THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERRY L. WILKINS,

Grievant,

v. **Docket No. 2011-1793-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

DISMISSAL ORDER

Grievant, Sherry L. Wilkins, filed a grievance against her employer, Department of Environmental Protection, on June 13, 2011. The statement of grievance states as follows: "[r]eprimand without good cause of a retaliatory intent." Grievant seeks to "[t]o be made whole, including withdrawal of reprimand."

A level one hearing was conducted in this matter on July 14, 2011. The grievance was denied at level one by decision dated September 19, 2011. Grievant appealed to level two of the grievance process on October 3, 2011. A level two mediation was conducted on January 31, 2012. Grievant perfected her appeal to level three on February 2, 2012. A level three hearing was convened on December 20, 2012, before the undersigned administrative law judge.[1] Grievant appeared in person and by counsel, Andrew J. Katz, The Katz Working Families' Law Firm, L.C. Respondent appeared by counsel, Gregory G. Skinner, Assistant Attorney General. However, due to problems surrounding the subpoenaing of witnesses, the matter was continued, as reflected in the Order entered January 9, 2013. The level three hearing was

[1] It is noted that this matter was scheduled for hearing prior to December 20, 2012, but requests for continuances were granted.

rescheduled and conducted on February 21, 2013. On that date, the parties appeared, along with their counsel, and evidence was presented. However, the evidence was not concluded that day because one of the witnesses whom Grievant had subpoenaed failed to appear. As such, the matter was continued and was to be rescheduled.

On July 19, 2013, Respondent filed a Notice of Substitution of Counsel, naming David A. Stackpole, Assistant Attorney General, as its counsel of record. On July 24, 2013, before the second day of hearing could be conducted, Respondent filed a Motion to Dismiss alleging that Grievant was leaving her position with Respondent effective August 1, 2013.[2] Grievant has not opposed this motion. This matter is now mature for consideration.

Synopsis

Grievant filed this grievance contesting a reprimand she had received. Grievant resigned her position with Respondent effective August 1, 2013, while this matter was pending at level three of the grievance process. Grievant's resignation from her employment with Respondent rendered her grievance moot. Accordingly, this grievance is DISMISSED.

Findings of Fact

1. Grievant was employed by Respondent as an Environmental Resource Specialist III.

2. On June 13, 2011, Grievant filed this grievance contesting a reprimand she had received.

[2] The second day of hearing had been previously scheduled. However, a Motion to Continue was granted. The matter was in the process of being rescheduled when the Motion to Dismiss was filed.

3. A level three hearing was conducted on February 21, 2013, and the matter was to be rescheduled for a second day of hearing.

4. The second day of the level three hearing was to be conducted on July 11, 2013. However, Grievant, by counsel, moved for a continuance of said hearing. The Motion to Continue was granted by Order entered June 25, 2013.

4. On July 23, 2013, Grievant, by counsel, notified counsel for Respondent that Grievant would be leaving her employment with Respondent as of August 1, 2013.

5. Respondent filed this Motion to Dismiss on July 24, 2013, serving the same on counsel for Grievant.

6. Grievant has not filed a response to the Motion to Dismiss, and has not otherwise contested the claims that she resigned her position effective August 1, 2013. Further, Grievant has not opposed the Motion to Dismiss.

Discussion

Respondent asserts that this matter is now moot since Grievant is no longer employed by Respondent. 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).

The Public Employees Grievance Procedure was established to allow public employees and their employers to reach solutions to problems which arise within the

scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See, Wilson v. Dep't of Health and Human Res.*, Docket No. 2011-1769-DHHR (Oct. 31, 2011). WEST VIRGINIA CODE § 6C-2-2(e)(1) defines "employee" for the purposes of the grievance procedure, as follows: "'Employee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

A "grievance" is "a claim by an employee." *See,* W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. *See,* W. VA. CODE § 6C-2-2(a)(1).

This Board has dismissed grievances once the Grievant is no longer employed by the Respondent. *See, Fizer v. Dep't of Health and Human Res*., Docket No. 2008-1698-DHHR (Mar. 4, 2009); *Bragg v. Dep't of Health and Human Res.*, Docket No. 03-HHR-348 (May 28, 2004). It is undisputed that Grievant ended her employment effective August 1, 2013. This action makes it unnecessary for the Grievance Board to act in this matter even if she had proven the action of Respondent was improper. *See, Collins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-227/248 (Jan. 30, 2003).

Grievant's resignation from her employment has rendered the issues raised in her grievance moot. A decision on this grievance either granting or denying the relief sought would have no effect on Grievant's employment. There are no issues of back

pay or benefits that have been raised or argued by Grievant that need to be addressed. 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]." *Fizer*, *supra*, *Bragg*, *supra*; *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003). Any remaining issues are now moot. Accordingly, this grievance must be DISMISSED.

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

Conclusions of Law

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

2. Grievant's resignation from her employment with Respondent rendered her grievance moot.

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: August 22, 2013.

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Carrie H. LeFevre
Administrative Law Judge