

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA K. BAKER,

Grievant,

v.

Docket No. 2017-2458-WVUP

**WEST VIRGINIA UNIVERSITY
AT PARKERSBURG,**

Respondent.

DISMISSAL ORDER

Grievant, Debra K. Baker, filed a level one grievance against her employer, Respondent, West Virginia University at Parkersburg ("WVU-P"), dated June 19, 2017, alleging a number of claims regarding the use of her course materials, stating, in part, as follows:

DELIBERATE THEFT OF INTELLECTUAL PROPERTY
CONSISTING OF ONLINE COURSE MATERIALS FOR
GBUS 101, INCLUDING CURRENT AND CONTINUED
MISUSE OF SAME. – CRN 180 COURSE DELIVERY DATES
5/15/17-6/23/17. SCHEDULED FUTURE INFRINGEMENT—
CRN 192 COURSE DELIVERY DATES 6/26/17-8/4/17. . .

VIOLATION OF COPYRIGHT ACT OF 1976, 17 U.S.C
SECTIONS 101 AND 102—THE "WORK FOR HIRE"
DOCTRINE. . .

Violation of West Virginia Code:

WVC 18B 12-4 USE OF INTELLECTUAL PROPERTY

WVC 24-E 1-7 WORK FOR HIRE

WVC 29-22 C-3 FACILITATION OF THE
COMMERCIALIZATION OF INTELLECTUAL PROPERTY

WVC 47-2A COPYRIGHT PROTECTION. . . .¹

As the relief sought, Grievant listed the following:

1. COMPENSATION FOR EACH COURSE DELIVERED USING MY CONTENT (CRN 5455, CRN 5457, CRN 180, AND CRN 192) AT THE RATE OF \$4,000 PER SECTION. (note: Pearson Publishing was paid \$4,050 per section for use of their inferior content.)
2. ACCESS TO ANY COURSE SECTIONS NECESSARY TO VERIFY THE PAST OR FUTURE USE/MISUSE OF MY COURSE CONTENT.
3. ASSURANCE THAT FUTURE ONLINE SECTIONS, WHICH I DEVELOP ON MY OWN TIME AND USING MY OWN RESOURCES WILL BE CONSIDERED TO BE MY INTELLECTUAL PROPERTY AND WILL NOT BE COPIED WITHOUT MY CONSENT.
4. COMPENSATION FOR ANY FUTURE THEFT OF MY ONLINE COURSE MATERIALS ILLEGALLY USED TO SECURE UNIVERSITY PROFITS.
5. ASSURANCE THAT I WILL NOT BE RETALIATED AGAINST IN ANY MANNER FOR RAISING THESE ISSUES, INCLUDING CHANGES TO MY TEACHING SCHEDULE.²

A level one conference was conducted on July 10, 2017. This grievance was denied by decision dated July 28, 2017. Grievant appealed to level two on August 8, 2017. A level two mediation was conducted on October 4, 2017. Grievant perfected her appeal to level three on October 12, 2017. Thereafter, this matter was scheduled for a

¹ Grievant's statements of grievance are entirely type-written on pages attached to the standard form. In such, Grievant uses capitalization as indicated herein. This is a quotation, and the ALJ has not added this capitalization for emphasis.

² In her statement of grievance, Grievant used capitalization as indicated herein. This is a quotation, and the ALJ has not added this capitalization.

level three hearing on December 12, 2017. Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. Grievant appeared in this matter *pro se*.

It is noted that, on her own volition, Grievant apparently amended her statement of grievance and relief sought at each level, and attempted to change her claim during the telephonic hearing on December 11, 2017, to include new claims. In her level two appeal, Grievant's statement of grievance and relief sought grew from three pages attached to the form, to eight type-written pages, plus twenty-one tabbed, multipage exhibits. Further, in her appeal to level three, Grievant changed the relief sought to the following:

1. WRITTEN CONFIRMATION THAT FACULTY'S PERSONAL SYLLABUS, COURSE NOTES, LECTURE NOTES, STUDY AIDS, AND EXAMS ARE PROTECTED INTELLECTUAL PROPERTY UNDER THE PRINCIPLE OF ACADEMIC FREEDOM LAW AND WILL NOT BE PLAGIARIZED OR USED IN THE FUTURE WITHOUT PERMISSION FROM THE FACULTY MEMBER.
2. Payment for independent development of GBUS 101 WITH COLL 101 EMBEDDED, which WVUP took for its use and claims as its property, as explicitly provided by the employee contract dated August[,] 2016 for the sum of \$4,800, (Based on 60 hours of work @ \$80/hr.)

OR

3. COMPENSATION (ROYALTY FEE) FOR EACH COURSE DELIVERED USING MY CONTENT (CRN 5455, CRN 5457, CRN 180, AND CRN 192) AT THE RATE OF \$4,050 PER SECTION. (note: Pearson publishing was paid \$4,050 per section for use of their content).

Courses that used/copied my entire gbus 101 online content:

Crn 5526, 5455, 5457, 180 @ \$4,050 (same amt paid for Pearson content)= \$16,200

Courses that plagiarized my syllabus, assignments, discussion: Crn 192

4. ACCESS TO ANY COURSE SECTIONS NECESSARY TO VERIFY THE PAST OR FUTURE USE/MISUSE OF MY COURSE CONTENT.
5. ASSURANCE THAT OTHER ONLINE SECTIONS (MGMT 220, MGMT 322, MKTG 230) WHICH I DEVELOPED ON MY OWN TIME AND USING MY OWN RESOURCES WILL BE CONSIDERED TO BE MY INTELLECTUAL PROPERTY AND WILL NOT BE COPIED WITHOUT MY CONSENT.
6. ASSURANCE THAT I WILL NOT BE RETALIATED AGAINST IN ANY MANNER FOR RAISING THESE ISSUES.³

Respondent filed a Motion to Dismiss the grievance on December 4, 2017, asserting that the Grievance Board lacks jurisdiction, that the relief sought is wholly unavailable through the grievance procedure, that Grievant's claim is barred by the doctrine of Constitutional Immunity, and lack of standing. By email dated December 6, 2017, the Grievance Board informed the Grievant that she had until December 8, 2017, to respond in writing to the motion, and included for her review a copy of Respondent's Motion to Dimiss. Grievant filed her written response to Respondent's Motion to Dismiss by email dated December 8, 2017. Thereafter, the Motion to Dismiss was scheduled to be heard at a telephonic hearing on December 11, 2017 at 10:00 a.m. On December 11, 2017, prior to the telephonic hearing, Grievant submitted a supplement to her response to the Motion to Dismiss to the undersigned ALJ and counsel for Respondent. At the telephonic hearing, the ALJ heard the arguments of both parties. Based upon the parties'

³ Again, this is an exact quotation from the level three statement of grievance. The ALJ has included capitalization as it is written in that form.

written submissions, supplements, and oral arguments, the ALJ granted the Motion to Dismiss.

Synopsis

Grievant is employed by Respondent as a professor. Grievant alleges claims involving intellectual property rights and copyright infringement, and seeks various remedies, including tort-like damages. Respondent moved to dismiss this grievance for a variety of reasons, including, but not limited to, lack of jurisdiction, and that Grievant seeks remedies that are wholly unavailable through the grievance process. Respondent has proved by a preponderance of the evidence that its Motion to Dismiss should be granted. Therefore, this 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. Upon information and belief, at the times relevant herein, Grievant was employed by Respondent as a professor.
2. Grievant initiated this matter seeking money damages for alleged theft of intellectual property and copyright infringement. Grievant did not allege any violations of her contract.
3. Upon information and belief, Grievant has not been separated from employment, and has made no claim for back pay.
4. Grievant states in her grievance that she is seeking monetary damages to compensate her for the alleged theft of intellectual property and copyright infringement.

Further, Grievant has asked for relief for other employees, as well as relief for potential future events.

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. § 159-1-6.2 (2008). The issue before the undersigned is Respondent’s Motion to Dismiss. The burden of proof is on the Respondent, the moving party, to demonstrate that the motion should be granted by a preponderance of the evidence. “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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

“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)).

“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. § 159-1-6.11 (2008). The Grievance Board has no authority to award relief for tort-like claims or punitive damages. See *Vest v. Bd.*

of *Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995). Further, “[b]ecause 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. ‘This Grievance Board does not issue advisory opinions. *Dooley, et al., v. Dep’t of Transp.*, 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).’ *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

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). “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).

The Grievance Board has no statutory authority to address issues of copyright infringement or theft of intellectual property. Therefore, this is not the proper forum for such claims. Further, the relief Grievant seeks in this matter is wholly unavailable to her

through the grievance procedure. As reflected in her statements of grievance, Grievant appears to seek tort-like damages for her claims. She is asking for monetary damages, not as back pay, but as the remedy for her intellectual property and copyright infringement claims. At least some of the relief she seeks appears to be punitive in nature. The Grievance Board has no authority to award such damages even if it could hear the claims Grievant has raised.

Lastly, Grievant also seeks money damages for potential future events. With respect to such, Grievant has not claimed an actual injury-in-fact. Therefore, the relief Grievant seeks is not only tort-like in nature but also premature and speculative. Grievant further appears to seek relief for other employees who are not parties to this grievance. “Just as future events cannot be grieved through the grievance process, and one cannot file grievances for occurrences that do not affect him or her. See W. Va. Code § 6C-2-4(a).” *Clark v. Raleigh County Bd. of Educ.*, Docket No. 2016-1611-RaLED (Nov. 17, 2016), *aff’d* Kan. Co. Cir. Ct., Civil Action No. 16-AA-123 (Apr. 7, 2017).

Respondent has proved by a preponderance of the evidence that its Motion to Dismiss should be granted. Accordingly, for the reasons set forth herein, this grievance is 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. § 159-1-6.2 (2008).

2. The burden of proof is on the Respondent, the moving party, to demonstrate that the motion should be granted by a preponderance of the evidence. “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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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. § 159-1-6.11 (2008).

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)).

5. The Grievance Board has no authority to award relief for tort-like claims or punitive damages. See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

6. “Because 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. ‘This Grievance Board does not issue advisory opinions. *Dooley*,

et al., v. Dep't of Transp., 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).’ *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

7. “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).

8. “Just as future events cannot be grieved through the grievance process, and one cannot file grievances for occurrences that do not affect him or her. See W. Va. Code § 6C-2-4(a).” *Clark v. Raleigh County Bd. of Educ.*, Docket No. 2016-1611-RalED (Nov. 17, 2016), *aff'd* Kan. Co. Cir. Ct., Civil Action No. 16-AA-123 (Apr. 7, 2017).

9. Respondent proved by a preponderance of the evidence that the Grievance Board has no authority to address Grievant’s claims of intellectual property theft and copyright infringement. Even if her claims could be addressed, the relief Grievant seeks is wholly unavailable to her through the grievance process.

Accordingly, this Grievance is **DISMISSED**.

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 (eff. July 7, 2008).

DATE: January 26, 2018.

Carrie H. LeFevre
Administrative Law Judge