

**THE WEST VIRGINIA  
PUBLIC EMPLOYEES GRIEVANCE BOARD**

**AARON L. WHITE,**

**Grievant,**

**v.**

**DOCKET NO. 2017-2488-CONS**

**DIVISION OF CORRECTIONS/MOUNT  
OLIVE CORRECTIONAL COMPLEX,**

**Respondent.**

**DISMISSAL ORDER**

Aaron L. White ("Grievant") filed a grievance on June 1, 2015, against his employer, the Division of Corrections ("Respondent" or "DOC"), concerning an allegedly improper entry in his personnel record. Grievant's statement of grievance reads:

On 31 May 2017 I was reviewing my personell (*sic.*) file when I came across the attached Memo regarding my fitness for duty by Dr. Steven Cody. This is in direct violation of the HIPAA Privacy Rule and Civil Rights Violations. This type of information (*sic.*) should have been kept in Tanya Harrison's Office instead of the Personell (*sic.*) Office where Staff could easily access my information (*sic.*). The named Staff on this Memo, David Ballard, Katherine Hess and Tanya Harrison should be held accountable for such a total disregard to One's Privacy and Civil Rights.

As relief, Grievant sought "Compensatory Damages in the amount of 100,000.00 for Emotional Distress." This grievance was assigned Docket Number 2017-2284-MAPS.

Contrary to the procedure set forth in the grievance statute, W. Va. Code § 6C-2-1, *et seq.*, Grievant submitted this grievance directly to Level Two. On June 13, 2017, Chief Administrative Law Judge Billie Thacker Catlett transferred this grievance back to Level One for processing in accordance with the statute. However, Respondent had

already waived this grievance to Level Two on June 12, 2012, because the Level One Hearing Examiner did not have authority to grant the relief requested. Thereafter, on July 7, 2017, Chief Administrative Law Judge Billie Thacker Catlett joined the West Virginia Division of Personnel as an essential party, and transferred the grievance to Level Two for mediation. A Level Two mediation session on this grievance was thereafter scheduled for August 31, 2017.

On June 27, 2017, Grievant filed a related grievance stating “Medical Records in a less secure file in Human Resources when they should have been secured in Tany[a] Harrison’s Office by her own admission. Therefore violated HIPAA Law.” As relief for this grievance, Grievant requested “\$100,000.00 in Compensation for Emotional Distress.” This grievance was assigned Docket Number 2017-2486-MAPS. On July 6, 2017, the Level One Hearing Examiner waived this grievance to Level Two based on inability to grant the relief sought. Subsequently, on July 27, 2017, Deputy Chief Administrative Law Judge Brenda L. Gould consolidated this grievance with Docket Number 2017-2284-MAPS, and assigned Docket Number 2017-2288-CONS to the consolidated grievance. In addition, Deputy Chief Administrative Law Judge Gould dismissed the West Virginia Division of Personnel as a party, finding that the Division of Personnel had been joined in error.

On September 1, 2017, Administrative Law Judge William B. McGinley entered an Order of Unsuccessful Mediation in this consolidated matter. Subsequently, on October 20, 2017, a Level Three hearing on this consolidated grievance was set for December 4, 2017. On November 21, 2017, Respondent, by counsel, John Boothroyd, Assistant

Attorney General, filed a Motion to Dismiss the consolidated grievance, asserting that the remedy sought by Grievant is unavailable through the statutory grievance procedure for public employees in West Virginia.

Grievant, who appeared *pro se* in this matter, was solicited for a response to Respondent's Motion to Dismiss, and the evidentiary hearing set for December 4, 2017, was continued, pending a ruling on the motion. On November 29, 2017, Grievant submitted a short response via electronic correspondence stating: "I do not want to dismiss these hearings due to the illegal practices at Mt. Olive." Later that same day, Grievant submitted a second brief response via electronic correspondence which stated: "Also these are not 'Tort like Damages' but actual Damages that I continue to Suffer." Thereafter, on December 4, 2017, Grievant submitted a written response by mail which stated:

I do not want my Hearing, 2017-2482 and 2488 Dismissed due to all the Illegal Activity that occurred at Mt. Olive. I want to be heard and I want all the wrongs done to me corrected thru my Legal Rights.

Upon receipt of Grievant's response, this motion became ready for decision on December 4, 2017.

### **Synopsis**

Grievant complains that DOC violated the HIPAA Privacy Rule and unspecified civil rights provisions by filing correspondence related to a fitness for duty examination which he had undergone in his personnel file, rather than a more secure medical file. For purposes of ruling upon a motion to dismiss, it shall be presumed that all facts alleged in the grievance are true. Respondent contends that even if Grievant's rights were violated

as alleged, the remedy sought, monetary damages for emotional distress, is not available through the statutory grievance procedure for public employees in West Virginia. This Grievance Board has previously determined in multiple grievance rulings that damages such as Grievant is seeking may not be obtained through the public employee grievance procedures. Accordingly, this grievance must be dismissed.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the available pleadings:

### **Findings of Fact**

1. Grievant is employed by the Respondent Division of Corrections at Mount Olive Correctional Complex.

2. Grievant submitted grievances on June 1, 2017, and June 27, 2017, both of which related to personal medical information being stored by his supervisors in his personnel file, or some other unprotected location which was improper or illegal for the type of information in question.

3. In each grievance filed, the only relief Grievant requested was \$100,000.00 in compensation for emotional distress.

4. Consistent with this Grievance Board's procedural practice, these grievances were consolidated for processing on July 27, 2017.

### **Discussion**

When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. *Frost v. Bluefield State College*, Docket No. 2012-0055-BSC (Sept. 22, 2014),

*aff'd*, Cir. Ct. of Kanawha County No. 14-AA-104 (July 22, 2015). See *Higginbotham v. Dep't of Public Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Cir. Ct. of Mason County, No. 96-C-02 (June 17, 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant alleges that his privacy and civil rights were violated by his employer and seeks a hearing to establish those violations. Respondent DOC has submitted a Motion to Dismiss, which contends that even if Grievant establishes the violations he is claiming, he will still not be entitled to the only remedy he is seeking, financial compensation for emotional distress. Therefore, the question to be decided is whether, even if DOC improperly placed personal medical information in an accessible location in violation of Grievant's privacy and civil rights, may he recover the damages he is requesting?

Ordinarily, the relief or remedy provided to a grieving employee under the grievance procedure involves a "make-whole" remedy, intended to restore the grievant to his or her rightful place as an employee. *Frost v. Bluefield State College*, Docket No. 2013-2074-BSC (Mar. 19, 2015); *Matney v. Dep't of Health & Human Res.*, Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Barker v. Lincoln County Bd. of Educ.*, Docket No. 98-22-496 (Mar. 30, 1999). See *Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992). However, the Grievance Board's ability to grant relief to an employee is not

unlimited. See generally, *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995). For example, the Grievance Board does not have jurisdiction over claims based upon actions of defamation. *Archer v. W. Va. Bd. of Trustees at Marshall Univ.*, Docket No. 94-BOT-138 (Sept. 7, 1994). More particularly, this Grievance Board has consistently concluded that it does not have authority to award punitive or tort-like damages for pain and suffering. *Troutman v. Dep't of Health & Human Res.*, Docket No. 2013-0630-DHHR (Apr. 26, 2013); *Roberts v. Dep't of Health & Human Res.*, Docket No. 2010-0953-CONS (Sept. 14, 2010); *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009); *Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (Mar. 15, 2004); *Spencer v. Bureau of Employment Programs*, Docket No. 97-BEP-139R (Aug. 31, 2000); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). See *White v. Monongalia County Bd. of Educ.*, Docket No. 2008-0586-CONS (Dec. 16, 2008); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997). The monetary damages for emotional distress which Grievant is seeking in this matter clearly involve tort-like damages which have been determined to be unavailable through the grievance procedure.

Pursuant to the Procedural Rules of the West Virginia Public Employees Grievance Board, “[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.” 156 C.S.R. 1 § 6.11 (2008). Inasmuch as Grievant is seeking a remedy which is wholly unavailable, the undersigned Administrative Law Judge finds that dismissal of this grievance is appropriate in the circumstances presented.

The following Conclusions of Law support the Decision reached.

**Conclusions of Law**

1. When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. *Frost v. Bluefield State College*, Docket No. 2012-0055-BSC (Sept. 22, 2014), *aff'd*, Cir. Ct. of Kanawha County No. 14-AA-104 (July 22, 2015). See *Higginbotham v. Dep't of Public Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Cir. Ct. of Mason County, No. 96-C-02 (June 17, 1996).

2. "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." 156 C.S.R. 1 § 6.11 (2008).

3. The Grievance Board does not have authority to award punitive or tort-like damages for pain and suffering or emotional distress. *Troutman v. Dep't of Health & Human Res.*, Docket No. 2013-0630-DHHR (Apr. 26, 2013); *Roberts v. Dep't of Health & Human Res.*, Docket No. 2010-0953-CONS (Sept. 14, 2010); *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009); *Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (Mar. 15, 2004); *Spencer v. Bureau of Employment Programs*, Docket No. 97-BEP-139R (Aug. 31, 2000); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). See *White v. Monongalia County Bd. of Educ.*, Docket No. 2008-0586-CONS (Dec. 16, 2008); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997).

4. The remedy which Grievant is seeking, \$100,000.00 in compensatory damages for emotional distress, is not available through the grievance procedure.

Accordingly, Respondent's Motion to Dismiss is hereby **GRANTED**, and this consolidated grievance is hereby **DISMISSED and STRICKEN** from the docket of this 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 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: December 13, 2017**

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**LEWIS G. BREWER**  
**Administrative Law Judge**