WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SAMUEL ANDREW KEENAN,
Grievant,

v. **Docket No. 2012-0716 MAPS**

WV DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX
Respondent.

DISMISSAL ORDER

Grievant, Samuel Andrew Keenan, filed a grievance against the West Virginia Division of Corrections/Mount Olive Correctional Complex ("WVDOC"), Respondent, on January 10, 2012, protesting his non-selection for the position of Correctional Programing Specialist, (aka Library Supervisor). The grievance statement, in part, stated:

> I made voluntary written application for the position of Librarian. Applications were reviewed and an interview was conducted. Another applicant was selected for the position. It was then determined by Division of Personnel that the selected applicant did not meet the minimum qualifications for the position. I finished second in the selection process. Given that there was an adequate number of applicants and that I received the highest interview rating of all qualified applicants, I should have been awarded the position. This has not been done. The agency has arbitrarily decided to "hold" the position and repost it as such time as the non-qualified applicant has sufficient time/experience to meet the minimum requirements for the position. The agency continues to deny me the position for which I was determined to be eligible and the most qualified at the time of the interview.

* * *

Relief Sought:

> To be granted the position of Librarian, with back pay to the date the position would have been filled from the original selection process. To receive the percentage of pay increase as determined by the Division of Personnel's review of my qualifications and rating of such.

A hearing was held at level one on February 1, 2012, and the grievance was denied at that level on February 8, 2012. Grievant appealed to level two dated February 16, 2012, and a mediation session was held on April 16, 2012. Grievant appealed to level three on April 28, 2012. Respondent filed a Motion to Dismiss this grievance on June 13, 2012, asserting that the matter was moot in that Grievant voluntarily resigned from employment on April 10, 2012. On July 25, 2012, a phone conference was held regarding the filed Motion to Dismiss. The parties were provided the opportunity to address the issue(s) highlighted by events and the Motion to Dismiss. Parties presented both verbal and written argument. No ruling on the motion was issued prior to the level three hearing. A level three hearing was convened before the undersigned Administrative Law Judge on August 7, 2012, at the Grievance Board's Beckley facility. Grievant was represented by Lee Harper, Grievant did not appear in person. Respondent was represented, by counsel, Cynthia R. M. Gardner, Assistant Attorney General. This case became mature for decision on September 5, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant filed this grievance challenging his non-selection by Respondent for the position of Correctional Programing Specialist, Senior. Subsequent to the interview process, (twice) an employee other than Grievant was deemed more qualified for the position. Grievant asserts he should have been awarded the position rather than reposting of the job. Grievant argues that the selection process was flawed in various ways. It is Grievant's proposition that Respondent unlawfully deprived him of the position.

Respondent maintains its administrative decisions with regard to this matter were not improper, nor arbitrary and capricious. Further, Respondent avers this matter is moot in that Grievant has resigned from employment with Respondent. Grievant failed to establish facts essential to his contentions and allegations. Grievant did not present evidence at the level three hearing. Grievant is no longer an employee of Respondent. Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not proper issues before the Public Employees Grievance Board. Because there is no actual relief to be granted, any ruling issued regarding the questions raised by this grievance would merely be an advisory opinion. This Grievance Board does not issue advisory opinions, therefore this grievance is dismissed.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was a Correctional Officer III, at Mount Olive Correctional Complex (MOCC) at the time this grievance was filed, but has since resigned.

2. Grievant applied for the posted position of Correctional Program Specialist, Sr., which was posted on October 26, 2011, and closed on November 4, 2011.

3. Grievant and five other candidates were selected to interview for the position. Interviews were conducted on November 14, 2011.

4. Applicant John Pennington was selected by the Interview Committee for the position. Subsequently, Mr. Pennington's application was rejected by the West Virginia

Division of Personnel (DOP) because the applicant lacked a credential required for the position. In addition to numerous other duties, DOP is charged with verifying pertinent education, training, licensure, eligibility, preference points, experience qualifications and other information of various applicants.

5. Applicant Pennington appealed the determination by DOP and subsequently received a letter dated January 3, 2012, stating Mr. Pennington would be qualified for the position by submitting nine (9) additional credit hours.

6. Applicant Pennington's qualification for the position became effective January 1, 2012.

7. Mr. Pennington was engaged in educational pursuit which initially qualified him to interview and be considered for the position under DOP Administrative Rules § 6.4.

8. DOP Administrative Rules § 6.4(b) states: "In order to be admitted to an open competitive examination, an applicant shall have satisfied all publicly announced minimum qualifications of the position for which he or she has requested an examination, except that he or she may be admitted if he or she is qualified in all respects except for: (1) a deficiency of no more than six months of qualifying training and, at the time of application, he or she is engaged in educational pursuits that will qualify him or her…".

9. DOP Administrative Rule § 11.2 states: "To be eligible for promotion, an employee must, at the time of the promotion is effective, have permanent status and must meet the minimum qualifications as to training and experience for the class or position." DOP Administrative Rule § 11.2 does not require a candidate meet the requirements for a position until the promotion is actually effective.

10. The status of the position was in limbo for some time during the selectee's appeal to West Virginia Division of Personnel.

11. Upon receiving the DOP's decision regarding the selectee's appeal, Respondent reposted the position. The original selectee, John Pennington, was not ceremoniously given the position upon receipt of DOP's determination regarding eligibility.

12. Grievant asserts that Respondent should have awarded him the job, rather than reposting the position. When the position was reposted, each applicant was given the opportunity to reapply.

13. Following the second posting, interviews were conducted.

14. Grievant applied for the position when it was reposted, but, again, was not the candidate selected.

15. Applicant Pennington was again selected by Respondent's agents and awarded the position.

16. Grievant resigned from his position at Mount Olive Correction Complex on April 10, 2012.

17. After assuming the duties, Mr. Pennington has (since) left the position of Corrections Program Specialist, Sr. and the position has been posted again. The third posting of this position was in June 2012.

18. Grievant did not apply for the latest posting of the position.

Discussion

It is Grievant's proposition that Respondent deprived him of the posted position of Correctional Programing Specialist, Senior at Mount Olive Correction Complex (the internal operating title for the position is "Library Supervisor"). Grievant argues that the selection process was flawed in various ways. Specifically, Grievant argues Respondent was obligated to select him for the position in that the applicant chosen was ineligible for the position and Grievant was next in line.[1] Grievant's assertions are interesting but not established in the record of this grievance. It is Grievant's proposition that Respondent has unlawfully deprived him of the position.

Respondent in support of its actions and in response to this grievance, as filed, avers: (1) Grievant is not entitled to the to be placed in the position because the Division of Corrections' (DOC) decision to repost the position was not arbitrary or capricious; (2) Grievant is not entitled to the to be placed in the position because Grievant was not the second choice candidate for the position; (3) DOC has remedied any potential error by reposting the position; (4) Grievant is no longer employed by MOCC, which renders a decision on this grievance moot. (See Respondent's proposed findings of fact and conclusions of law.)

Respondent duly filed a Motion to Dismiss this grievance. A phone conference on the motion was held. Both parties were provided an opportunity to submit verbal and

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[1] Grievant asserts and firmly believes that he was the second choice for the position; however, no evidence was submitted to support this belief. Further, at level one, Warden David Ballard, the appointing authority, presented evidence disputing Grievant's argument that he was second choice. Putting forth conjecture, verbally or in written format, does not establish a contested piece of information as fact. Grievant has not established his conjecture to be factually correct.

written argument. The burden of proof is on Respondent, the moving party, to demonstrate that the motion should be granted by a preponderance of the evidence. Respondent requested that the instant grievance be dismissed, arguing in that Grievant is no longer employed by Respondent. Respondent asserts that Grievant's voluntary resignation moots the issues raised in this grievance, citing "[t]he 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).

Grievant contends viable remedy is still available. In reply to the Motion, Grievant infers there is a "high probability" that he would accept the Correctional Program Specialist, Sr. position if this Board were to award him the job. He explains that the position is appealing because it would allow him to spend more time with his family. Grievant's assertion is counter to the unsubstantiated information that such a move would represent a pay cut from his current employment with another state agency. Even if there was a defect in the interview process and that successful applicant Pennington should never have been interviewed, the proper remedy would be to repost the position, and allow all the applicants an opportunity to reapply, not simply to award the position to Grievant. This is what Respondent did, twice. Respondent has persuaded the undersigned that no viable relief is pending pursuant to the instant grievance.

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). This Board has dismissed grievances once a 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). This Grievance Board has dismissed several grievances as moot due to voluntary retirement in several cases. *See Komorowski v. Marshall Co. Bd. of Educ.*, Docket No. 08-25-007 (March 23, 2007); *King v. Dep't of Transp.*, Docket No. 06-DOH-020 (Oct. 20, 2006); *Jones v. Cabell Co. Bd. of Educ.*, Docket No. 97-06-041 (Aug. 6, 1997).

This Board has found that where a grievant is no longer an employee, "a decision on the merits of [the] grievance would be a meaningless exercise, and would merely constitute an advisory opinion." *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997). "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).

"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). Additional cites omitted.

It is undisputed that Grievant ended his employment on or around April 10, 2012. This action makes it unnecessary for the Grievance Board to act in this matter even if he 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). Respondent's Motion to Dismiss is granted. Grievant is no longer an employee, his resignation rendered his request for the position moot and despite numerous opportunities, Grievant presented no reliable evidence to substantiate qualification for potential back pay prior to his resignation date.[2] Respondent has reposted the position, providing interested candidates an opportunity to apply. No viable relief is pending, therefore any ruling issued by the undersigned regarding the question(s) raised by this grievance would be advisory in nature.

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[2] Notwithstanding the pending motion, Grievant was provided ample opportunity to put forth persuasive evidence regarding the merits of his allegations. In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. This Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Grievant failed to establish Respondent's actions were unreasonable or unlawful.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. "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." Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. "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).

3. "[T]he 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).

4. Grievant voluntarily resigned from employment with Respondent on April 10, 2012.

5. When it is not possible for any actual relief to be granted, any ruling issued regarding the question raised by a grievance would merely be an advisory opinion.

6. "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).

Based upon the foregoing, Respondent's "Motion to Dismiss" is **GRANTED** and the above-styled action 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: February 21, 2013

Landon R. Brown
Administrative Law Judge