PATRICIA PETTY, et al.,

Grievants,

v. **Docket No. 00-20-154**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants Patricia Petty, George Beckett, Ben Shew, Linda Winter, Diana Long, and Randy Shillingburg, filed separate grievances against their employer, the Kanawha County Board of Education ("KBOE"), in February and March 1999. The grievances complain of harassment and intimidation by, and inappropriate behavior of, individual members of the KBOE, and one of the grievances complains of discriminatory acts.

On various dates in May and June of 2000, Respondent appealed the Level II decisions issued in the grievances of Grievants Petty, Long, Winter, and Beckett, to Level IV. These Level II decisions had found that these Grievants had been subject to harassment by KBOE member Betty Jarvis, and ordered that the harassment cease as it related to the particular Grievants. Grievants Shew and Shillingburg appealed adverse Level II decisions in May and June of 2000, which had found their grievances to be moot. The six grievances were consolidated at Level IV. The parties attempted to settle this matter, but were unsuccessful. The parties then decided that a Level IV hearing was not necessary, and submitted the grievances for decision on the record developed at Level II. Grievants were represented by Lonnie Simmons, Esquire, and Respondent was represented by James W. Withrow, Esquire. These grievances became mature for decision on April 11, 2002, the deadline for the submission of a reply brief by Grievants. No reply brief was received.

Two days of hearing were held at Level II, on June 29 and September 23, 1999. As of the second day of hearing at Level II, Grievant Shillingburg was no longer an employee of KBOE, and Grievant Shew had given notice that he was leaving KBOE's employment. At the Level II hearing, Grievants' counsel at that time, Mike Kelly, argued their grievances were not moot, arguing they were harassed

to the point that they resigned, and because the harassment was so severe, the issue of whether they were harassed should therefore be addressed. It does not appear from the statement of counsel at the hearing, however, that either Grievant was attempting to amend the grievance to argue constructive discharge, and there was no indication that either Grievant wanted his job back. Further, neither Grievant Shew nor Grievant Shillingburg testified that he was forced to resign, nor did they offer testimony about their new employment, if any. The written argument filed on behalf of Grievants at Level II by Lonnie C. Simmons, Esquire, does not argue constructive discharge. It argues the grievances are not moot and should be addressed because the harassment is capable of repetition. Accordingly, the undersigned will not consider the legal theory of constructive discharge.

As of the time Respondent submitted its written argument at Level IV, Grievants Petty, Long, and Winter were also no longer employees. The only Grievant who is still an employee of KBOE is Grievant Beckett. Grievants Petty, Long, and Winter did not offer any testimony that they felt forced to resign, nor did they offer testimony about their new employment, if any. According to KBOE's written argument, Grievants Petty and Winter retired. No argument was made on behalf of these Grievants that the legal theory of constructive discharge should be applied.

Further, the parties acknowledged that Betty Jarvis is no longer a member of the KBOE, having lost her bid to retain her position in the last election. The following Findings of Fact are made from the evidence presented at Level II.

FINDINGS OF FACT

1. Grievant Beckett is employed by KBOE as an Administrative Assistant, Personnel and Transportation.
2. Grievants Shew, Shillingburg, Long, Winter, and Petty are no longer employed by KBOE.
3. Betty Jarvis is no longer a member of the KBOE, having lost her bid to retain her position in the last election.

DISCUSSION

The only issue is whether the grievances are moot. The undersigned concludes that they are. Both parties were specifically asked by the undersigned to address this issue in their briefs. Grievants relied upon the written argument submitted at Level II, which argued Grievants Shew and

Shillingburg should be allowed to continue their grievances because the harassment was capable of repetition, relying upon Syllabus Point 1 of State ex rel. M.C.H. v. Kinder, 173 W. Va. 387, 317 S.E.2d 150 (1984), which states as follows:

> A case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.

Respondent argued in its brief that the grievances of those who are no longer employees are moot, even though Respondent had appealed three of these seemingly moot grievances. During a conference call held on June 14, 2000, Respondent had argued that certain Level II findings and conclusions were inappropriate, and that KBOE did not want the decisions to stand as precedent.

W. Va. Code § 18-29-1 states that the purpose of the grievance procedure:

> is to provide a procedure for employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employmentrelationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. This procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose.

Accordingly, "[t]his 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). Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.22. This Grievance Board has found that, where a grievant is no longer an employee, "a decision on the merits of her grievance would be a meaningless exercise, and would merely constitute an advisory opinion. Muncy v. Mingo County Bd. of Educ., Docket No. 96-29-211 (Mar. 28, 1997); Brightwell v. Tyler County Bd. of Educ., Docket No. 96-48-255 (Nov. 22, 1996). See Harrison v. Cabell County Bd. of Educ., 177 W. Va. 257, 351 S.E.2d 606 (1986); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989)." Jones v. Cabell County Bd. of Educ., Docket No. 97-06-041 (Aug. 6, 1997).

The relief sought by Grievants Shew and Shillingburg must be a consideration in determining

whether the grievances are moot, as a claim for back pay would survive after the employee left the respondent's employment. However, “[r]elief 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). De minimus relief is also unavailable. Carney v. W.Va. Div. of Rehab. Services, Docket No. VR-88-055 (Mar. 28, 1989).” Baker v. Bd. of Directors, Docket No. 97-BOE-265 (Oct. 8, 1997). Grievants Shew and Shillingburg both sought as relief compensatory and punitive damages, a public apology, training for two KBOE members, that those two KBOE members not be able to vote on any personnel matters involving either of them, or any of their family members, that no retaliatory action be taken, that harassment cease, and that KBOE follow state personnel laws and act as a Board. Neither Grievant Shew nor Grievant Shillingburg identified any compensatory damages to which he believed he was entitled. As to the punitive damages sought by Grievants, the grievance procedure is not the proper forum for such relief. The purpose of the grievance procedure is to provide a forum for the resolution of employment problems, with the goal that the employer and employee will be able to work out a solution.

> As for the "pain and suffering" damages Grievant seeks, an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". W. Va. Code § 18-29-5(b). This Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case. Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 225, 227 n.11 (1995).

Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997). Further, a public apology is not relief that is available through the grievance procedure. Logar v. Monongalia County Bd. of Educ., Docket No. 00-30-270 (Sept. 25, 2000).

Finally, Grievants' written argument submitted at Level II, and relied upon by Grievants at Level IV, requested attorney fees. The undersigned has no authority to award attorney fees. Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95- BCHD-362 (June 21, 1996); See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54- 86-062 (June 16, 1986). Thus, Grievants Shew and Shillingburg have not identified any monetary relief for which KBOE would remain liable through the grievance procedure after they left its employment. The undersigned is not convinced

that Grievants have presented justification for an exception to the rule that the Grievance Board will not issue advisory opinions. See Jervis v. Bd. of Trustees, Docket No. 94-BOT-1117 (Mar. 20, 1995). “One person cannot grieve on behalf of another party. Hall v. Mercer County Bd. of Educ., Docket No. 94-27-1099 (Mar. 20, 1995).” Farley v. W. Va. Parkways Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). “The grievance procedure 'is designed to address specific problems or incidents and not general and speculative apprehensions of employees...' Wilds v. W.Va. Dept. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991).” Id. “The availability of the grievance procedure is restricted to 'affected state employees.' W.Va. Code §29-6A-2(i). It is not available to address injury to the interests of ordinary citizens. There must be some nexus between the employment relationship and the interests affected.” Id. While Grievants may truly be concerned that the acts complained of are capable of repetition, this concern does not fit within the purpose of the grievance procedure. Grievants are attempting to grieve on behalf of other employees, and their concern is speculative. Further, given that Ms. Jarvis is no longer a member of the KBOE, and there was sparse evidence about any actions or statements by the other KBOE member who was named by Grievants, Pete Thaw, the undersigned is not convinced that there is any danger or likelihood of repetition of the acts complained of.

Thus, considering all of the above, Grievants' argument that their grievances should be decided because the acts complained of are capable of repetition is rejected. The grievances of Grievants Shew and Shillingburg will not be further addressed.

The remaining grievances are here on the appeal of KBOE. W. Va. Code § 18-29- 3(t) provides the framework for consideration of an appeal by a board of education of an adverse Level II decision, stating as follows:

> Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearingexaminer's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§ 18-29-4] of this article and provided both parties in section seven [§ 18-29-7] of this article.

KBOE is apparently claiming the findings by the Level II grievance evaluator that KBOE member Jarvis engaged in harassment are contrary to law, because an employee cannot utilize the grievance

procedure to claim harassment by an individual member of a board of education, as the board of education essentially has no control over the actions of individual board members.

Whether Grievants could utilize the grievance procedure in this instance to address their complaints need not be addressed, as the remaining grievances are moot, and, again, to rule on whether the Level II decisions issued in favor of Grievants Beckett, Petty, Long, and Winter are contrary to law would be advisory. Each of these decisions found that Ms. Jarvis had engaged in harassment of the Grievants, and each decision issued a cease and desist order particular to each Grievant, and designed to stop Ms. Jarvis' harassment of these individuals. Inasmuch as the decisions were specific to Grievants Winter, Petty, and Long, and those Grievants are no longer employees of KBOE, the Level II decisions no longer have any force and effect.

As to Grievant Beckett, although he remains an employee, and had complained to some extent about the actions of two members of the KBOE, his main complaint in his grievance was the actions of Ms. Jarvis. The findings of fact in the cease and desist order set forth in the Level II decision issued on his grievance detail only the actions of Ms. Jarvis, and while the decision orders KBOE to cease and desist from certain actions, it is clear that the actions which are to cease are the very actions in which Ms. Jarvis was engaging. The cease and desist order goes on to state, “[b]ased on evidence adduced at the hearing, it is reasonable to infer that Mrs. Jarvis will not change her conduct, jeopardizing Respondent's ability to abide by this CEASE AND DESIST Order.” The orderthen goes on to specifically refer to Ms. Jarvis, and how KBOE is to deal with unsubstantiated allegations made by her. As Ms. Jarvis is no longer a member of the KBOE, the Level II decision issued in favor of Grievant Beckett also no longer has any force and effect.

As to KBOE's argument that the undersigned should address whether the Level II decisions are lawful anyway, because of the fear of their precedential value, they have no precedential value at Level IV. If KBOE finds itself in this same position again, it can simply appeal the Level II decisions to Level IV, and, if those grievances are not moot, the issue can be addressed at that time, when it will have some meaning. To issue a decision in any of these grievances would be advisory.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. With regard to the issues presented on appeal to Level IV, these grievances are moot.

2. "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). Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.22.

Accordingly, this consolidated grievance is **DISMISSED and STRICKEN** from the docket of the Grievance Board.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Dated: May 2, 2002