THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBIN JAY MISER,

Grievant,

v. **Docket No. 2010-0185-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN and DIVISION OF PERSONNEL,

Respondent.

DISMISSAL ORDER

Grievant Robin Jay Miser filed a grievance on August 15, 2009, stating, "Denied raise for HSA's." For relief, he seeks, "To be made whole, including granting raise."

This case was dismissed at level one. A mediation session was held on November 23, 2009. On November 24, 2009, an Order of Joinder was issued joining Division of Personnel ("DOP") as an indispensable party. Then, on July 9, 2010, Respondent, by and through its counsel Heather Laick, Assistant Attorney General, filed a Motion to Dismiss. Grievant responded on or around July 22, 2010, and is represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union.

Findings of Fact

1. Grievant is employed by Respondent and works at Mildred Mitchell-Bateman Hospital.

2. Grievant began working as a Health Service Worker on July 1, 2007.

3. On February 1, 2008, Grievant was promoted to a Health Service Assistant.

4. In early 2009, the West Virginia Legislature passed West Virginia Code §5-5-4a, allowing raises to be given to physicians, physician specialists, nurses, nursing

directors, health service workers, health service assistants, health service associates or other positions at Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital. This pay raise was to assist with recruitment and retention. This raise was effective on July 1, 2009.

5. On June 18, 2009, the State Personnel Board approved Respondent's Proposal Number 2514, stating that Bateman and Sharpe Hospitals would "provide for a 3% retention incentive after three years in the respective job classifications of Health Service Worker, Health Service Assistant, and Licensed Practical Nurse with a plan of implementation whereby current employees in those job classifications who have three or more years in their job classifications receive a 3% increase." Respondent's Exhibit B.

6. As of July 1, 2009, the effective date of the proposal, Grievant had been employed as a Health Service Assistant for five months.

7. The specific intent of the West Virginia Legislature is that there be no cause of action arising from the passage of W. VA. CODE § 5-5-4a(c).

Discussion

W. VA. CODE §5-5-4a(c) states:

> Funding for the pay rates and employment requirements shall be provided from the appropriation of the Department of Health and Human Resources. Due to the limits of funding, the implementation of the pay rates and employment requirements shall not be subject to the provisions of article two, chapter six-c of this code. The provisions of this section are rehabilitative in nature and it is the specific intent of the Legislature that no private cause of action, either express or implied, shall arise pursuant to the provisions or implementation of this section.

This statute specifically prohibits the filing of grievances and civil complaints. Grievant asserts that no statutory construction can be made in such a way so as to violate

the Equal Protection Clause. In essence, Grievant is arguing that the legislature has created a statute that runs afoul of the basic tenants of our legal system.

While Grievant has a very valid argument, the undersigned does not have authority under the statute to hear this grievance. Therefore, this grievance must be DISMISSED.

Conclusions of Law

1. West Virginia Code §5-5-4a prohibits the filing of a grievance and civil complaints regarding this statute.

2. The undersigned is without authority to hear this grievance.

Accordingly, this 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 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 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 19, 2010

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Wendy A. Elswick
Administrative Law Judge