THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LISA D. STILGENBAUER
Grievant,

v. **DOCKET NO. 2012-0634-WooED**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

This grievance was filed at level three of the grievance procedure by Grievant, Lisa D. Stilgenbauer, on December 13, 2011, against the Wood County Board of Education. Grievant submitted a lengthy statement of grievance detailing what had occurred when she left her employment with the Calhoun County Circuit Clerk. Grievant stated she had then applied for a job with Respondent as a substitute secretary, and had been re-hired, but then had "received a letter from Mr. Harris stating that the decision to hire me as a substitute secretary had been reversed, and that I would not be hired for the position." On December 16, 2011, Grievant submitted another grievance form, stating, "I'm filing a grievance against Wood County Board of Education for reversing (terminating) my re-hire as a Substitute Secretary." As relief Grievant seeks "to be re-hired as a Substitute Secretary for Wood County Schools, with a start date at least equal to the earliest start date of any that were hired in this group."

On December 23, 2011, Respondent submitted a letter stating that Grievant "is not eligible to file a grievance due to the fact that she is not an employee of Wood County Schools." Grievant was provided the opportunity to respond to this "Motion to Dismiss,"

and did so, stating that she believed "that I was re-hired for a Substitute Secretary [position] with Wood County Schools." The basis for Grievant's belief was that she had been interviewed for a substitute secretary position, fingerprinted, and completed paperwork "as a new hire would do." Grievant stated that about two weeks later she "received a letter from Mr. [Robert] Harris [Assistant Superintendent of Human Resources], stating the decision to hire me as a substitute secretary for Wood County Schools had been reversed, and that he would not be hiring me for the position. . . . If I had not been hired, why did I receive a letter stating that the decision had ben reversed?"

After receiving Grievant's response, the undersigned gave the parties the opportunity to submit the letter referenced by Grievant, and documentation of action by the Wood County Board of Education approving the hiring of Grievant. Both parties submitted the letter Assistant Superintendent Harris had sent to Grievant, and Respondent submitted the minutes of the January 10, 2012 meeting of the Wood County Board of Education showing that Grievant was not hired by Respondent for a substitute secretary position. Wood County Superintendent J. Patrick Law also submitted a letter in which he stated that Grievant "was not recommended to be hired and her name was not placed before the Board of Education for approval for the appointment. She was never hired for the position." The undersigned finds that the information submitted by the parties is sufficient to make a ruling on the Motion to Dismiss, and this matter became mature for decision on receipt of the last of the parties' responses, on February 2, 2012.

Synopsis

Grievant filed a grievance after not being hired for a position with Respondent. The grievance procedure was put in place to provide a mechanism for resolution of problems

which arise in the workplace, between employees and their employer. It does not, by statute, provide a mechanism for a grievant to bring a grievance against a state agency that is not her employer. Grievant was not an employee of Respondent, and cannot file a grievance.

The following facts are made based upon the information submitted by the parties.

Findings of Fact

1. Grievant applied for a substitute secretary position in the late fall of 2011, after it was posted by the Wood County Board of Education ("WBOE").

2. Grievant had been employed by WBOE previously, but had resigned her position and was employed by the Calhoun County Circuit Clerk for some period of time.

3. Grievant was interviewed for a substitute secretary position with WBOE, and WBOE Assistant Superintendent Robert K. Harris gave Grievant the impression that she would be hired for the position.

4. WBOE did not approve the hiring of Grievant for the posted substitute secretary position.

5. Grievant was not an employee of WBOE.

Discussion

Respondent asserts that Grievant is not an "employee" of WBOE, within the meaning of WEST VIRGINIA CODE § 6C-2-2, and therefore has no standing to pursue her grievance. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec.

26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

The Public Employees Grievance Procedure was established to allow public employees and their employer 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); *Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615DEF (April 30, 2002). The grievance procedure is only available to challenge the actions taken by a current employer. *Chang v. Berkeley County Bd. of Educ.*, Docket No. 2008-0174-BerEDDEF (April 28, 2008); *Mascaro v. Marion County Bd. of Educ.*, Docket No. 2008-0299-MrnED (Nov. 24, 2008). WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

In turn, the same statute, in subsection (e)(1), defines "[e]mployee" as "any person hired for permanent employment by an employer for a probationary, full- or part-time position." A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). An employee may only file a grievance against his or her employer. W. VA. CODE § 6C-2-2(a)(1). As established by statute, any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not

grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public *employee* and his or her *employer* to reach solutions to problems which arise within the scope of their employment relationship. W. VA. CODE § 6C-2-1(a); *See Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1, *et seq*. The grievance procedure is only available to the Grievant to challenge the actions taken by her employer. *Posey v. W. Va. Univ.*, Docket No. 2009-0745-WVU (Apr. 10, 2009); *Narkevic v. Div. of Corr. and Dep't of Health & Human Res.*, Docket No. 2009-0846-MAPS (Apr. 29, 2009).

While Grievant believed after her discussions with Assistant Superintendent Harris that she would be hired for the position for which she applied, Assistant Superintendent Harris had no authority to hire Grievant. That authority was vested with the members of the WBOE. W. VA. CODE § 18A-2-5. WBOE took no action to hire Grievant, and did not offer Grievant employment. Despite the poor choice of words used by Assistant Superintendent Harris in the letter he sent to Grievant, Grievant was not employed by WBOE to fill the posted substitute secretary position for which she applied. Since Grievant

was not and is not an employee of WBOE, the Grievance Board does not have jurisdiction to adjudicate this dispute. Therefore, the grievance must be dismissed. *Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009).

The following conclusions of law support the dismissal of this grievance.

Conclusions of Law

1. As established by statute, any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

2. For the purposes of the grievance procedure, an "employer" is the "state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multi-county vocational center, or agent thereof, using the services of an employee." W. VA. CODE § 6C-2-2(g). An "[e]mployee" is "any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). An employee may only file a grievance against his or her employer. W. VA. CODE § 6C-2-2(a)(1).

3. The Public Employees Grievance Board is an administrative agency established by the Legislature to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. W.

VA. CODE § 6C-2-1(a); *See Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

4. "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority under WEST VIRGINIA CODE §§ 6C-2-1, *et seq*.

5. The Public Employees Grievance Board does not have jurisdiction to resolve a dispute between Grievant and the Wood County Board of Education.

Accordingly, the 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 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 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).

BRENDA L. GOULD
Administrative Law Judge

Date: February 27, 2012