THE WEST VIRGINIAPUBLIC EMPLOYEES GRIEVANCE BOARD

KIM PRINCE,
Grievant,

v. **Docket No. 2013-0156-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL,
Respondent.

DISMISSAL ORDER

On August 6, 2012, Kim Price, Grievant, filed this grievance against the Respondent, Department of Health and Human Resources ("DHHR") at Level Three of the Grievance procedure alleging, "Dismissal without good cause." As relief, Grievant seeks, "To be made whole, including [b]ack pay wit[h] interest & all benefits restored."

On December 27, 2012, Respondent, by counsel, filed a *Motion to Dismiss* on the grounds that the grievance is moot. Grievant did not submit a written response to the Motion to Dismiss.

On January 8, 2013, a telephonic hearing was conducted on Respondent's *Motion to Dismiss*. Present by telephone were Gordon Simmons, U.E. Local 170, representative for Grievant, and Anne B. Ellison, Assistant Attorney General, counsel for Respondent.

The following Findings of Fact are made based on the documents submitted and arguments presented during telephonic hearing on January 8, 2013.

Findings of Fact

1. Grievant, Kim Prince, was employed by Respondent DHHR as a Nurse Aid, in the Health Service Worker classification, at Jackie Withrow Hospital.

2. Respondent terminated the Grievant's employment for alleged multiple instances of substantiated verbal abuse of a patient and violations patient's rights.

3. Grievant filed the instant grievance, claiming "dismissal without good cause."

4. As relief, Grievant sought, "To be made whole, including [b]ack pay [w]ith interest and all benefits restored."

5. West Virginia regulations require that whenever a charge of abuse or neglect is reported, facilities are required to submit an Immediate Report to the Nurse Aide Registry, which is administered by the Office of Health Facilities Licensure and Certification (OHFLAC). 69 C.S.R.6 § 3.2a.

6. Once an Immediate and Follow-up Report are received by the Nurse Aide Program, an OHFLAC surveyor will conduct an investigation and submit a report to the Nurse Aide Program. *Id* at § 4. The Nurse Aide Program will then make a final disposition of the investigation, which can include sustaining the allegations and starting proceedings to place the Nurse Aide Abuse Registry. *Id*. at § 4.4.

7. If the Nurse Aide Program decides to place the nurse aide on the Nurse Aide Abuse Registry, it will notify the Nurse Aide of its intent and provide 30 days for the nurse to request a hearing. *Id*. at § 5.1. If the substantiation is upheld, the Nurse Aide's name will be placed on the Nurse Aide Abuse Registry and OHLFAC will notify the Nurse Aide's last known place of employment.

8. If placed on the West Virginia Nurse Aide Abuse Registry, federal regulations mandate that a Nurse Aide cannot work, in any capacity, in a certified nursing facility within the United States. 42 C.F.R. 483.13 (c)(1). As well, the individual

cannot work in any capacity in a Behavioral Health facility within the State of West Virginia.

9. Jackie Withrow Hospital is a certified nursing facility regulated by OHLFAC.

10. OHLFAC investigated and subsequently substantiated the charges of abuse against Grievant that had resulted in her termination of employment from Jackie Withrow Hospital.

11. On November 9, 2012, OHFLAC informed Grievant that it intended to place her name on the Nurse Aide Abuse Registry, and provided her 30 days by which to request an appeal of the substantiated charges of abuse.

12. Grievant did not appeal OHFLAC's findings. On December 11, 2012, OHFLAC notified Grievant that she had been placed upon the Nurse Aide Abuse Registry.

13. Due to her placement on the Nurse Aide Abuse Registry, Jackie Withrow is prohibited by federal regulation from employing Grievant. 42 C.F.R. 483.13 (c) (1).

Discussion

Grievant is seeking to be reinstated to her employment with Respondent. This Board is bound by the findings from OHFLAC. The Grievance Board is without authority to grant the relief requested. The Public Employees Grievance Board Procedure Rules specifically state:

> "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 § 11 (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). "[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). Because the relief sought bv Grievant is not available from the Grievance Board, the grievance must be DISMISSED.

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 § 6.11 (2008).

2. 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).

3. Because the relief sought by Grievant is not available from the Grievance Board, the grievance is moot and must be dismissed pursuant to Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008).

Accordingly, the grievance is **DISMISSED.**

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: January 18, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE