WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KIMBERLY ANN BECKETT,
Grievant,

v. **Docket No. 2013-0078-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND DIVISION OF PERSONNEL,
Respondents.

DISMISSAL ORDER

Grievant, Kimberly Ann Beckett, was employed by Respondent, Department of Health and Human Resources, ("DHHR") in the Bureau for Children and Families. Her position was classified as Administrative Secretary. Ms. Beckett filed a level one grievance form dated July 23, 2012, alleging the following:

> On April 19, 2012, I was asked to temporarily assume the duties of Executive Sec. for Deputy Commissioner Doug Robinson. I agreed and was told a WV-11 for a temporary upgrade would be processed to move me from Administrative Secretary to an Executive Secretary.
> On July 18, 2012, Doug Robinson informed me of an email he received from Harold Clifton stating that temporary upgrade was denied by DOP.
> I continued performing the duties of the Executive Secretary without any additional compensation.
> Therefore, I believe I am working out of classification without the benefits of the additional compensation.

As relief, Grievant seeks, "to be temporarily upgraded to the Executive Sec. classification and provided the compensation commensurate to that pay grade. Also, I seek back pay to April 19, 2012.

By letter dated July 27, 2011, the grievance was waived to level two. Grievant filed an appeal to level two dated July 30, 2012. An Order was entered joining the

Division of Personnel as a party on the same day. At level two mediation was conducted on December 19, 2012, and an Order related to the mediation was entered on December 21, 2012. Grievant filed an appeal to level three dated December 28, 2012.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on March 14, 2013. Grievant appeared *pro se,* Respondent, Division of Personnel, was represented by Karen O'Sullivan Thornton, Senior Assistant Attorney General, and Respondent, DHHR, was represented by Charlene A. Vaughan, Deputy Attorney General. All parties submitted Proposed Findings of Fact and Conclusions of Law.

On June 3, 2013, Respondent DHHR filed a Motion to Dismiss the grievance as moot because Grievant Beckett had voluntarily resigned her employment with that agency. Neither Grievant nor Respondent Division of Personnel responded to the Motion.

Synopsis

Grievant filed this action requesting a temporary upgrade of her classification on July 23, 2012. Grievant voluntarily resigned her position with the DHHR effective May 31, 2013, while this matter was pending at level three of the grievance process. Following Grievant's resignation, any relief that she may have received from the Grievance Board had she not resigned, and had she prevailed before the Grievance Board, is now purely speculative, rendering the grievance moot. Accordingly, the grievance is DISMISSED.

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. Grievant Beckett filed a level three grievance form dated July 23, 2012, alleging that she had been working out of her proper classification without additional benefits. As relief, Grievant sought a temporary upgrade to the classification of Executive Secretary, and to be compensated commensurate with that pay grade. Grievant also sought back pay April 19, 2011.

2. A level three hearing was conducted pursuant to the grievance on March 14, 2013.

3. In a written memorandum dated May 17, 2013, Grievant submitted her voluntary resignation from the Department of Health and Human Resources. Pursuant to that memorandum, her resignation became effective May 31, 2013.

4. Counsel for Respondent DHHR filed a Motion to Dismiss the grievance arguing that Grievant's voluntary resignation rendered the grievance moot.

5. Neither Grievant nor Respondent Division of Personnel filed a response to 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 May 31, 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).

The West Virginia Supreme Court of Appeals has recently addressed the issue of an employee voluntarily leaving employment while a grievance was pending in the case of *Joseph Komorowski v. Marshall County Board of Education*, No. 11-1659 and 11-1767 (Kanawha County 11-AA-52 and 09-AA-67) (Feb. 22, 2013). In *Komorowski* the grievant applied for a position as principal in a public school system. Had he received the position it would have raised his salary. Mr. Komorowski filed a grievance contesting his non-selection for the principles position, and the grievance procedure through a level three hearing. Subsequent to the hearing Mr. Komorowski retired. In dealing with the issue of whether Mr. Komorowski's retirement rendered the grievance moot the Supreme Court wrote the following:

> The grievance system provides a procedure for public employees to resolve grievances with regard to their employment. W.Va. Code § 6C2-1(a). Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative . . . " 'Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .' Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991)." Syl. Pt. 4, *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E.2d 585 (2011). " 'Courts will not ordinarily decide a moot question.' Syl. pt. 1, *Tynes v. Shore*, 117 W.Va. 355, 185 S.E. 845 (1936)." Syl. Pt. 4, *Bland v. State*, Nos. 11– 0746, 11–0747, 11–1146, 2012 WL 5898071 (W.Va. 2012).

Id.

As in *Komorowski supra,* any relief that Grievant Beckett may have received from the Grievance Board had she not resigned, and had she prevailed before the Grievance Board, is now purely speculative. Additionally, like the Courts, 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]." *Harrison v. Cabell County Bd. of Educ.,* 351 S.E. 2d 604 W. Va. 1985); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-5-073 (May 30, 2003). Grievant's resignation from employment before this matter was resolved renders the grievance moot. Accordingly, the grievance is DISMISSED.

Conclusions of Law

1. When a Grievant resigns while his or her grievance is still pending, any relief that might have been accorded to Grievant had he or she not resigned, and had he or she prevailed before the Grievance Board, is purely speculative. *Joseph Komorowski v. Marshall County Board of Education*, No. 11-1659 and 11-1767 (Kanawha County 11-AA-52 and 09-AA-67) (Feb. 22, 2013).

2. 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).

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]." *Harrison v. Cabell County Bd. of Educ.,* 351 S.E. 2d 604 W. Va. 1985); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-5-073 (May 30, 2003).

4. Because any relief Grievant would have received if she had not resigned and prevailed in the grievance procedure is speculative, Grievant's resignation from employment before the grievance was resolved renders the grievance moot.

Accordingly, the grievance is 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: AUGUST 20, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE