

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**DONNA JOY,  
Grievant,**

**v.**

**Docket No. 2016-1687-JefED**

**JEFFERSON COUNTY BOARD OF EDUCATION,  
Respondent.**

**DISMISSAL ORDER**

This grievance was filed by Grievant, Donna Joy, against her employer, the Jefferson County Board of Education, on May 25, 2016. The statement of grievance reads, “[o]n or about May 3, 2016, Grievant discovered that a grade issued to a student has been changed, per a directive from the building principal. This is a violation of West Virginia Code § 18-5-46.” Grievant initially sought as relief: “for the directive to be rescinded, to cease and desist from such future directives, and any other relief the grievance evaluator deems appropriate.”

Following a level one conference, the grievance was denied at level one of the grievance procedure on June 21, 2016. Grievant appealed to level two on July 6, 2016, and a mediation session was held on September 20, 2016. Grievant appealed to level three on November 21, 2016. After a review of the statement of grievance and relief sought, the undersigned Administrative Law Judge issued an Order on March 13, 2017, requiring Grievant to state clearly, in writing, the harm she has suffered, the authority of the Grievance Board to hear this grievance and grant relief, and a detailed statement of the relief sought. Respondent was given the opportunity to respond by no later than April 14, 2017. Grievant, through her attorney, Brett Offutt, submitted the required information, and

Respondent, represented by Tracey B. Eberling, Esquire, Steptoe & Johnson, PLLC, submitted a response, received by the Grievance Board on April 17, 2017, at which time this matter became mature for consideration as to whether this matter should be heard.

Grievant, in her response to the March 13, 2017 Order, regarding the relief sought stated:

The Grievant is deeply disturbed [by] the actions of the principal in this case. Changing grades violates state code, it is unprofessional, prevents learning and undermines the entire educational system. Grievant requests that the Respondent acknowledge it acted improperly in changing a student's grades. From the Grievance Board, Grievant requests an Order requiring that the Respondent cease and desist from requiring teachers to change student grades, except as authorized by W. Va. Code § 18-5-46, and from taking other actions to circumvent the statutory prohibitions, including but not limited to moving students to other classes mid-semester in order to have more favorable grading from another teacher. Grievant seeks to have the actions of the principal that form the basis of this grievance reversed where possible. Grievant seeks additional relief that the Grievance Board deems appropriate, including compensation for the mental and emotional stress caused by this matter and the accompanying physical harm the Grievant suffered.

### **Synopsis**

The statement of grievance alleges a violation of WEST VIRGINIA CODE § 18-5-46, which provides that, "[n]o teacher may be required by a principal or any other person to change a student's grade on either an individual assignment or a report card," and then provides exceptions. Grievant was not required to change a student's grade, rather a student was moved to another classroom and Grievant has alleged that teacher was required to change a grade. Grievant cannot grieve for another employee. Additionally, Grievant seeks as relief that Respondent acknowledge it was wrong, a cease and desist order, damages for mental, emotional, and physical distress, and to have the action of the principal reversed, which would require the undersigned to take actions

which would affect the rights of the student, none of which is available from the Grievance Board in this case.

The following Findings of Fact are properly made from the information in the written arguments of both parties.

### **Findings of Fact**

1. Grievant is employed by the Jefferson County Board of Education ("JBOE") as a classroom mathematics teacher at Jefferson High School.

2. Grievant was not required to change a student's grade. A student was moved from Grievant's mathematics class to a mathematics class taught by a different teacher, and the newly assigned teacher, in grading the achievements of this student, removed an assignment from the equation which Grievant had graded as missing.<sup>1</sup>

### **Discussion**

Pursuant to the Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "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."

When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004);

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<sup>1</sup> Grievant asserts that this newly assigned teacher was directed in some fasion to change the student's grade.

*Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

*Pritt, et al., v. Dep't of Health and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). In situations where “it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion.” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Grievant set forth several different requests for relief. Respondent argued that the claim should be dismissed for several reasons, including a lack of standing, and failure to seek a remedy that is available from the Grievance Board, such as damages, an apology, a cease and desist order. As Respondent correctly noted, the relief sought by Grievant is not available from the Grievance Board. More importantly, however, the grievance statement alleges a violation of WEST VIRGINIA CODE § 18-5-46, which alleged violation was not taken against Grievant.

**1. Failure to assert a Claim**

WEST VIRGINIA CODE § 18-5-46, the focus of the grievance statement, provides that, “[n]o teacher may be required by a principal or any other person to change a student’s grade on either an individual assignment or a report card unless there is clear and convincing evidence that there was a mathematical error in calculating the student’s grade.” It is clear that Grievant was not required to change a grade, rather the student in question was transferred to another classroom. Whether the newly assigned teacher was required to change a grade is of no relevance. Grievant cannot grieve for another

employee. *Super v. Randolph County Bd. of Educ.*, Docket No. 99-42-043 (Mar. 5, 1999). Accordingly, Grievant cannot assert the claim that WEST VIRGINIA CODE § 18-5-46 was violated.

## **2. Grievant's request for admission of wrongdoing**

This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't. of Trans./Div. of Highways*, Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, 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). "[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). "The Grievance Board has also held, 'a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.' *Emrick, supra.*" *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008).

With regard to the stated relief sought that “Respondent acknowledge it acted improperly,” this would be a declaration that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board.

### **3. Request for damages**

With regard to the claim for compensation for mental and emotional stress and physical harm, the Grievance Board has never awarded punitive or tort-like damages in making an employee whole.

*W. Va. Code* § 29-6A-5(b) allows for the provision of “fair and equitable” relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep’t of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

*Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006).

### **4. Request for Cease and Desist Order**

Grievant requested that an Order be entered requiring Respondent to “cease and desist from requiring teachers to change student grades, except as authorized by *W. Va. Code* § 18-5-46, and from taking other actions to circumvent the statutory prohibitions, including but not limited to moving students to other classes mid-semester in order to have more favorable grading from another teacher.” First, Grievant was not required to change a grade, so she is not entitled to relief that would involve the issue of whether Respondent can require that a grade be changed.

Second, Grievant is essentially asking the Grievance Board to tell Respondent to follow the law. The Grievance Board is not the proper forum for such an Order, which would have no force and effect and be meaningless. The Grievance Board has no enforcement powers, and telling Respondent to follow the law is something it is already required to do.

Injunctive relief is an extraordinary remedy, particularly in administrative proceedings. *Appalachian Power Co. v. W. Va. Public Service Commission*, 296 S.E.2d 887 (W. Va. 1982). In the few cases in which cease and desist orders have been issued at Level IV, it was established that the employer had engaged in a pattern of harassment, discrimination or other egregious conduct, and that it was likely that the conduct would continue. See, *Helvey v. W. Va. Workers' Compensation Fund*, Docket No. 91-WCF-034 (Mar. 30, 1992); *White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (Mar. 30, 1994).

*Baker v. Bd. of Dir./Concord College*, Docket No. 97-BOD-265 (Oct. 8, 1997).

As to the request that the action be reversed, Grievant is asking the undersigned to change a student's grade, and/or return the student to Grievant's classroom.<sup>2</sup> This relief would affect the rights of the student, would require that the student be made a party to this grievance, and that the undersigned make a decision in the best interests of the student. The purpose of the grievance procedure is to resolve workplace issues between the employer and the employee. The Grievance Board has not been granted jurisdiction over students, nor has it been granted any authority to evaluate student welfare or make changes to a student's grades or classroom assignments. The Grievance Board has no jurisdiction to grant this relief.

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<sup>2</sup> Respondent indicated in its written proposals that the student has graduated, making this remedy unavailable if true.

Further, Grievant did not assert that Respondent violated any statute, rule, regulation or policy in moving the student in question from her classroom. Whether a student should be moved from one classroom to another is not Grievant's decision, but is a management decision, with which she disagreed. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Dep't of Transp.*, Docket No. 96-DOH-247 (Aug. 29, 1997).

[I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources*, Docket No. 97-HHR-461 (June 9, 1999).

While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.

*Board, et al., v. W. Va. Dep't of Health and Human Resources*, Docket No. 99-HHR-329 (Feb. 2, 2000).

*Frame v. Dep't of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

The following Conclusions of Law support the dismissal of this grievance.



### **Conclusions of Law**

1. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 6.11 (2008).

2. Grievant cannot grieve for another employee. *Super v. Randolph County Bd. of Educ.*, Docket No. 99-42-043 (Mar. 5, 1999). Accordingly, there is no basis for an assertion by Grievant that WEST VIRGINIA CODE § 18-5-46 was violated in this case.

3. “[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board.” *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

4. The Grievance Board does not award tort-like or punitive damages.

*W. Va. Code* § 29-6A-5(b) allows for the provision of “fair and equitable” relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep’t of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

*Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006).

5. Injunctive relief is an extraordinary remedy, particularly in administrative proceedings. *Appalachian Power Co. v. W. Va. Public Service Commission*, 296 S.E.2d 887 (W. Va. 1982). In the few cases in which cease and desist orders have been issued at Level IV, it was established that the employer had engaged in a pattern of harassment, discrimination or other

egregious conduct, and that it was likely that the conduct would continue. See, *Helvey v. W. Va. Workers' Compensation Fund*, Docket No. 91-WCF-034 (Mar. 30, 1992); *White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (Mar. 30, 1994).

*Baker v. Bd. of Dir./Concord College*, Docket No. 97-BOD-265 (Oct. 8, 1997).

6. The purpose of the grievance procedure is to resolve workplace issues between the employer and the employee. The Grievance Board has not been granted jurisdiction over students, nor has it been granted any authority to evaluate student welfare or make changes to a student's grades or classroom assignments.

7. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Dep't of Transp.*, Docket No. 96-DOH-247 (Aug. 29, 1997).

[I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaiff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources*, Docket No. 97-HHR-461 (June 9, 1999).

While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. See *Skaiff, supra*.

*Board, et al., v. W. Va. Dep't of Health and Human Resources*, Docket No. 99-HHR-329 (Feb. 2, 2000).

*Frame v. Dep't of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board at level three.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal 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: May 16, 2017

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**BRENDA L. GOULD**  
Deputy Chief Administrative Law Judge