

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TANYA DUNCAN,
Grievant,

v.

Docket No. 2025-0139-BerED

BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant, Tanya Duncan, filed this grievance against the Berkeley County Board of Education on or about September 8, 2024, alleging “[N]o interview for rehire of current position, no employee review given in 1 year, not informed another candidate was hired, no exit meeting, loss of wages, no date given to clean out offices. Student permitted to harass.” Grievant seeks “[F]inancial compensation for loss of wages, continued mental therapy, defamation of character. Repercussions to Berkeley County employees named due to gross negligence, underperformance and lack of professional support.” Respondent filed a Motion to Dismiss Grievance on or about September 18, 2024. The undersigned instructed Grievant to respond, in writing, by September 25, 2024, stating why the grievance should not be dismissed for lack of jurisdiction. Grievant responded on September 19, 2024. Respondent filed a Reply In Support Of Respondent’s Motion To Dismiss Grievance on September 20, 2024. The case is in a posture to rule on the motion without the necessity of a hearing. Grievant appeared *pro se*. Respondent appeared by its counsel, Kimberly S. Croyle and Leigh Anne Wilson, Bowles Rice LLP.

Synopsis

Grievant was employed by the Eastern Panhandle Instructional Cooperative as an athletic trainer. Although the location of Grievant’s employment through Eastern

Panhandle Instructional Cooperative was at Spring Mills High School, Grievant was not employed by the Berkeley County Board of Education. Grievant does not meet the definition of an employee subject to the grievance procedure. The Berkeley County Board of Education does not meet the definition of employer subject to the grievance procedure. The Grievance Board lacks jurisdiction in this matter, and the grievance must be dismissed.

The following Findings of Fact are undisputed in this case.

Findings of Fact

1. On or about September 8, 2024, Grievant filed a grievance against Respondent directly to level three.
2. For the 2023-2024 school year, Grievant was employed by the Eastern Panhandle Instructional Cooperative ("EPIC") as an athletic trainer. Although the location of her employment through EPIC was at Spring Mills High School, Berkeley County, West Virginia, Grievant was not employed by Berkeley County Board of Education.
3. Grievant acknowledged that her employer was EPIC.
4. EPIC is an educational service cooperative that serves ten county school systems in West Virginia, the West Virginia Schools for the Deaf and Blind, and multi-county vocational centers.
5. While Berkeley County Board of Education works cooperatively with EPIC, EPIC is a distinct entity.

6. By letter dated July 11, 2024, EPIC informed Grievant that her position had been eliminated, and that Berkeley County Board of Education would post and hire directly for fiscal year 2025.¹

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). 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 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. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent asserts a few grounds for the dismissal of this grievance, but the controlling and tantamount ground is whether the undersigned has jurisdiction to hear the

¹ Grievant was notified on July 11, 2024, by EPIC, that her “position of Athletic Trainer, serving Berkeley County Schools, has been eliminated. As you were aware, these positions were going to run through EPIC for one year and then the county would post and hire directly for FY25. Due to the elimination of position, we are releasing you from the Athletic Trainer position through EPIC, effective June 30, 2024.”

case. Respondent asserts that Grievant is not an “employee” 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). In addition, standing is a party’s right to make a legal claim or seek judicial enforcement of a duty or right. BLACK’S LAW DICTIONARY (Eighth Edition 2004).

The Public Employees Grievance Procedure was established to allow public employees and their employers 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). WEST VIRGINIA CODE § 6C-2-2(e)(1) defines “employee” for the purposes of the grievance procedure, as follows:

(1) "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position.

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.

A “Grievance” is “a claim by an employee.” W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

In the instant case, Grievant has never been an employee of the Berkeley County Board of Education. Grievant was employed by EPIC. Grievant was notified on July 11, 2024, by EPIC, that her “position of Athletic Trainer, serving Berkeley County Schools, has been eliminated. As you were aware, these positions were going to run through EPIC for one year and then the county would post and hire directly for FY25. Due to the elimination of position, we are releasing you from the Athletic Trainer position through EPIC, effective June 30, 2024.” The Berkeley County Board of Education was clearly not the employer pursuant to WEST VIRGINIA CODE § 6C-2-2(g). As such, Grievant was not an employee of the Berkeley County Board of Education pursuant to W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1). None of the above is disputed by Grievant. Therefore, the undersigned lacks jurisdiction to hear the matter, and the grievance must be dismissed. The question of whether EPIC can be viewed as a “regional educational service agency” is not properly before the undersigned. Any discussion of that issue would amount to an advisory opinion which is prohibited.

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. 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).

3. The Public Employees Grievance Procedure was established to allow public employees and their employers 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). WEST VIRGINIA CODE § 6C-2-2(e)(1) defines "employee" for the purposes of the grievance procedure, as follows:

(1) "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position.

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[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.

A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

4. Berkeley County Board of Education was not the employer for the purpose of the grievance procedure at the time that the grievance was filed. Grievant was not an

employee of the Berkeley County Board of Education at the time that the grievance was filed.

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).

Date: October 1, 2024

Ronald L. Reece
Administrative Law Judge