THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL ADKINS,
Grievant,

v. **Docket No. 2012-0259-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant, Michael Adkins, filed this grievance on September 9, 2011, in which he alleges that a co-worker poured out drinking water and then laughed about his actions. He requests that the employee be disciplined. Respondent filed a Motion to Dismiss the grievance on November 14, 2011, because the Grievance Board does not have authority to order an agency to impose discipline on an employee. Grievant provided a response to this motion indicating that he wanted to proceed with a level three hearing. The grievance was dismissed at level one by the Grievance Evaluator because the relief sought was unavailable to the Grievant. Grievant appeared *pro se*. Respondent was represented by its counsel, Robert Miller, Legal Division. The consideration of this motion is mature.

The undersigned makes the following findings of facts.

Findings of Fact

1. Grievant is classified as a Transportation Crew Supervisor 1 in District Two with the Division of Highways ("DOH"). He has been employed since September 21, 1978, and is currently assigned to Yawkey Substation.

2. On or about September 2, 2011, an incident occurred regarding the drinking water jug that is meant for the road crew to use during the work day. Grievant reports that

a subordinate employee poured the water out of the jug intentionally. The employee states that it fell over and he did not pour the water out.

3. A conference was held on September 21, 2011, at the Lincoln County Headquarters to discuss the incident with the Highway Administrator and the Maintenance Assistant.

4. Management informed the Grievant of the discipline policy/process used by the DOH.

Discussion

Respondent asserts that the grievance fails to state a cause of action upon which relief could be granted, and therefore it must be dismissed. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 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." In instances where "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. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

As defined by statute, a grievance must allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee." W. VA. CODE § 6C-2-2(i). The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Concerning the initial Statement of Grievance, which was filed on September 9, 2011, the remedy sought by Grievant is disciplinary action against an employee. It is a well-settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.,* Docket No. 95-41-479 (July 8, 1996). Any decision concerning disciplinary action generally resides with the employer. *Dunlap v. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (March 20, 2009).

Based upon the above, no claim upon which relief can be granted is stated and the remedy requested is wholly unavailable to the Grievant; these facts present no case in controversy. When there is no case in controversy, the Grievance Board will not issue

advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

The following conclusions of law support the dismissal of this grievance.

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." Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008).

2. As defined by statute, a grievance must allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee." W. VA. CODE § 6C-2-2(g)(1).

3. The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

4. It is a well-settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.,* Docket No. 95-41-479 (July 8, 1996). Any decision concerning disciplinary action generally resides with the employer. *Dunlap v. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (March 20, 2009).

5. "Because 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. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

6. This grievance presents no claim upon which relief can be granted and a remedy wholly unavailable is requested.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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: May 24, 2012

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Ronald L. Reece
Administrative Law Judge