

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**WILLIAM HARVEY ARCHIBALD,
Grievant,**

v.

Docket No. 2024-0569-MISC

**ADJUTANT GENERAL'S OFFICE/
WEST VIRGINIA MILITARY AUTHORITY,
Respondent.**

DISMISSAL ORDER

On October 24, 2023, Grievant filed a grievance against Respondent alleging harassment. By order entered November 16, 2023, the grievance was dismissed for lack of jurisdiction. On February 21, 2024, Grievant again filed the instant grievance alleging harassment, attaching his Motion to Accept Petitioner's Grievant and Apply the West Virginia Public Employees Grievance Procedures Via Permissive Jurisdiction. By letter dated October 25, 2023, the undersigned again notified Grievant that it appeared the Grievance Board lacked jurisdiction to hear the grievance, and required Grievant to file a response by March 21, 2024, if he still believed he had the right to pursue his grievance. Grievant, by counsel, responded to the letter referencing the prior motion. Respondent, by counsel, responded by letter on March 27, 2024. Grievant is represented by Todd Reed, Esq. Respondent is represented by Leslie Dillon, General Counsel.

Synopsis

Grievant is employed by the West Virginia Military Authority as a Trades Specialist 3. Grievant filed a grievance alleging harassment. Grievant's employment with Respondent is specifically exempted from the grievance procedure by statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant is employed by the West Virginia Military Authority as a Trades Specialist 3.
2. Grievant filed the instant grievance against Respondent alleging harassment.
3. Following the dismissal of a prior grievance for lack of jurisdiction, Grievant availed himself of Respondent's internal grievance procedure, which is ongoing.
4. Respondent's *Workplace Harassment Policy*, states in section 15.9(a) that "[e]mployees must address such complaints through their manager/supervisor, the West Virginia Public Employees Grievance Procedure, or litigation."

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*" W.VA. CODE ST. R. § 156-1-6.2 (2018). The administrative law judge may dispose of a grievance through an appealable dismissal order. W.VA. CODE ST. R. § 156-1-6.19.3.

Grievant argues that the grievance should not be dismissed due to permissive jurisdiction as Respondent has granted "explicit permission to have the matter heard before the Board." Respondent asserts the Grievance Board lacks jurisdiction and denies that it has submitted its employee grievances to the Grievance Board.

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must

find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). "The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a). "'Employer'" means 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." W. VA. CODE § 6C-2-2(g).

Grievant is an employee of the West Virginia Military Authority. West Virginia Military Authority employees are "exempt from both the classified services category and the classified exempt services category as set forth in section four, article six, chapter twenty-nine of this code." W. VA. CODE §15-1J-5(a)(1). "Due to the at-will employment relationship with the authority, its employees may not avail themselves of the state grievance procedure as set forth in article six-a, chapter twenty- nine of this code¹. . ." W. VA. CODE §15-1J-4(d)(11).

Grievant argues the Grievance Board may take "permissive jurisdiction" due to language included in Respondent's *Workplace Harassment Policy*, which states in section 15.9(a) that "[e]mployees must address such complaints through their

¹ West Virginia Code § 29-6A-1 *et seq.* was repealed and recodified into the present grievance procedure in West Virginia Code § 6C-2-1 *et seq.*

manager/supervisor, the West Virginia Public Employees Grievance Procedure, or litigation.” Grievant likens this language to a “forum selection” provision in a contract.

It seems likely that the provision in Respondent’s policy mistakenly refers to the West Virginia Public Employees Grievance Procedure rather than Respondent’s own separate internal grievance procedure. Regardless, the parties cannot select a forum that lacks jurisdiction. Grievant’s employment is specifically exempted from the grievance procedure by statute. A policy cannot override a statute to confer jurisdiction to the Grievance Board that the legislature did not grant. Therefore, the Grievance Board lacks jurisdiction in this matter, and the grievance must be dismissed.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W.VA. CODE ST. R. § 156-1-6.2 (2018).

2. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

3. “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “Employer” means 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.” W. VA. CODE § 6C-2-2(g).

4. “West Virginia Military Authority employees are “exempt from both the classified services category and the classified exempt services category as set forth in section four, article six, chapter twenty-nine of this code.” W. VA. CODE §15-1J-5(a)(1). “Due to the at-will employment relationship with the authority, its employees may not avail themselves of the state grievance procedure as set forth in article six-a, chapter twenty-nine of this code. . .” W. VA. CODE §15-1J-4(d)(11).

5. As Grievant’s employment is specifically exempted from the grievance procedure by statute, the Grievance Board lacks jurisdiction in this matter, and the grievance must be dismissed.

Accordingly, this Grievance is **DISMISSED**.

“The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed.” W. VA. CODE § 6C-2-5(a) (2024). “An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. VA. CODE § 6C-2-

5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: April 23, 2024

Billie Thacker Catlett
Chief Administrative Law Judge