WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAUL FRANZ,
Grievant,

v.

Docket No. 2012-1296-DEP

WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL PROTECTON,
Respondent.

DECISION

Grievant, Paul Franz, is employed by the West Virginia Department of Environmental Protection ("WVDEP") as an engineer in the Dam Safety Unit of the Division of Water and Waste Management. On May 16, 2012, Mr. Franz filed this grievance, which states as follows: "Failure of agency to make whole per resolution of Docket No. 2012-0178-DEP." As relief, Grievant seeks, "[t]o be made whole including back pay with interest." On May 22, 2012, in accordance with 156 C.S.R. 1 § 4.4.3, WVDEP waived this grievance to Level Two. It proceeded to Level Two on December 5, 2012.

A Level Three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on May 22, 2013. Grievant appeared at the hearing with his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Assistant Attorney General Gregory Skinner represented Respondent. The parties submitted Proposed Findings of Fact and Conclusions of Law, which were received at the West Virginia Public Employees

Grievance Board on July 8, 2013. This grievance became mature for decision on that date.

Synopsis

Grievant seeks to have the Public Employees Grievance Board enforce an agreement between the Respondent and himself. This relief is not available as a matter of law through the grievance procedure.

The following Findings of Fact are made based upon the entire record developed in this matter.

Findings of Fact

1. Grievant, Paul Franz, is employed by the WVDEP as an engineer in the Dam Safety Unit of the Division of Water and Waste Management. Grievant has been an employee of the State of West Virginia since 1986.

2. Grievant filed a grievance on August 17, 2011, entitled *Paul Franz v. Department of Environmental Protection,* Docket No. 2012-0178-DEP ("prior grievance"). The statement of grievance was, "Agency failed to seek equity pay increase for Grievant."

3. Grievant sought this increase pursuant to the "Internal Equity" provision of the Division of Personnel's Pay Plan Implementation Policy ("DOP's PPI"). The "Internal Equity" provision is discretionary, allowing the DOP to grant salary increases to employees to eliminate inequities in pay between those who work in the same classification of a particular organizational unit, provided that particular criterion are met.

4. As relief, Grievant requested, "[t]o be made whole, including that a request for pay increase for Grievant be made."

5. Grievant did not specifically request back pay or interest in the prior grievance.

6. The prior grievance was waived to Level Two on September 27, 2011. The West Virginia Division of Personnel ("DOP") was joined as an indispensable party by Order on October 5, 2011. Respondent DOP filed a Motion to Dismiss DOP as an Indispensable Party on January 12, 2012.[1]

7. WVDEP and Grievant settled the prior grievance at the Level Two mediation. Respondent increased Grievant's salary by 10% as a part of that settlement agreement.

8. Following the mediation, Grievant voluntarily withdrew his grievance and the Grievance Board entered a Dismissal Order on April 20, 2012.

9. Grievant did not receive back pay or interest as a part of his settlement.

10. Grievant filed the instant grievance to obtain that specific relief, asserting a "[f]ailure of agency to make whole per resolution of Docket No. 2012-0178-DEP." The relief sought in this grievance is "to be made whole including back pay with interest."

11. Grievant requests the Grievance Board to infer back pay and interest from the phrase "to be made whole…" and to enforce the settlement between the parties accordingly.

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[1] A ruling on DOP's Motion to Dismiss was not made. However, the DOP was not included in subsequent proceedings.

Discussion

Grievant filed a prior grievance seeking an internal equity pay increase under the DOP's PPI. In the prior grievance, as his relief, Grievant requested only "to be made whole," without further specificity. The prior grievance was dismissed following a settlement between the parties, wherein Respondent agreed to grant the requested pay equity increase. During the mediation and throughout the settlement process of the prior grievance, Grievant admittedly did not specifically request either back pay or interest. Following the settlement, Respondent paid Grievant only a 10% pay increase under the aforesaid "Internal Equity" provision, without any back pay or interest. Grievant testified that he assumed that back pay and interest were included as a part of the agreement because when he had prevailed in previous grievances against Respondent, Grievant had been "made whole" by the award of back pay and interest. Grievant contends that for the instant grievance to be granted on substantially different terms, without written agreement or prior notification, would clearly be arbitrary and capricious.

Respondent asserts that rather than filing a Motion to Reinstate, Grievant improperly filed another Level One grievance form arising out of the same circumstances as his former grievance, which was identical with exception that Grievant requested additional and more specific relief than the relief originally requested and agreed upon by the parties. Respondent argues that this grievance is, therefore, barred based upon the doctrine of *res judicata.*

Respondent further asserts that the phrase "'to be made whole' is insufficient to provide specific relief …"

In this grievance, Grievant requests the Grievance Board to infer back pay and interest from the phrase "to be made whole…" and to enforce the settlement between the parties accordingly. This relief is unavailable as a matter of law through the grievance procedure. W. VA. CODE § 6C-2-4(b)(2) provides that agreements reached in settlement of grievances "are binding and enforceable in this state by a writ of mandamus." Additionally, W. VA. CODE §6C-2-7 provides that:

> Any employer failing to comply with the provisions of this article may be compelled to do so by a mandamus proceeding and may be liable to a prevailing party for court costs and reasonable attorney's fees to be set by the court.

"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. Dept. 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 and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

In situations 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). Because the relief sought by Grievant is not available from the Grievance Board, the grievance must be DENIED.[2]

Conclusions of Law

1. W. VA. CODE §§ 6C-2-4(b) (2) and 6C-2-7 provides that agreements reached by the parties to a grievance and Grievance Board decisions may be enforced in Circuit Court by mandamus.

2. "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

[2] The undersigned notes that the granting of internal equity pay increases pursuant to the DOP's PPI Policy is a decision that is within the discretion of the agency to make, and such increases are not mandatory on the part of the Respondent. *Green v. Department of Health & Human Res./Bureau for Children Families and Div. of Pers.,* Docket No. 2011-1577-DHHR (October 1, 2012) (*citing Harris Dep't of Transp.,* Docket No 06 DOH-224 (Jan. 31, 2007)). Therefore, this Board determined that,"[g]rievant was not entitled to a pay raise at all, let alone a retroactive pay raise, from the date of filing her grievance simply because she demonstrated that she was paid 20% less than similarly qualified and tenured employees in the same job class and organizational unit. *Green, supra, (citing Morgan v. Department of Health and Human Resources, Docket No. 07- HHR131 (June 5, 2008)).*

remedy wholly unavailable to the grievant is requested." Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008).

3. In situations 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).

4. Because the relief sought by Grievant is unavailable from the Grievance Board, the grievance is moot.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly

transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: August 15, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE