WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOSHUA McGILL,
Grievant,

v. **Docket No. 2009-0260-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTH CENTRAL REGIONAL JAIL,
Respondent.

DISMISSAL ORDER

Grievant Joshua McGill filed a grievance on August 28, 2008, against his employer due to an alleged change in duties. For relief, Grievant seeks "Corrections to Level One hearing record 2) Return to full duties, as well as issues not awarded in Level One hearing 3) Only neutral parties allowed in all future hearings."

A level one hearing was held on September 9, 2008. After a denial was issued, Grievant then appealed to level two. Mediation was held on February 11, 2009. Grievant then successfully appealed to level three, and a hearing was held at the Grievance Board's Charleston office on May 26, 2009. Grievant appeared *pro se*, and Respondent was represented by Chad Cardinal, Esq. In the course of the level three hearing, the undersigned discovered Grievant had resigned his employment with Respondent and had filed a grievance alleging constructive discharge, Docket No. 2009-1552-MAPS. At the conclusion of the hearing, this case was held in abeyance pending the outcome of 2009-1552-MAPS. The constructive discharge grievance was never appealed to level three. This case then became mature on March 10, 2010, upon Respondent's submission of proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts he went on leave when his child was born. Prior to leave, Grievant argues he was assigned to assist Lt. Rick Rodgers[1] in conducting internal investigations within South Central Regional Jail ("SCRJ"). Grievant avers when he returned from leave, he was stationed outside the administrative offices and did not have the training required to work with inmates.

Respondent asserts that, due to the needs of the facility, Grievant was needed out in jail, as opposed to the administrative offices. Respondent argues that the Regional Jail Authority hired an investigator stationed outside the central office to conduct investigations. Lastly, Respondent avers that, because Grievant voluntarily left employment, this case is moot.

Grievant's voluntary resignation from his position renders this grievance moot.

Findings of Fact

1. Grievant was employed as a Correctional Officer III ("CO III") and was stationed at SCRJ.

2. As a CO III, Grievant's primary job duties include the direct supervision of inmates, as well as serving as a supervisor. The job duties also allow for a CO III to "perform other duties as assigned."

3. Sometime in 2005, Grievant began additional duties of assisting Lt. Rick Rodgers in conducting internal investigations within the facility. As a result of these additional duties, Grievant was stationed in the administrative offices of SCRJ.

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[1]Lt. Rodgers is no longer employed at South Central Regional Jail.

4. When John McKay became Administrator of the facility, he determined that, due to overcrowding and staffing shortages, Grievant was needed to assume supervision of inmates and staff which are considered primary job duties of his position.

5. The Regional Jail Authority hired an investigator stationed outside the main office of SCRJ. For that reason, investigations would no longer be conducted at the facility level.

6. After taking leave in July 2008, Grievant returned to find that he had been moved from the administrative offices to the inside of SCRJ to supervise inmates and staff.

7. Grievant performed all tasks assigned adequately, and there was no performance based reason for the removal of additional duties, other than the additional duties to which he was assigned were no longer required.

8. On September 22, 2009, Grievant voluntarily resigned from his position as CO III.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would

accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts the move from the administrative office at SCRJ to being on the floor of the jail supervising inmates and staff amounts to a change in duties. Grievant seeks to have that decision reversed. Grievant himself has ensured that he will no longer be subjected to SCRJ's management decisions with which he disagreed by resigning his position on September 22, 2009. This action makes it unnecessary for the Grievance Board to act in this matter even if he had proven the decision of his supervisor was improper. *See*, *Collins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-227/248 (Jan. 30, 2003).

Also, there is no adequate remedy available to the Grievant who voluntarily resigned his position with SCRJ. Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

When it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. "This Grievance Board does not issue advisory opinions." *Collins*, *supra*. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.21(2008).

"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, supra*; *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-

073 (May 30, 2003). A decision on this grievance either granting or denying the relief sought would have no effect on Grievant's employment, hence the grievance is now moot.

Accordingly, this grievance must be dismissed.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

3. When it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. "This Grievance Board does not issue advisory opinions." *Collins*, *supra*. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Bragg*

v. Dep't of Health & Human Res., Docket No. 03-HHR-348 (May 28, 2004); Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.21(2008).

4. "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, supra*; *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

5. A decision on this grievance either granting or denying the relief sought would have no effect on Grievant's employment, hence the grievance is now moot.

Accordingly, this grievance must be **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: July 8, 2010

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Wendy A. Elswick
Administrative Law Judge