# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

**DENNIS KING,**

**Grievant,**

**v.** **Docket No. 06-DOH-020**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,**

**Respondent.**

## DISMISSAL ORDER

Grievant, Dennis King, filed a grievance against his employer, alleging:

Unjustified, arbitrary and capricious transfer resulting in a functional demotion. Said transfer is disciplinary in nature, politically motivated and discriminatory.

Relief Sought:

Reinstatement to former position as District One Maintenance Engineer with full duties, including full supervisory responsibilities, of this position and free from any form of harassment or retaliation. Reimbursement for all court and legal fees.

This grievance was denied at all lower levels. A Level IV hearing was held at the Grievance Board's Charleston office on March 23, 2006. Grievant appeared *pro se* and Respondent was represented by Barbara Baxter, Esq.

## Procedural History

Because the procedural posture of this case is somewhat different, it is necessary to provide a brief procedural history. At the conclusion of the Level IV hearing on March 23, 2006, Ms. Baxter requested a continuance to determine if Respondent needed additional testimony. This motion was granted. On April 25, 2006, the undersigned senta letter to both Grievant and Ms. Baxter explaining that she had been informed that Respondent decided no further witnesses were necessary and a briefing schedule should be established.

On June 27, 2006, the Grievance Board received Respondent's Motion to Dismiss and Findings of Fact and Conclusions of Law. Respondent requested the grievance be dismissed as moot because Grievant retired from his position on March 31, 2006. (See footnote 1) On July 25, 2006, a letter was sent to Grievant requesting he confirm or deny whether he had retired. (See footnote 2) No response was received, and on August 22, 2006, the undersigned issued an Order to Show Cause, requesting Grievant respond in writing no later than September 6, 2006.

On September 1, 2006, the Grievance Board received a letter from Cameron S. McKinney, Esq., stating he had been retained by Grievant to represent him in the pending matter. Mr. McKinney requested an extension on the Order to Show Cause. The extension was granted, and Grievant's response was delivered on September 13, 2006.

In that response, Grievant confirmed he had retired, but asserted he did not abandon his claim because his retirement was the result of a constructive discharge. He also alleged the constructive discharge was the result of a pattern and practice of age discrimination, retaliation, favoritism, and cronyism on the part of Respondent. On September 28, 2006, Respondent filed an Objection to Grievant's Response to Show Cause, asserting Grievant was trying to amend his grievance after the close of evidence. Also, Grievant never suggested until the Response that he felt compelled to retire. Respondent then reiterated that this grievance is moot.

Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

## Findings of Fact

1. Grievant filed this grievance on October 6, 2006, grieving his involuntary transfer without any decrease in compensation. At that time he was an employee of DOH. 2. His Level IV hearing was held on March 23, 2006.

3. Grievant's allegations did not involve any issues of monetary compensation.

4. Grievant retired on March 31, 2006.

5. Grievant did not file a grievance alleging constructive discharge.

**Discussion**

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).

Grievant wishes to continue to pursue his grievance concerning his involuntary transfer, even though he, on his own volition, retired. His retirement makes the grievanceconcerning his involuntary transfer moot. There were no issues of back pay or benefits that need to be addressed. As a result, any relief which could be granted at this point would be moot and speculative.

Since Grievant alleged his retirement was a constructive discharge, the undersigned believes this should briefly be addressed. This assertion is an entirely new cause of action and cannot be raised in this grievance. Instead, it should have been filed as a separate grievance at the appropriate time, and should not be dovetailed into this grievance after the evidence has been presented. Further discussion on the merits of this issue is unwarranted.

The following conclusions of law support the above discussion:

**Conclusions of Law**

1. 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).

2. Grievant's retirement rendered his grievance on his involuntary transfer moot.

Accordingly, this grievance is hereby **DISMISSED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court

of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neitherthe West Virginia Education and State Employees Grievance Board nor any of its administrative law judges are 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**DATE: October 20, 2006**

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**Wendy A. Campbell**

**Administrative Law Judge**

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*Footnote: 1*

*It should also be noted Grievant phoned the Grievance Board and inquired of the staff the ramifications of retirement on his grievance. At that time, he was informed that retirement would make his grievance moot since there were no issues involving monetary compensation.*

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*Footnote: 2*

*Copies of all correspondence was sent to the parties.*