THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ADDIE ROBERTS, et al.,
Grievants,

v. **Docket No. 2010-0953-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL,
Respondent.

DISMISSAL ORDER

Addie Roberts and twenty-two other employees[1] ("Grievants") of the Department of Human Resources/Lakin Hospital ("DHHR") filed level one grievance forms on January 21, 2010. On January 28, 2010, the grievances were consolidated and given the docket number set out above. The Statement of Grievance is the same for all the grievances and alleges:

> senior employees being subjected to intentional/reckless infliction of emotional distress, humiliation, intimidation, retaliation, harassment, discrimination causing unsuitable working conditions/conflicts creating hostile work environment by showing favoritism toward a known group of staff at Lakin.

For relief Grievants seek:

> for Administrator to cease and desist continued discrimination, retaliation, harassment, intentional infliction of emotional distress, showing favoritism and consistent unfair treatment of each grievant and discontinue these events causing a hostile work environment due to favoritism of a known group of staff at Lakin and that no further retaliation from this grievance be evident and to be made whole in every way.

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[1] The names of the additional grievants are: Brenda Jividen, Kathy Chadwell, Phyllis Hoffman, Elizabeth Jones, Joyce Wooton, Sylvia Pearson, Nikki Divers, Anita Donahue, Mary Hodge, Mary McCoy, Kimberly King, Jennifer Miller, January Becket, Tamara Watson, Annette Hill, Bonnie Mankin, Linda Neal, Sheila McDaniel, Delores Riggs, Opal Simms, James Gueser and Marilyn Fetty.

A level one hearing was convened and a day of hearing was held at Lakin Hospital on March 5, 2010. The hearing was not completed and a second day of hearing was scheduled for April 26, 2010. Respondent moved to continue the level one hearing scheduled for that date and Grievants objected. The level one Grievance Evaluator granted Respondent's Motion for Continuance, but held that Grievants could appeal to level two. Grievants appealed to level two on May 5, 2010. On May 20, 2010, Respondent filed a Motion to Remand the grievance to level one to complete taking testimony at that level. Respondent's Motion was denied by Order dated May 24, 2010.[2]

On August 10, 2010, Respondent filed a Motion to Dismiss the consolidated grievances as moot. A telephonic hearing was held regarding the Motion to Dismiss in the Charleston office of the West Virginia Public Employees Grievance Board on August 25, 2010. Grievants' representative, Rebecca Grueser, participated in the hearing as did Jennifer K. Akers, Assistant Attorney General, counsel for the Respondent. Both sides explained their positions and Grievants' representative was offered an opportunity to provide a written response to Respondent's motion, which she declined.

Findings of Fact

1. All twenty-three Grievants are employed by the DHHR and work at Lakin Hospital.

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[2] Ordinarily a grievance would be remanded to level one if a hearing or conference had not been held or completed at that level. However, that was not done in this instance because of the unusual procedural issues that had transpired at the lower level. *See* May 24, 2010 Order.

2. Grievants filed separate grievances all alleging the same complaints regarding their treatment by an administrator at Lakin Hospital. Those grievances were consolidated to be heard together.[3]

3. The Administrator whom Grievants were complaining of is Melissa Kinnaird. She was the Chief Executive Officer of Lakin Hospital at that time.

4. One day of the level one hearing was held in this grievance and a second day was scheduled and continued. After the second day of hearing was continued on April 23, 2010, Grievant's appealed to level two.

5. Melissa Kinnaird left employment at Lakin Hospital and she has not been employed at that facility since May 1, 2010. Consequently, Ms. Kinnaird has no influence over the working conditions of the Grievants.

Discussion

The only issue to be decided is raised by the Respondent's Motion to Dismiss. Respondent notes that all of the consolidated grievances center around the treatment of Grievants by their former supervisor, Melissa Kinnaird. Further, the sole remedy sought by Grievants is for the alleged maltreatment they suffered under Ms. Kinnaird to end. Respondent opines that once Ms. Kinnaird left employment with Lakin Hospital and no longer had any supervisory control over the working conditions of Grievants, the consolidated grievances became moot.

The Procedural Rules for the West Virginia Public Employees Grievance Board state in part that:

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[3] The detailed statements of the grievances and the relief sought are set out on the first page of this Order as they appeared on the level one grievance form.

> A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

156 C.S.R. 1 § 6.11. In this case, the specific remedy sought by Grievants is that the Administrator, Melissa Kinnaird, be required to cease and desist from acts of discrimination, favoritism and retaliation against all of the Grievants. Since the Administrator is no longer able to have any effect over the working conditions of the Grievants, there is no further remedy that can be granted

Grievants also sought generally to be "made whole." In that regard, there are limited remedies available. Grievants would not be entitled to an award of monetary damages through the grievance process. Damages such as medical expenses, mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). Additionally, any order requiring the Respondent and its agents to prevent such treatment of Grievants by Ms. Kinnaird in the future would be meaningless since Ms. Kinnaird is no longer employed at Lakin Hospital.

"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]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). Because Grievants would gain no concrete remedy from these consolidated grievances, they are now moot.

Grievants' representative noted that Grievants were seeking remedies related to the issues in this case in other forums. She was concerned that since not all hearings were completed in the Grievance Procedure it might adversely impact Grievants' claims in those forums. The representative specifically mentioned EEO claims. Other forums define specific terms such as discrimination and favoritism differently than those terms are defined in the Grievance Procedure statute and they may provide other remedies. The determination that these grievances are moot is unlikely to have any impact upon Grievants' ability to proceed in other forums. The availability of remedies elsewhere notwithstanding, there is no further remedy available to Grievants in the Public Employees Grievance Procedure. Consequently, the consolidated grievances are DISMISSED.

Conclusions of Law

1. A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested. 156 C.S.R. 1 § 6.11.

2. Damages such as medical expenses, mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

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. *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

4. The Administrator who was the source of Grievants' allegations of maltreatment no longer has any control over their working conditions because she is no longer employed at Lakin Hospital. Since there is no longer any remedy available to Grievants through the Grievance Procedure, the consolidated Grievances are moot.

Accordingly, the consolidated grievances are DISMISSED.

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. *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 (2008).

DATE: SEPTEMBER 14 , 2010.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE