WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JIMMY BONNETT and RONDALL GROGG,
Grievants,

v. **Docket No. 2013-0184-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE JR. HOSPITAL,
Respondents.

DISMISSAL ORDER

Jimmy Bonnett and Rondall Grogg, Grievants, both worked for the Department of Health and Human Resources ("DHHR") at William R. Sharpe Jr. Hospital ("Hospital") in Weston, West Virginia. Both Mr. Bonnett and Mr. Grogg filed separate level one grievance forms dated 8/10/12 which alleged the following:

> Drivers instructed on 8/2/12 to not only accompany patients during transport but also to be sole sitter when direct care staff are absent during transport and to assist in duties beyond and unrelated to driving.

As relief, both Grievant's sought, "To be made whole including withdrawal of 8/2/12 directive." The two grievances were consolidated for consideration and decision at level one and given the docket number set out above.

A level one hearing for the consolidated grievances was held on December 27, 2012, and a decision denying the grievances was issued on January 18, 2013. The Grievants appealed to level two on January 22, 2013. A level two mediation was held on March 29, 2013, and Grievants subsequently appealed to level three on April 8, 2013. A level three hearing was scheduled for early October 2013, but was continued due to a schedule conflict.

Respondent filed a Motion to Dismiss dated October 7, 2013. For administrative reasons, this matter was reassigned to the undersigned administrative law judge for decision on the motion. By letter dated December 4, 2013, the Grievants were given until December 18, 2013, to respond to the motion. This matter became mature for decision on December 18, 2013.

Synopsis

Both Grievants retired before this matter was heard at level three. The remedy requested by both Grievants is not available to them after their retirement. Accordingly, this matter is dismissed as moot.

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. Both Grievants, Jimmy Bonnett and Rondall Grogg, were employed by Respondent Department of Health and Human Resources as drivers at William R. Sharpe Jr. Hospital.

2. William R. Sharpe Jr. Hospital is a facility for the treatment of mentally ill patients. Many of these patients are required to have a staff member with them at all times.

3. Both Mr. Bonnett and Mr. Grogg filed a level one grievance contesting a directive that required them to occasionally be the sole staff person with patients they were transporting, and to assist with duties of the care staff beyond transporting these patients. As relief, both Grievant's sought, "to be made whole including withdrawal of the 8/2/12 directive." The grievances were consolidated at level one.

4. Prior to the level three hearing in this matter, both Grievants retired from employment at the Hospital. Grievant Grogg's resignation for retirement was dated January 3, 2013, and his last day of employment was February 19, 2013. Grievant Bonnett's resignation was dated February 14, 2013, and his last day of employment was April 30, 2013.

Discussion

Respondent brought a Motion to Dismiss alleging that the resignation of both Grievants rendered their consolidated grievances moot. The burden of proof is on the Respondent to demonstrate that the motion should be granted by a preponderance of the evidence. 153 C.S.R. 1 § 3;[1] *Donohue, et al. v. Div. of Highways*, Docket No. 2010-1590-CONS (May 24, 2012).

Pursuant to the Procedural Rules of the Public 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 on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." "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). The Grievance Board will not hear issues that are moot. *Cobb, et al. v. Div. of Highways*, Docket No. 2009-1017-CONS (Dec. 31, 2009).

Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood*

[1] Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. *Id.*

County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). The Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't of Trans./Div. of Highways*, Docket No. 06-DOH-215 (Oct. 27, 2006) (*citing Dooley v. Dep't. of Trans./Div. of Highways*, 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). "[R]elief 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).

In these consolidated grievances, the only specific remedy sought is "withdrawal of the 8/2/12 directive" which allegedly requires drivers to perform caretaker duties with patients who were being transported. Now that the Grievants are no longer employed at the Hospital, a decision on this directive will have no effect on them. There is no remedy which can be provided to Grievants, and any decision in these consolidated grievances would only serve as an advisory opinion regarding the validity and efficacy of the directive. As stated above, an administrative law judge may dismiss actions for which no remedy may be granted,[2] and the Grievance Board does not issue advisory opinions on "[m]oot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property. . . " *Pritt, et al. v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). Accordingly, the consolidated grievances are DISMISSED.

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

Conclusions of Law

1. The burden of proof is on the Respondent to demonstrate that a motion to dismiss should be granted by a preponderance of the evidence. 153 C.S.R. 1 § 3; *Donohue, et al. v. Div. of Highways*, Docket No. 2010-1590-CONS (May 24, 2012).

2. Pursuant to the Procedural Rules of the Public 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 on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

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). The Grievance Board will not hear issues that are moot. *Cobb, et al. v. Div. of Highways*, Docket No. 2009-1017-CONS (Dec. 31, 2009).

4. The Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't of Trans./Div. of Highways*, Docket No. 06-DOH-215 (Oct. 27, 2006) (*citing Dooley v. Dep't. of Trans./Div. of Highways*, 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).

5. "[R]elief 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).

6. After their resignations from employment with Respondent, Grievants would gain no remedy from a ruling on the issues set out in their consolidated grievances. Consequently, the 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: DECEMBER 20, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE