

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BONITA BURACKER, ET AL.,**

**Grievants,**

**v.**

**Docket No. 2022-0720-CONS**

**JEFFERSON COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DISMISSAL ORDER**

Grievants<sup>1</sup> are employed as full-time school bus drivers by Respondent, Jefferson County Board of Education. On April 4, 2022, Grievants filed grievances alleging that during the 2021-2022 school year Respondent failed to abide by the driver seniority list, did not allow Grievants to bid on extracurricular bus runs and midday runs, and engaged in favoritism by giving “double pay” to less senior drivers to change their runs.

These grievances were consolidated. After a level one hearing, a denial was issued on October 8, 2022. Grievant appealed to level two October 27, 2022. A level two mediation occurred on January 6, 2023. The matter was placed in abeyance at the request of the parties in January 2023. An appealable order issued from level two on May 11, 2023. Grievants appealed to level three on August 8, 2023. The matter was continued at the request of Grievants in November 2023 and March 2024. A level three hearing was held before the undersigned via videoconference on November 12 & 15, 2024. Grievants appeared and were represented by Anthony Brunicardi, Esq, WVSSPA. Respondent was represented by Denise Spatafore, Esq., Dinsmore & Shohl LLP. This matter matured for

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<sup>1</sup>Grievants include Bonnie Buracker, Rosemarie Butler, Tesa Anderegg and Yvette Mohler. Former Grievant Karen Nelson was dismissed because she is no longer employed by Respondent.

decision on January 17, 2025, after an extension was granted. Parties submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL).

After the level three hearing, it became apparent from the evidence that the grievances challenged actions taken by Respondent to address the immense shortage of bus drivers brought on by the COVID-19 pandemic. While Respondent did not move to dismiss the grievance, the undersigned determined a lack of jurisdiction.

### **Synopsis**

Grievants are employed by Respondent as school bus drivers. Grievants claim that during the 2021-2022 school year Respondent failed to adhere to the driver seniority list when it assigned extracurricular and midday runs to less senior drivers and engaged in favoritism by giving some drivers “double pay.” Respondent disputes the allegations but contends that the actions grieved were its attempt to address a bus driver shortage induced by COVID-19. As such, the COVID-19 Jobs Protection Act deprives the Grievance Board of jurisdiction over this grievance. Thus, this grievance is DISMISSED.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. Grievants are employed as bus drivers by Respondent, Jefferson County Board of Education.
2. This grievance arises from actions taken by Respondent to deal with bus driver absences and shortages brought on by the COVID-19 pandemic.
3. Grievants alleged that Respondent violated West Virginia law by failing to adhere to the seniority list in assigning extracurricular and midday bus runs to less senior drivers and engaging in favoritism by giving some drivers “double pay.”

4. In 2021, the West Virginia Legislature enacted the Covid-19 Jobs Protection Act, effective retroactively to January 2020, recognizing that the “novel coronavirus, also known as COVID-19, has been deemed a pandemic.”

6. The Legislature stated that the purpose of the COVID-19 Jobs Protection Act is to provide assurances that the reopening of the State would not create the risk of claims, lawsuits, or liability related to losses or damages arising from COVID-19.

### **Discussion**

“Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “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.” W. VA. CODE ST. R. § 156-1-6.11.

“In *Worley*, the Grievance Board recognized that the Grievance Board lacked jurisdiction over certain claims due to the COVID-19 Jobs Protection Act.” *Hampton et. al. v. Raleigh County*, Docket No. 2021-0923-CONS (March 30, 2022). Consequently, when after the level three hearing it became apparent that Grievants’ claims arose from

actions taken by Respondent to deal with a bus driver shortage induced by COVID-19, the undersigned determined that the Grievance Board lacked jurisdiction over this grievance under the COVID-19 Jobs Protection Act. The West Virginia Supreme Court of Appeals has directed courts to “take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein.” Syl. Pt. 2, *In re Boggs’ Estate*, 135 W.Va. 288, 63 S.E.2d 497 (1951). “The urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void.” *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (2005); *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017). Although not a court, the same reasoning applies to the Grievance Board as an adjudicating body.

“Through passage of the COVID-19 Jobs Protection Act, the Legislature recognized a need for the state of West Virginia to reopen its businesses, schools, and churches in the wake of the COVID-19 lockdown without threat of claims or civil litigation.” *Worley v. Jackson County Board of Education*, Docket Number 2022-0349-JacED (Jan. 14, 2022). The purpose of the Act is to “eliminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.” W. VA. CODE § 55-19-2(b)(1). The Act states:

Notwithstanding any law to the contrary, except as provided by this article, there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.

W. VA. CODE § 55-19-4. The Act defines “person” to include county governmental entities and schools. W. VA. CODE § 55-19-3. The Act defines “arising from COVID-19” as:

[A]ny act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:

(A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;

. . .

(I) “[a]ctions taken in response to federal, state, or local orders, recommendations, or guidelines lawfully set forth in response to COVID-19.”

W. VA. CODE § 55-19-3.

The Act states, “Nothing in this article shall be construed to affect any duties, rights, benefits, or any other term or condition arising from a contractual relationship.” W. VA. CODE § 55-19-9(c). A review of the grievance shows that Grievants’ allegations do not assert violation of their contracts but rather violations of statute. Grievants’ “duties, rights, and benefits” in this case arise from statute, not contract, thus the exception for contractual relationships does not apply.

In *Worley*, the Grievance Board found that the COVID-19 Jobs Protection Act applies to claims before the Grievance Board. By clear language, “[n]otwithstanding any law to the contrary, except as provided by this article,” the Legislature has removed such grievances from the Grievance Board’s jurisdiction. As a State entity, Respondent is the type of entity the West Virginia Legislature sought to protect when it enacted the COVID-19 Jobs Protection Act. Respondent’s action in dealing with driver absences and

shortages was an attempt to ensure that the severe driver disruption caused by the COVID-19 pandemic did not hamper its important objective of ensuring students were transported to and from school. As such, it was action taken in response to the COVID-19 pandemic. As the COVID-19 Jobs Protection Act prohibits claims arising from a response by a State entity to COVID-19, and does so retroactively to January 2020, the Grievance Board lacks jurisdiction to consider this grievance. Thus, this grievance must be dismissed.

The following Conclusions of Law support the dismissal of this grievance

### **Conclusions of Law**

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “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.” W. VA. CODE ST. R. § 156-1-6.11.

2. “Through passage of the COVID-19 Jobs Protection Act, the Legislature recognized a need for the state of West Virginia to reopen its businesses, schools, and churches in the wake of the COVID-19 lockdown without threat of claims or civil litigation.”

*Worley v. Jackson County Board of Education*, Docket Number 2022-0349-JacED (Jan. 14, 2022).

3. The purpose of the COVID-19 Jobs Protection Act is to “eliminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.” W. VA. CODE § 55-19-2(b)(1).

4. The Act states:

Notwithstanding any law to the contrary, except as provided by this article, there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.

W. VA. CODE § 55-19-4.

5. “Person” includes county governmental entities and schools. W. VA. CODE § 55-19-3.

6. The Act defines “arising from COVID-19” as:

[A]ny act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:

(A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;

. . .

- (l) “[a]ctions taken in response to federal, state, or local orders, recommendations, or guidelines lawfully set forth in response to COVID-19.”

W. VA. CODE § 55-19-3.

7. “Nothing in this article shall be construed to affect any duties, rights, benefits, or any other term or condition arising from a contractual relationship.” W. VA. CODE § 55-19-9(c).

8. Grievants allege violations of statute rather than contract.

9. “In *Worley*, the Grievance Board recognized that the Grievance Board lacked jurisdiction over certain claims due to the COVID-19 Jobs Protection Act.” *Hampton et. al. v. Raleigh County*, Docket No. 2021-0923-CONS (March 30, 2022).

10. The Grievance Board lacks jurisdiction to hear the grievance.

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: February 14, 2025**

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**Joshua S. Fraenkel**  
**Administrative Law Judge**