

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RAPHAEL ADEBULU,  
GRIEVANT,**

**V.**

**DOCKET NO. 2017-2117-MAPS**

**DIVISION OF JUVENILE SERVICES/  
LORRIE YEAGER JR. JUVENILE CENTER,  
RESPONDENT.**

**DISMISSAL ORDER**

Grievant, Raphael Adebulu, was employed by Respondent, Division of Juvenile Services, at Lorrie Yeager Jr. Juvenile Center. On April 26, 2017, Grievant filed this grievance against Respondent stating, "The conclusion of the investigation conducted was incorrect that I abused a juvenile. I did not abuse any juvenile during restraint." For relief, Grievant sought reinstatement.

On December 4, 2017, Respondent, by counsel, filed its *Motion to Dismiss* asserting the grievance must be dismissed as a prior administrative decision, from which Grievant did not appeal, found he had committed child abuse, which disqualifies him from his position. On December 15, 2017, Grievant, by counsel, filed *Grievant Raphael Adebulu's Response to Respondent Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center's Motion to Dismiss* asserting Grievant had been discriminated against, had never received a copy of the full investigation and that the grievance should not be dismissed as there was a claim upon which relief could be granted, and that the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board prevents the dismissal of the grievance without hearing. A telephone conference was scheduled with the cooperation of the parties for February 1, 2018. The telephone conference was held as scheduled on February 1, 2018. Respondent appeared by counsel, Celeste

Webb-Barber, Assistant Attorney General. Grievant failed to appear in person or by counsel, Adrian Hoosier, Lord Hoosier, PLLC. During the telephone conference, the undersigned ordered that Respondent would be permitted to supplement the motion to dismiss with the administrative decision that had been referenced in the motion. Ms. Webb-Barber left her employment shortly thereafter and did not supplement the motion. On March 1, 2018, Grievance Board staff contacted Respondent regarding the status of the supplementation of the motion. On the same date, Respondent, by counsel Kelli D. Talbott, Senior Deputy Attorney General, filed Respondent's *Motion for a Protective Order*, referencing the disclosure of an investigative report. By Order dated March 5, 2018, the undersigned clarified that it was the administrative decision that was to be supplemented and permitted additional time for Respondent to supplement the original motion with the administrative decision. By facsimile transmission on March 6, 2018, Respondent provided the October 6, 2017 *Decision of State Hearing Officer* that substantiated that Grievant had committed child abuse.

### **Synopsis**

Grievant was employed by Respondent as a counselor at Lorrie Yeager Jr. Juvenile Center and filed the instant grievance protesting his termination from that position. Respondent moved to dismiss the grievance, stating that Grievant had been found to have committed child abuse by a prior administrative decision, which disqualifies him from his former position. Grievant did not dispute that such a decision had been rendered, instead he asserted he had been discriminated against, had never received a copy of the full investigation, and that the grievance should not be dismissed as there was a claim upon which relief could be granted. He further argued that the Rules of Practice

and Procedure of the West Virginia Public Employees Grievance Board prevents the dismissal of the grievance without hearing. The Grievance Board has no authority to overturn the administrative decision of an agency that is not Grievant's employer. Grievant requests reinstatement to his position, which is relief that is wholly unavailable as he can no longer perform the essential duties of his position. Accordingly, the grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. Grievant was employed by Respondent as a counselor at Lorrie Yeager Jr. Juvenile Center and filed the instant grievance protesting his termination from that position.
2. Grievant was terminated from his employment because Child Protective Services substantiated a report of child abuse, finding Grievant had committed child abuse upon a resident of the Center.
3. Grievant appealed the substantiation of child abuse to the Department of Health and Human Resources' Board of Review.
4. By Decision of State Hearing Officer entered October 6, 2017, the Board of Review upheld the substantiation of child abuse. Grievant failed to appeal that decision to the circuit court.

### **Discussion**

"Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. §

156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “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.” W. VA. CODE ST. R. § 156-1-6.11.

Grievant first asserts that the grievance may not be dismissed without a hearing citing the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board § 156-1-6.11. This Rule does not require a hearing on a motion to dismiss. “An administrative law judge may, in the judge's discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. . . .” W. VA. CODE ST. R. § 159-1-6.6.1. The only deficiency in the record in this case was the absence of the Board of Review decision that had been cited by Respondent in the motion to dismiss. Grievant had not disputed that an administrative decision had been issued, only that he objected to the investigation and the way in which the administrative hearing had been conducted. Therefore, Grievant was not prejudiced by allowing Respondent to supplement the motion to dismiss with a copy of the administrative decision. With the copy of the prior administrative decision in the record, the decision on the motion to dismiss was then a

simple question of law, which did not require an evidentiary hearing. Grievant was provided opportunity to be heard on the legal argument in his written response to the motion and was provided an additional opportunity to be heard with the scheduling of the telephone conference, for which he failed to appear without explanation.

Grievant disputes the results of the Child Protective Services investigation that substantiated abuse and the administrative decision of the Department of Health and Human Resources' Board of Review that upheld the substantiation of abuse. The Grievance Board has no authority to overturn the decision of the Board of Review. "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 Grievance Board's jurisdiction is limited to hearing grievances, defined as "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. . . ." W. VA. CODE § 6C-2-2(i)(1). Grievant's dispute is with the findings of an agency that is not his employer. Grievant's remedy was to appeal the decision of the Board of Review to the circuit court, which he failed to do.

An employee of the Division of Juvenile Services who has been found to have committed child abuse by the Department of Health and Human Resources is no longer fit to perform the essential duties of his/her position. *Jett v. Div. of Juvenile Serv.*, Docket

No. 2009-0845-MAPS (May 27, 2009); *Elder v. Div. of Juvenile Serv.*, Docket No. 2010-0111-MAPS (Apr. 12, 2010); *Brammer v. Div. of Juvenile Serv.*, Docket No. 2015-0913-CONS (June 15, 2015). Grievant requests reinstatement to his position, which is relief that is wholly unavailable. The Grievance Board cannot reverse the decision of the Board of Review, and Grievant is no longer fit to perform the essential duties of his position because he has been found to have committed child abuse by the Department of Health and Human Resources. Therefore, this grievance must be dismissed.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

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.” W. VA. CODE ST. R. § 156-1-6.11.

3. “An administrative law judge may, in the judge's discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. . . .” W. VA. CODE ST. R. § 159-1-6.6.1.

4. “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 Grievance Board’s jurisdiction is limited to hearing grievances, defined as “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. . . .” W. VA. CODE § 6C-2-2(i)(1).

5. The Grievance Board has no authority to overturn the decision of the Board of Review which upheld the substantiation of child abuse by Grievant.

6. An employee of the Division of Juvenile Services who has been found to have committed child abuse by the Department of Health and Human Resources is no longer fit to perform the essential duties of his/her position. *Jett v. Div. of Juvenile Serv.*, Docket No. 2009-0845-MAPS (May 27, 2009); *Elder v. Div. of Juvenile Serv.*, Docket No. 2010-0111-MAPS (Apr. 12, 2010); *Brammer v. Div. of Juvenile Serv.*, Docket No. 2015-0913-CONS (June 15, 2015).

7. Grievant requests reinstatement to his position, which is relief that is wholly unavailable as he can no longer perform the essential duties of his position.

Accordingly, the grievance is **DISMISSED**.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: March 9, 2018**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**