

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRANDY BURDETTE, *et al.*,

Grievants,

v.

Docket No. 2024-0056-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR FAMILY ASSISTANCE AND
DIVISION OF PERSONNEL,**

Respondent.

DISMISSAL ORDER

Grievants¹ are employed as Family Support Specialists (FSS) by Respondent, Department of Human Services (DHS).² Between July 2023 and September 2023, Grievants filed grievances requesting a pay increase commensurate with that given to Economic Service Workers (ESW). They assert that their duties and required minimum qualifications are more complex than those of ESW.

The grievances were waived to level two because they involve classification and compensation issues. The Division of Personnel (DOP) was joined as an indispensable party on August 4, 2023. The grievances were consolidated on October 30, 2023. A level two mediation occurred on November 22, 2023. After the matter was placed in abeyance for a few months, an order of unsuccessful mediation was issued on March 12, 2024, and timely appealed to level three.

¹Grievants include Brandy Burdette, Dana Daugherty, Dawn Forro, Dana Lee Shrontz, and JoAnna Watkins. Former Grievant Tina Elza withdrew from this grievance.

²As of January 1, 2024, the agency formerly known as the Department of Health and Human Resources is now three separate agencies -- the Department of Health Facilities, the Department of Health, and the Department of Human Services. For purposes of this grievance, the Department of Health and Human Resources shall mean the Department of Human Services.

DHS filed a motion to dismiss on September 17, 2024, arguing that the Grievance Board lacks jurisdiction to award Grievants a pay raise since necessary funding was not provided by the legislature. After multiple continuances, a hearing on the motion was held before the undersigned via videoconference on January 22, 2025. Grievants appeared and were self-represented. DHS was represented by Heather Olcott, Assistant Attorney General. DOP was represented by Katherine Campbell, Assistant Attorney General. This matter matured for decision on February 26, 2025. Only DHS and DOP submitted written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by the Department of Human Services (DHS) as Family Support Specialists. In conjunction with the pay raise given by DHS to its Economic Service Workers, Grievants claim they are entitled to a pay raise due to the greater complexity of their duties and required qualifications. DHS proved that the Grievance Board lacks jurisdiction over the requested relief because the legislature chose not to provide funding for the requested raise. 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 Family Support Specialists (FSS) by Respondent Department of Human Services (DHS).
2. In 2023, DHS gave its Economic Service Workers (ESW) a pay raise after the legislature earmarked funding for this raise. Even then, DHS first had to request a review by the Division of Personnel (DOP) and then wait for the State Personnel Board to approve a plan of implementation submitted to it by DOP.

3. DHS later requested that DOP review the FSS series. Whereupon DOP reviewed the FSS series and began a plan to implement an FSS series pay raise.

4. However, the legislature chose not to provide the requested funding for an FSS series pay raise.

5. DOP ended the review process for an FSS series pay raise when it learned there would be no legislative funding for an FSS series pay raise. DOP therefore did not forward a plan of implementation for the FSS series pay raise to the State Personnel Board.

6. A plan of implementation cannot be submitted for approval by the State Personnel Board unless funding exists to implement the plan.

7. Grievants are properly paid within their pay grade.

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.

"Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-

3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

"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). West Virginia Code § 6C-2-2(i)(1) defines "grievance" as "a claim by an employee alleging a violation, a misapplication, or a misinterpretation of the statutes, policies, rules, or written agreements applicable to the employee including: (i) Any violation, misapplication, or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status, or discrimination; (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer; (iii) Any specifically identified incident of harassment; (iv) Any specifically identified incident of favoritism; or (v) Any action, policy, or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee."

"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. 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).

In conjunction with the enabling statute for public employee grievances, Grievants did not cite "a violation, a misapplication, or a misinterpretation of the statutes, policies, rules, or written agreements" that would entitle them to the requested relief. "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).

In requesting an upward reclassification of their pay grade, Grievants seem to unintentionally imply that their positions are improperly classified and that they are thus underpaid. If this were truly their claim, they could arguably overcome the motion to dismiss this grievance for lack of jurisdiction over the requested relief. However, this grievance is neither about position classification nor improper compensation within a pay grade. Rather, this case seems to entail a veiled claim of discrimination precipitated by DHS giving a pay raise to ESW that resulted in higher compensation than Grievants receive under their FSS classification. Grievants further this implied basis by arguing that the greater complexity of their duties and qualifications entitles them to meet and exceed the pay of ESW.

However, the legislature funded the pay raise for ESW but did not fund a pay raise for the FSS series. The Grievant Board cannot order a pay raise when the legislature does not provide funding for the raise if Grievants are properly paid within their position classification and do not challenge their position classification. Neither Respondent DHS nor Respondent DOP can earmark the funding necessary for the requested raise. Funding is the prerogative of the legislature. The legislature is not and cannot be a party to this action. “‘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). The legislature is not an “employer” subject to the jurisdiction of the Grievance Board.

As for discrimination, even if this grievance went forward on a discrimination claim, it would fail. Discrimination for purposes of the grievance process has a very specific definition. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). Grievants do not claim they are similarly situated to ESW. Rather, they contend that their duties and qualifications under the FSS classification are more complex and thus different than those of ESW. However, the undersigned cannot go forward with a decision on the merits in this regard since it does not have jurisdiction. Thus, any ruling on the merits would be an impermissible advisory opinion.

When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "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). Respondents proved that the Grievance Board lacks jurisdiction to provide the relief requested by Grievants. 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.

2. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3. "The preponderance standard generally requires proof that a reasonable

person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

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.

4. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). “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).

5. “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).

6. Respondents proved that the Grievance Board lacks jurisdiction to grant the relief requested by Grievants.

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 10, 2025

Joshua S. Fraenkel
Administrative Law Judge