WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ELIZABETH ANN MCCOY,
Grievant,

v. **Docket No. 2011-1880-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Elizabeth Ann McCoy, was employed by the Respondent, Department of Health and Human Resources ("DHHR") and worked at Mildred Mitchell-Bateman Hospital ("Hospital") as a Psychologist. Ms. McCoy filed a level three grievance[1] form dated April 1, 2011, alleging that she was "Terminated for refusing a drug test without good cause." As relief, grievant sought "To be made whole including back pay with interest."[2] Ms. McCoy filed a second grievance at level one date May, 6, 2011. In this grievance she alleged that "On 5/6/11, Grievant [was] informed that she would not be allowed representation in a meeting with management. As relief Grievant sought, "To be made whole, including compelling DHHR to issue a revocation of its illegal 2/8/08 memo restricting employee rights to have representation & rescission of performance

[1] Grievant exercised her rights pursuant to W. VA. CODE § 6C-2-4(a)(4) to file an expedited grievance at level three since she was contesting the alleged termination of her employment.

[2] As will be fully discussed herein, Grievant was informed on the same day that she was not dismissed for failing to submit to a drug test and that she was still employed at the Hospital.

improvement plan improperly administered by Respondent."[3] At the request of Grievant's representative, an Order was entered consolidating the two grievances for hearing and decision.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on March 5, 2012. Grievant appeared at the hearing and was represented by Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent was represented by James "Jake" Wegman, Assistant Attorney General. The parties submitted Proposed Findings of Facts and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on April 9, 2012. This grievance became mature for decision on that date.

Synopsis

Grievant filed her first grievance form on April 1, 2011, alleging that she was dismissed for refusing to take a drug test. Within a day or two she was assured that her employment had not been terminated and she continued to work at the hospital. Grievant's second grievance contested a performance improvement plan alleging that the plan was invalid because she was not allowed to bring a representative to the meeting in which it was implemented. Grievant was subsequently dismissed from employment for alleged poor performance, leave abuse, and insubordination. She did not file a grievance contesting this action.

Respondent argues that the grievances have been rendered moot by the

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[3] On the Grievant's signature line, both of these grievances contained the notation "By Representative." The representative listed was Gordon Simmons, who is a Steward for UE Local 170, West Virginia Public Workers Union.

termination of Grievant's employment for different reasons than were originally alleged. Grievant counters that her grievance contested her dismissal and she should not have to file a new one.

The consolidated grievances which were filed, have nothing to do with the ultimate termination of Grievant's employment which took place months after the first one was filed. Therefore, they are DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Mildred Mitchell-Bateman Hospital is an acute care psychiatric hospital operated by the West Virginia Department of Health and Human Resources.[4]

2. Grievant, Elizabeth McCoy, was employed as a psychologist at the Hospital from November 28, 2005, until her employment was terminated by letter dated July 11, 2011.

3. Grievant had missed a lot of work due to health problems in early 2011. By January 2011, she had exhausted all of her available leave and had to go off the payroll[5] when she missed work.

4. Dr. Shahid is a psychiatrist employed as the Hospital Clinical Director. On April 1, 2011, Grievant was called into a meeting with Dr. Shahid and the Hospital Human

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[4] *See,* http://www.batemanhospital.org/

[5] When an employee's paycheck has to be adjusted to reflect that she took leave without pay because all of her sick and annual leave had been exhausted, the employee is said to be "off the payroll."

Resource Director, Kieth Anne Worden. The purpose of the meeting was to discuss Grievant's attendance issues.

5. Grievant brought a co-worker to the meeting as a representative but was told by Director Worden that the meeting was not disciplinary in nature, so no representative would be allowed to attend.

6. At some point during the meeting, Dr. Shahid left the meeting to take a telephone call. While he was out of the meeting Director Worden asked Grievant if she would submit to a drug test. Grievant initially agreed and the two of them went down to Director Worden's office to arrange for the test.

7. While in Director Worden's office, Grievant spoke to her representative who told Grievant she believed that proper procedures were not followed related to the drug test. After speaking with her representative, Grievant told Director Worden that she would not agree to take the drug test. Director Worden led Grievant to believe that she would be dismissed for refusal to take a drug test.

8. Grievant left the meeting and began cleaning out her desk. While Grievant was cleaning out her desk she received a call from Pat Frantz, the Hospital Chief Executive Officer. CEO Franz informed Grievant that there was a misunderstanding and that Grievant's employment was not terminated. Ms. Franz told Grievant that she was still employed and that she was expected to report to work the next day as usual.

9. Grievant felt that the Hospital management knew that they had violated the drug testing policy, and the message from CEO Franz was a ruse to get her back into the management offices so they could fire her for another reason.

10. The first grievance form was dated April 1, 2011, and was received by the

West Virginia Public Employees Grievance Board on April 4, 2011. The Statement of Grievance listed only one allegation: "Terminated for refusing a drug test without good cause." The only relief sought was, "To be made whole including back pay with interest and benefits."

11. On Friday April 1, 2011, CEO Franz sent a letter to Grievant which stated, among other things, the following:

> I understand the stress you experienced Friday and would like to again offer you the opportunity to meet with me (alone, if you wish) to discuss your specific situation and how we can meet the needs of the hospital and maintain your active and constructive contribution to the treatment of the patients.
>
> Please call [my secretary] when you get to work on Monday to schedule a time to meet with me.

Respondent's Exhibit 5.

12. While there was certainly some confusion regarding the consequences of Grievant's refusal to take the drug test, within a short period of time it was clear that Grievant's employment at the Hospital was not terminated on April 1, 2011.

13. On Tuesday, April 5, 2011, CEO Franz sent Grievant another letter by certified mail. In that letter, CEO Franz noted that Grievant had not come to work on Monday or Tuesday nor had she called in. Several text messages had been sent to Grievant indicating Ms. Franz's desire to meet with Grievant to "help overcome barriers that makes (sic) your attendance and performance sporadic." Grievant had not replied to any of the messages. The letter ended by stating:

> Therefore, you are directed to appear in my office at 9:00am on Monday April 11, 2011. If you do not appear or do not call to explain your reasons for not appearing, you will give me no alternative but to assume that you no longer wish to work here and we will initiate your dismissal for abandonment

> of position. Please understand that your dismissal is not my desire, however, without your willingness to cooperate and communicate with me, I have no recourse.

Respondent's Exhibit 6.

14. Grievant had a telephone conversation with CEO Franz on Friday, April 8, 2011, in which she stated that she understood that she had been directed to come to work. Thereafter, Grievant continued to miss work without calling in to say why she was not there.

15. Director Worden sent Grievant a certified letter dated April 26, 2011, in which she stated:

> This letter serves as notice that you are directed to return to your position as a Staff Psychologist (Psychologist 1) on Monday, May 2, 2011, at your usual start time of 8:00am. Be prepared to resume your responsibilities as a member of the Treatment Team at that time.

Respondent's Exhibit 7. The letter went on to explain that failure to return to work or provide a satisfactory reason for such failure would result in the termination of Grievant's employment.

16. Grievant returned to work as directed on May 2, 2011. Grievant requested and received a meeting with CEO Franz on May 3, 2011. Grievant was accompanied by her representative. Grievant again raised the issue that she was dismissed from employment. CEO Franz informed Grievant that the CEO was the only person with the authority at the Hospital to dismiss an employee and she did not dismiss Grievant.

17. Grievant was directed to meet with Director Worden and Dr. Jawaid Latif, her supervisor on May 11, 2011, to go over a Performance Improvement Plan ("PIP") that had been prepared to address Grievant's attendance issues. The meeting had been originally

scheduled May 6, but Grievant was told that she would not be allowed a representative at the meeting and it was rescheduled.

18. Grievant asked that the meeting be postponed because the co-worker Grievant wanted as her representative was not working that day. Director Worden would not reschedule the meeting but arranged for another co-worker to attend the meeting with Grievant. Grievant was presented with the PIP at this meeting.

19. Grievant filed out her second grievance form on May 6, 2011, and it was received at the West Virginia Public Employees Grievance Board on May 9, 2011. For the Statement of Grievance the only allegation was, "On 5/6/11, Grievant informed that she would not be allowed representation in a meeting with management." The only relief that Grievant sought was:

> To be made whole, including compelling DHHR to issue a revocation of its illegal 2/8/08 memo restricting employee rights to have representation & rescission of performance improvement plan improperly administered by Respondent.[6]

20. During the months of May and June 2011, Grievant became ill and missed a great deal of work. In May, Grievant missed 79.26 percent of the work that she was scheduled to perform and in June she missed all of her work. Additionally, when Grievant was at work she missed a number of treatment meetings where staff assigned to a particular patient were supposed to get together and discuss the patient's treatment plan. Grievant also had difficulties completing her required reports in a timely manner.

21. A predetermination conference was held with Grievant, her representative,

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[6] These statements are set out as they were written on the grievance form with no additions, deletions or corrections.

Director Worden and CEO Franz on July 8, 2011. By letter dated July 11, 2011, Grievant was notified that her employment with the Hospital was terminated as a "result of [her] history of poor performance, leave abuse and insubordination.

22. Neither Grievant nor her representative, filed a grievance contesting the termination of Grievant's employment following the July 11, 2011 letter.[7]

Discussion

Respondent argues that the consolidated Grievances are moot and must be dismissed. The allegation that a grievance is moot is an affirmative defense. An affirmative defense is "A [respondent's] assertion of facts and arguments that, if true, will defeat the [grievant's] claim, even if all the allegations in the [grievance] are true." *Black's Law Dictionary*, 8th Ed. (1999)(2nd reprint 2007). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. 1 § 3, (2008).

The initial grievance was filed on April 1, 2011, and alleges that Grievant was dismissed for refusing to take a drug test. As relief she requested to be reinstated. Respondent points out that Grievant was not dismissed on April 1, 2011, and she continued to work at the Hospital after that date. Since Grievant was notified on April 1, 2011, that the issue of dismissal was a mistake, she didn't lose any time of employment and therefore back pay is not an issue. Consequently, there is no relief to be granted to Grievant from this grievance and it must be dismissed as moot.

The Grievance Board will not hear issues that are moot. "Moot questions or abstract

[7] Since no grievance was filed contesting the termination of Grievant's employment on July 11, 2011, the facts leading to that action are not discussed in detail herein.

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). A grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. *Milbert v. Division of Corrections/Northern Regional Jail*, Docket No. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994).

The Grievance filed on April 1, is clear and unambiguous in its wording. It contested what Grievant perceived as her dismissal from employment on that date. Grievant could not have contemplated what would happen three months later and no request was made to amend this grievance at any time. Grievant did not lose a single day of work as a result of the drug testing discussion that occurred in April. Since she received all of the relief she could have received from this grievance the day it was filed, it is moot.

At the hearing, Grievant's representative argued that Grievant was contesting the July dismissal. He argued that Grievant "was terminated in April and they finally got around to officially terminating her in July."[8] Grievant points to case law which has held that, "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ*., Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 393 S.E.2d

[8] Pre-hearing arguments, level three hearing.

739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). In the absence of bad faith, substantial compliance is deemed acceptable. *Duruttya, supra*; *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also Toothman v. Marion County Bd. of Educ.*, Docket No. 05-24-036D (Apr. 15, 2005). *Prichard v. Lincoln County Bd. of Educ.,* Docket No. 05-22-349 (Nov. 9, 2005). Grievant argues that since the actual dismissal of Grievant in July, was merely of the threat made in April, Grievant should be able to challenge that dismissal under the grievance that was filed three months before the dismissal occurred.

This argument is simply not consistent with the facts. Even assuming that Director Worden told Grievant she was dismissed for refusing to take a drug test, the Hospital CEO told her that day that there was a mistake and Grievant was not dismissed. She followed that verbal assurance with two letters. After being directed to return to work for the rest of the month, Grievant returned to work in May and continued to work until July 11, 2011, when she was dismissed for reasons which had nothing to do with drug testing. Grievant's actions cannot be viewed as substantial compliance with the grievance procedure because she simply did not file a grievance contesting her dismissal in July 2011. In effect, she did not invoke the grievance procedure at all.

The second of the consolidated grievances is moot as well. The gravamen in that matter was that Grievant was not allowed to bring a representative of her choosing to a meeting where a PIP was to be implemented. Based upon this allegation, Grievant sought to have the PIP invalidated. This issue might have some life had Grievant contested her

dismissal. However, since her employment has subsequently terminated, the question of whether she was entitled to have a representative of her choosing at that meeting is an abstract proposition, the decision of which would avail nothing in the determination of controverted rights of persons or property, and is therefore moot. *Bragg*, *supra.* Since both of the consolidated grievances are moot, the consolidated grievances are DENIED.

Conclusions of Law

1. The allegation that a grievance is moot is an affirmative defense. An affirmative defense is, "A [respondent's] assertion of facts and arguments that, if true, will defeat the [grievant's] claim, even if all the allegations in the [grievance] are true." *Black's Law Dictionary*, 8th Ed. (1999)(2nd reprint 2007). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. 1 § 3, (2008).

2. 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).

3. A grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. *Milbert v. Division of Corrections/Northern Regional Jail*, Docket No. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994).

4. Grievant suffered no injury-in-fact when she believed she was dismissed for refusing to take a drug test, since she was informed that she remained employed the same day she filed her grievance. Therefore, the grievance is moot.

5. Since Grievant's employment has been subsequently terminated, the question of whether she was entitled to have a representative of her choosing at a meeting to implement a Performance Improvement Plan is an "abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property," and is therefore moot. *Bragg*, *supra*.

6. "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). In the absence of bad faith, substantial compliance is deemed acceptable. *Duruttya, supra*; *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also Toothman v. Marion County Bd. of Educ.*, Docket No. 05-24-036D (Apr. 15, 2005). *Prichard v. Lincoln County Bd. of Educ.,* Docket No. 05-22-349 (Nov. 9, 2005).

7. Grievant did not substantially comply with the grievance procedure by relying on a grievance that was filed on April 1, 2011, to contest her dismissal which occurred on July 11, 2011, and was based upon completely different reasons than those set out on the April 1 grievance form.

Accordingly, the consolidated grievances are denied.

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: August 24, 2012.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE