THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY SIMONS,

Grievant,

v. **Docket No. 2013-0646-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DISMISSAL ORDER

Grievant, Kimberly Simons, filed a grievance at level one against her employer, Respondent, Division of Highways, dated October 10, 2012, stating as follows: "[s]upervisor engaged in comments constituting sexual harassment." As relief sought, Grievant seeks, "[t]o be made whole including cessation of harassment."

A level one conference was conducted on May 30, 2013. By decision dated June 19, 2013, the grievance was dismissed as moot. Grievant perfected her appeal to level two of the grievance process on June 27, 2013. On July 24, 2013, Respondent filed a Motion to Dismiss the grievance. As of this date, Grievant has filed no response to the Motion to Dismiss, and has not moved to withdraw her grievance. Grievant appears by her Representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appears by counsel, Krista D. Black, Esquire. This matter is now mature for decision.

Synopsis

Grievant filed this grievance asserting that her supervisor subjected her to sexual harassment. Following the filing of the grievance, Grievant was transferred to another work location, and she was assigned a new supervisor. Grievant has not

alleged that sexual harassment has continued since her transfer, and she is no longer supervised by the supervisor referenced in her Grievance. The grievance was rendered moot by Grievant's transfer. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Kimberly Simons is employed by Respondent as a Transportation Worker 2 Equipment Operator.

2. At the time she filed this grievance at level one, Grievant was assigned to work in Respondent's Medina Organization (0372). Grievant's supervisor was Jody Browning. Mr. Browning is the supervisor Grievant references in her statement of grievance.

3. Since the filing of this grievance, Grievant was transferred to Respondent's Jackson County, West Virginia, facility. As a result of this transfer, Adrian White became Grievant's supervisor.

4. Jody Browning no longer supervises Grievant in any capacity.

5. Grievant does not claim that the alleged sexual harassment has continued since she was transferred.

6. In her grievance, Grievant seeks as relief "cessation of harassment." No other relief sought is specified.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered

appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008). This issue before the undersigned is Respondent's Motion to Dismiss. The burden of proof is on the Respondent to demonstrate that the motion should be granted by a preponderance of the evidence.

Respondent asserts that the grievance is moot because Grievant no longer works with Mr. Browning, and because no relief can be granted. Respondent further argues that the grievance has been resolved, and that there is no longer a "live" issue.

> 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). In addition, 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. Dep't 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).

Pritt, et al., v. Dep't of Health & Human Res., Docket No. 2008-0812-CONS (May 30, 2008); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "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); *Spence*, *supra*.

As Grievant no longer works with Mr. Browning, and as she does not claim that the alleged harassment is ongoing, no live controversy exists between the parties. Additionally, the relief that Grievant seeks cannot be granted. According to the level one decision, Grievant acknowledged that the issue she raised has been resolved by her transfer. Therefore, this grievance is moot, and any ruling on the merits of the case would amount to an advisory opinion. Therefore, the Respondent's Motion to Dismiss is granted, and this grievance, dismissed.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. "Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008).

2. "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).

3. 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. Dep't 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).

4. "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); *Spence*, *supra*.

5. Grievant's transfer to the Jackson County, West Virginia, location has rendered this grievance moot.

6. Because this grievance is moot, any ruling issued by the undersigned on the merits of the case would amount to an advisory opinion.

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 (eff. July 7, 2008).

DATE: September 5, 2013.

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Carrie H. LeFevre
Administrative Law Judge