THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

TIM TITUS,

Grievant,

v. **Docket No. 06-HHR-188**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/WILLIAM

R. SHARPE, JR. HOSPITAL,

Respondent.

DISMISSAL ORDER

Grievant filed this grievance directly at level four on June 1, 2006, challenging the termination of his employment by Respondent Department of Health and Human Resources ("DHHR"). As relief, Grievant sought reinstatement to his position, with lost wages and interest.

A level four hearing was convened on October 13, 2006, at which time Grievant requested that this matter be placed in abeyance, while an investigation was made into whether or not Grievant's appeal of a finding from the West Virginia Office of Health Facility Licensure and Certification, Registry Review Committee, had been processed. After some time had passed, Respondent filed a Motion to Dismiss on December 6, 2006, alleging that Grievant had not appealed the finding of patient abuse and that he could no longer legally be employed by DHHR. A telephonic hearing on the motion was held on January 26, 2007, in which Grievant participated personally and by counsel.

Grievant confirmed that he had not pursued an appeal of the finding of abuse against him. Although the parties were given until February 9, 2007, to submit written arguments on the pending Motion to Dismiss, neither party has submitted any memoranda. After a review of all of the information presented by both parties, the undersigned makes the following findings. (See footnote 1)

Findings of Fact

1. Grievant was employed at Sharpe Hospital in an unknown capacity. He and other employees were involved in an incident with a patient on April 23, 2006, which resulted in allegations of mistreatment and/or abuse of that patient.

2. As a result of the incident on April 23, 2006, Grievant's employment was terminated on May 18, 2006.

3. An investigation of the incident was conducted by Adult Protective Services and the Legal Aid Patient Advocate, and Grievant was found to have committed patient abuse.

4. If an individual does not appeal a finding of patient abuse by the West Virginia Office of Health Facility Licensure and Certification, that person's name is permanently placed on the Abuse Registry.

5. Grievant did not pursue an appeal of the finding of patient abuse. 6. 42 C. F. R. § 483.13(c)(1)(ii) prohibits state facilities from employing individuals who have been placed on the Abuse Registry.

Discussion

Respondent asserts that even if Grievant were to win his grievance, DHHR would still be prohibited from employing Grievant because of his placement on the Abuse Registry. That assertion is clearly demonstrated as correct by 42 C. F. R. § 483.13(c)(1)(ii). Additionally, it is also clear Grievant's failure to request a hearing and present evidence to the West Virginia Office of Health Facility Licensure and Certification Registry Review Committee caused his named to be entered in the Abuse Registry. (See footnote 2)

At this point in time, the undersigned Administrative Law Judge is without authority to require DHHR to employ Grievant. Thus, even if Grievant were to prevail in his grievance, the relief sought--reinstatement to his previous position--is not a remedy the undersigned could grant. Therefore, the

issue is moot.

This Grievance Board does not issue advisory opinions on moot issues. *Collins v. Dep't of Transp./Div. of Highways*, Docket Nos. 02-DOH-227/248 (Jan. 3, 2003); *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Dooley v. Dep't of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket Nos. 91-35-229/239 (Nov. 27, 1991); Procedural Rules of the West Virginia Education & State Employees Grievance Bd. 156 C.S.R. §§ 4.12 & 4.22. "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). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Serv.*, Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOE-265 (Oct. 8, 1997). Under these circumstances, the issue has become moot and any ruling on the merits of this issue would constitute an inappropriate advisory opinion.

Conclusions of Law

1. Since Grievant cannot be employed after being placed on the Abuse Registry, he is requesting an advisory opinion which this Grievance Board does not issue, and the question of the propriety of his termination is moot. *Collins v. Dep't of Transp./Div. of Highways*, Docket Nos. 02-DOH-227/248 (Jan. 3, 2003); *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Dooley v. Dep't of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket Nos. 91-35-229/239 (Nov. 27, 1991); Procedural Rules of the West Virginia Education & State Employees Grievance Bd. 156 C.S.R. §§ 4.12 & 4.22.

2. "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). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Serv.*, Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOE-265 (Oct. 8, 1997).

Accordingly, this grievance is **DISMISSED**. Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of

receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: March 14, 2007 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

There being no underlying record in this case, and neither party having submitted any formal factual evidence or information, the factual findings above have been gleaned from the statements of counsel during the continued hearing in October and the December telephone conference, along with the apparently undisputed information in the Motion to Dismiss.

Footnote: 2

Although Grievant claimed that he did file an appeal, which he believed had been lost, he did not pursue that appeal or its apparent misplacement.