

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MICHAEL D. BRYANT,
Grievant,**

v.

Docket No. 2018-0021-DOC

**DIVISION OF NATURAL RESOURCES,
Respondent.**

DISMISSAL ORDER

Michael D. Bryant, Grievant, filed a level one grievance against his employer, the West Virginia Division of Natural Resources (DNR), on July 7, 2017. The statement of grievance provides:

“On June 12, 2017 an application for unused sick leave payout was hand delivered to the Department of Administration. On June 22, 2017 an email was received that the Legislature has eliminated funding for the State Employee Sick Leave Fund 5-5-6 and that I would not be paid. My application was received prior to this change, I should have been grandfathered in due to submitted the application prior to the change.”

The relief sought states:

“I would like to be paid out for my unused sick leave that I requested by application on 7/12/17.”

On August 3, 2017, the parties submitted an agreed waiver to level three of the grievance process. On August 28, 2017, Respondent, by counsel, filed a written Motion to Dismiss providing that the matter was not within the definition of a ‘grievance’ as identified and contained in applicable W. Va. Code. Grievant was contacted and requested to provide any rebuttal information he wished this Grievance Board to consider in opposition to the motion. Further, a hearing was convened before the undersigned Administrative Law Judge, on September 8, 2017, in the Grievance Board’s Charleston

office, where the parties were provided opportunity to fortify their position regarding the motion and their respective opinions regarding the proper disposition of this grievance. Respondent and Grievant had the opportunity to address the motion, theory of the grievance and any other relevant outstanding issue(s). Grievant appeared *pro se*.¹ Respondent appeared by its counsel, Jane Charnock, Assistant Attorney General. This motion is mature for ruling.

Synopsis

Grievant attempted to avail himself of the opportunity to receive value for accrued unused annual and/or sick leave. As authorized by W. VA. CODE §5-5-6, Grievant applied to exchange unused leave. Grievant's request was denied by the administering authority, West Virginia Department of Administration, because funding for the state-wide program had been eliminated. Grievant filed this grievance against his employer the West Virginia Division of Natural Resources. Grievant's employer, DNR, Respondent, does not have the ability to remedy the facts and circumstances that gave rise to this grievance. The grievance procedure is in place to allow employees to pursue grievances against the agency which employs them. Inasmuch as Respondent is not responsible for the action about which Grievant complains, and has no authority to resolve the grievance, this grievance is not proper for resolution by this body. Accordingly, Respondent's motion is granted and this grievance is dismissed.

The following Findings of Fact are undisputed in this grievance.

¹ "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Findings of Fact

1. Grievant is employed by the West Virginia Division of Natural Resources (DNR) as an Administrative Service Manager III.

2. Grievant filed a grievance on July 7, 2017, in which he named his employer, the DNR, as Respondent.

3. Legislature created a mechanism where State employees could exchange or receive identified payment for accrued annual and sick leave, a program to reduce the unfunded liability that arises from extended insurance coverage for certain employees who were entitled to credit unused annual and sick leave toward continued insurance coverage.² See W. Va. Code § 5-5-6.

4. The West Virginia Division of Natural Resources does not issue, or direct the issuance of benefits authorized by the program to its employees. The issuance of such funds or credit of unused annual and sick leave toward continued insurance coverage payroll is the responsibility of the West Virginia Department of Administration.³ The state-wide program is/was available to eligible state employee opting to receive payment in exchange for unused sick leave. The program was not isolated to employees

² A special revenue account within the State Treasury known as the State Employee Sick Leave Fund. The fund consists of moneys appropriated by the legislature, moneys deposited into the fund in accordance with administrative rules of the Department of Administration. The fund shall be administrated by the Secretary of the Department of Administration. See W. Va. Code § 5-5-6(g).

³ Respondent is a spending unit which verifies to the Secretary of Administration whether an employee is eligible for payment. A spending unit shall verify the funding source or sources of the employee's salary and shall verify the total number of unused sick leave days for all employees at least once per year. The secretary shall maintain sick leave records for all spending units. All sick leave days for which an employee is paid as provided in this section shall be deducted from the employee's sick leave balance by the secretary and the secretary shall verify to each spending unit the amount of days that have been deducted from an employee's sick leave balance. An employee shall not be permitted to reacquire any sick leave days for which he or she received payment under the provisions of this program. See W. Va. Code § 5-5-6.

of Respondent, nor is the program controlled by Respondent. The fund is/was administered by the Department of Administration, a wholly independent and distinct state agency separate and distinct from Respondent.⁴ See W. Va. Code § 5-5-6.

5. Grievant completed an application to exchange some of his accumulated sick leave.

6. Grievant hand delivered his application to the Department of Administration on or about June 12, 2017.

7. On June 22, 2017, Grievant received an email which informed him that his application was denied because funding for the State Employee Sick Leave Fund had been eliminated.

8. The funding for the State Employee Sick Leave Fund was eliminated in Senate Bill 1013 ("Budget Bill"), which passed on June 16, 2017. In the Budget Bill, the Legislature directed the transfer of \$454,906.67 held by the Department of Administration in Fund 2045 (State Employee Sick Leave Fund) for Fiscal Year 2018 to the Department of Health and Human Resources, Division of Medical Services, Medical Services Trust Fund.

9. The Budget Bill became effective on its passage on June 16, 2017.

⁴ Payment for unused sick leave may be made upon application and after the Secretary of the Department of Administration verifies that the employee is eligible for payment. Payments are made from an identified fund. The special revenue account within the State Treasury known as the State Employee Sick Leave Fund is continued. The fund shall consist of moneys appropriated by the Legislature, moneys deposited into the fund in accordance with administrative rules of the Department of Administration and any interest or other return to moneys in the fund. The fund shall be administrated by the Secretary of the Department of Administration. See W. Va. Code § 5-5-6 (e) and (g).

10. Grievant asserts that because his application was made prior to the effective date of the elimination of the program's funding, his submission should have been granted.

11. Grievant's employer, DNR, Respondent does not have the ability to remedy the facts and circumstances that gave rise to this grievance.

12. Grievant's dispute is NOT with Respondent, but with the West Virginia Department of Administration [Secretary of Administration].

13. Respondent highlights that W. Va. Code § 6C-2-2(i)(2) states that "[g]rievance" does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§§ 5-16-1, et seq.], chapter five of this code, retirement or any other matter in which the authority to act is not vested with the employer.

Discussion

Grievant is an employee of the West Virginia Division of Natural Resources (DNR). Grievant seeks moneys as identified and/or authorized by W. VA. CODE § 5-5-6. Grievant has identified his employer, DNR as the Respondent for the instant grievance, filed on July 7, 2017. Grievant at no time moved to join any other State agency as an indispensable party. It is not from DNR, his employer, that Grievant is requesting compensation for unused or accumulated annual and sick leave.

Respondent motions this matter be dismissed arguing that inasmuch as the same does not fall within the definition of "grievance" as contained in W. Va. Code § 6C-2-2(h), and further, is specifically exempted from being a grievance in W. Va. Code § 6C-2-2(i). Respondent asserts that Grievant's dispute as identified is not within the jurisdiction of this

Grievance Board to resolve. 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. (Emphasis added.)

In turn, the same statute, in subsection (e)(1), defines “[e]mployee” as “any person hired for permanent employment by an employer for a probationary, full- or part-time position.”

A “Grievance” is “a claim by an employee.” W. VA. CODE § 6C-2-2(i). An employee may file a grievance against his or her employer. W. VA. CODE § 6C-2-2(a)(1). As established by statute, any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Brining, et al. v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

Grievants seeks exchange of unused leave as authorized by W. VA. CODE § 5-5-6; nevertheless, Grievant’s employer, Respondent DNR is not empowered to provide the relief requested. The administration of the State-wide program is governed by Respondent. Grievant’s dispute is NOT with Respondent, but with West Virginia Department of Administration and/or West Virginia State Legislators.

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. See *generally*, W. VA. CODE § 6C-2-1 *et seq.* In other words, generally this Grievance Board is authorized to resolve disputes between an employee and his employer agency not every

state agency of West Virginia. "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1, *et seq.* The grievance procedure is available to the Grievant to challenge the actions taken by his employer. *Posey v. W. Va. Univ.*, Docket No. 2009-0745-WVU (Apr. 10, 2009); *Narkevic v. Div. of Corr. and Dep't of Health & Human Res.*, Docket No. 2009-0846-MAPS (Apr. 29, 2009).

Grievant's grievance does not fall within the statutory definition of "grievance" in W. Va. Code § 6C-2-2 *et seq.* Further W. Va. Code § 6C-2-2(i)(2) further states that "[g]rievance" does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§§ 5-16-1, *et seq.*], chapter five of this code, retirement or any other matter in which the authority to act is not vested with the employer. In that the West Virginia Department of Administration, the administrative agency directing the distribution of the State Employee Sick Leave Fund, is not Grievant's employer this Grievance Board has limited jurisdiction, if any, to adjudicate this dispute. The West Virginia Department of Administration is not a party to the instant grievance and Grievant failed, despite some prompting, to join said agency as an indispensable party. Therefore, the grievance as filed should be dismissed. *Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009).

The following conclusions of law support the dismissal of this grievance.

Conclusions of Law

1. As established by statute, any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Brining, et al. v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

2. For the purposes of the grievance procedure, an “employer” is the “state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multi-county vocational center, or agent thereof, using the services of an employee.” W. VA. CODE § 6C-2-2(g).

3. The Public Employees Grievance Board is an administrative agency established by the Legislature to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. W. VA. CODE § 6C-2-1(a); See *Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

4. "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority under WEST VIRGINIA CODE §§ 6C-2-1, *et seq.*

5. The Public Employees Grievance Board is not empowered with jurisdiction to resolve all dispute between a state employee and all state agencies. W. Va. Code § 6C-2-2(i)(2) further states that “[g]rievance” does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§§ 5-16-1, et seq.], chapter five of this code, retirement or any other matter in which the authority to act is not vested with the employer.

6. The West Virginia Public Employees Grievance Board Procedural Rule states the following:

6.11. Failure to State a Claim — 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.

153 C.S.R. 1 § 6.11.

7. In the fact pattern of this case, this Grievance Board lacks jurisdiction over the State entity controlling the disputed benefits. Grievant’s employer does not possess the authority to provide the relief sought by Grievant. The remedy which Grievant seeks in this grievance is unavailable through the West Virginia Public Employees Grievance Procedure.

8. This grievance as filed is ripe for dismissal.

Accordingly, Respondent's motion to dismiss is hereby **GRANTED**, and this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. See W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its

Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

DATE: October 6, 2017

**LANDON R. BROWN
ADMINISTRATIVE LAW JUDGE**