

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHELE STURGEON,
Grievant,

v.

Docket No. 2024-0680-DH

WEST VIRGINIA DEPARTMENT OF HEALTH/
BUREAU FOR PUBLIC HEALTH
Respondent.

DISMISSAL ORDER

On April 15, 2024, Grievant filed a grievance against Respondent stating: "Received notice I was not eligible for employment at BPH within 5 days of applying at OMFCH - Retaliation." As relief Grievant sought, "Return to work with back pay [and] damages." On July 18, 2024, Respondent, by counsel, filed *Respondent's Motion to Dismiss* arguing the Grievance Board lacks jurisdiction as Grievant should instead appeal to the Division of Personnel ("DOP"). Grievant responded to the motion by emails dated July 19th and 23rd, 2024. Grievant appears *pro se*.¹ Respondent appears by counsel, Gail V. Lipscomb, Assistant Attorney General.

Synopsis

Grievant filed her grievance against Respondent protesting the DOP's determination that Grievant is permanently ineligible for re-employment with the Bureau for Public Health. Grievant was not a state employee at the time she filed her grievance

¹ Grievant emailed the Grievance Board on July 22nd and 29th, 2024, regarding claims of being denied representation by Gordon Simmons. On July 29, 2024, the Grievance Board emailed the parties regarding Mr. Simmons representation stating: "Although Grievant named Gordon Simmons as her representative in her grievances, she provided no contact information for him on any grievance form. Mr. Simmons has not made any appearance in the grievances at level three and Grievant's prior email on May 2, 2024, stated that Mr. Simmons was not returning her texts. Mr. Simmons has not been removed from representation in Grievant's cases but, rather, appears to have not consented to representing Grievant at level three."

and therefore cannot meet the definition of a state employee pursuant to W. VA. CODE § 6C-2-2(e)(1). The grievance process is only available to state employees. DOP's decision relating to Grievant's application for employment with a state agency that is not her employer is not a grievable event. 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 filed this grievance on April 15, 2024, against the Respondent, West Virginia Department of Health/Bureau for Public Health protesting the actions of the Division of Personnel in disqualifying her application for a position within the Bureau for Public Health.

2. Prior to and separate from this grievance, Grievant filed multiple grievances. Currently, Grievant has pending grievances related to a written reprimand (No. 2023-0789-DHHR), an alleged harassment (2024-0048-DHHR), and ultimately, Grievant's dismissal from employment with the Bureau of Public Health, (2024-0440-DHHR).

3. On December 6, 2023, by *Level 1 Notice of Agreed Waiver*, Respondent requested docket numbers 2023-0789-DHHR, 2024-0048-DHHR, and 2024-0440-DHHR be consolidated into one grievance at level three based on the agreement of the parties.

4. By Order on March 14, 2024, those prior grievances were consolidated into one case styled as *Sturgeon v. Department of Health and Human Resources/Bureau for Public Health*, Docket No. 2024-0587-CONS. This grievance has yet to be set for a level three hearing and is separate from this pending grievance.

5. Sometime in March 2024, Grievant applied for a position within the Bureau of Public Health and was rejected 5 days after applying. Grievant's rejection was due to

being informed that she was ineligible for employment with Respondent's Bureau of Public Health.

6. On March 19, 2024, Grievant received a letter from the West Virginia Division of Personnel informing Grievant that:

It has been determined that you are permanently ineligible for re-employment in any classified or temporary position within the Bureau for Public Health. Your name will be permanently removed from existing certifications of eligible applicants for any position within the Bureau for Public Health. However, this does not mean you may not work for the State. You are welcome to apply to have your name certified to a register for any classification for which you may qualify so long as there are no restrictions as notated above.

(See Respondent's Motion to Dismiss attachment).

7. On April 15, 2024, Grievant filed this grievance based on her ineligibility for employment at Respondent's Bureau of Public Health claiming retaliation. For her relief, Grievant sought to be returned to work with back pay and damages.

8. On July 18, 2024, Respondent filed this Motion to Dismiss claiming Grievant's current grievance matter cannot be grieved before the finalization of her previous consolidated grievances because she is currently not an employee of Respondent.

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.

"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). "'Employee' means 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). "'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).

"Grievance" means 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.

W. VA. CODE § 6C-2-2(i)(1).

The March 19, 2024, letter from the DOP made it clear that Grievant is permanently ineligible for re-employment with the Bureau for Public Health. Grievant's separate grievance deals with her termination from Respondent and is still pending. However, Grievant was not a state employee at the time she filed this separate grievance and therefore cannot meet the definition of a state employee pursuant to W. VA. CODE § 6C-2-2(e)(1). The grievance process is only available to state employees. See W. VA. CODE § 6C-2-1(a). DOP's decision relating to Grievant's application for employment with a state agency that is not her employer is not a grievable event. 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).

4. "'Employee' means 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).

5. "'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).

6. "Grievance:"

means 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.

W. VA. CODE § 6C-2-2(i)(1).

7. Grievant was not a state employee at the time she filed this grievance and therefore cannot meet the definition of a state employee pursuant to W. VA. CODE § 6C-2-2(e)(1). The grievance process is only available to state employees. See W. VA. CODE § 6C-2-1(a). DOP's decision relating to Grievant's application for employment with a state agency that is not her employer is not a grievable event.

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: The 17th day of September, 2024.

Wes White
Administrative Law Judge