apparent that there were positions open in the BPH for which Grievant had applied. The hearing was continued at the request of the parties, to give them time to see if this matter could be settled by Grievant being successful in obtaining a different position with a different supervisor.

Respondent filed a Motion to Dismiss dated October 13, 2021, alleging Grievant had received a new position with a new supervisor effective September 25, 2021, rendering the grievance moot. Grievant responded on October 25, 2021, stating the issue of the written reprimand remand to be decided. The undersigned initially issued an Order Denying the Motion to Dismiss, but giving Respondent leave to raise the issue at a future date. However, upon review, it became apparent that Grievant was opposing dismissal of both grievances in her response even though Respondent was only seeking to dismiss the instant grievance.

A telephone hearing was held on December 20, 2021, in which Grievant and Ms. Ryers-Hindbaugh were given an opportunity to address the motion again. Grievant indicated that she wished to discuss the matter with her representative before dismissing

² Grievant's union representative did not appear at the hearing. Grievant stated that she wished to proceed without representation.

the grievance. Grievant's representative was very ill at that time. Two months later, on February 23, 2022, the undersigned inquired of the parties by email regarding the status of this matter. By email dated February 28, 2022, Doug Smock, Office Manager for UE Local 170 (Grievant's Union) replied that there had been no change. This matter is mature for a decision on the motion.

Synopsis

Ms. Simmons filed the present grievance in which she sought only "a change of supervisors as soon as possible." The level three hearing was continued to see if Grievant would receive a position for which she had applied which was within the BPH with a different supervisor. Grievant received and accepted such a position. Respondent argues that the grievance is now moot and should be dismissed. Respondent's motion is granted.

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.

Findings of Fact

1. At the time this grievance was filed, Grievant was employed by Respondent in the Bureau for Public Health ("BPH") as a Multi-Disease Epidemiologist in the Office of Epidemiology and Prevention Services. Her supervisor was Dr. Maria Del Rosario, Director of Surveillance.

2. The sole relief Grievant seeks is "a change of supervisors as soon as possible."

3. The level three hearing was continued at the request of the parties to see if this matter could be resolved.

4. Effective September 25, 2021, Grievant started a new position within the PBH Division of Epidemiology Evaluation. Her new position is classified as Epidemiologist 2WV Electronic Surveillance System. Her supervisor is Sharon Hill, Epidemiologist 3.

5. Grievant's grievance regarding a written reprimand is pending before a different West Virginia Public Employees Grievance Board ALJ and is a separate and discrete matter.

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 (2008).

Respondent argues that Grievant has received all the relief she seeks in this matter and therefore the grievance should be dismissed as moot. 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).

"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).

The only remedy Grievant seeks in this matter is "a change of supervisors as soon as possible." Neither party disputes that Grievant now has a new position within the Bureau for Public Health with a new supervisor. Grievant applied for and accepted that position. Grievant has received the only remedy she sought in her grievance.³ There is no more remedy to be granted in this matter which renders the grievance moot. Accordingly, the Motion to Dismiss is GRANTED and this 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

³ Any remedies she seeks regarding her past supervisor's action are still pending in a separate grievance.

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. “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).

3. 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, 2020).

4. The only remedy Grievant seeks in this matter is “a change of supervisors as soon as possible.” There is not more remedy to be granted in this matter which renders the grievance moot.

Accordingly, the Motion to Dismiss is GRANTED and 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 (2018).

DATE: March 8, 2021

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE