

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**ROBIN DAVIS, et al.**  
**Grievants,**

**v.**

**Docket No. 2018-0435-CONS**

**DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES/MILDRED  
MITCHELL-BATEMAN HOSPITAL,**  
**Respondent.**

## **DISMISSAL ORDER**

Robin Davis and her fellow Grievants<sup>1</sup> are employed by Respondent Department of Health and Human Resources (“DHHR”) and assigned to work at Mildred Mitchell-Bateman Hospital (“Hospital”). Each of the Grievants filed a Level One grievance form alleging that they had not received a pay increase or supplement which had been paid to other employees at the Hospital. As relief Grievants seek to be paid the salary increase plus back pay with interest. Separate Level One decisions were issued on September 7, 2017, denying the grievances for lack of jurisdiction. Grievants appealed to Level Two and the grievances were consolidated by Order dated October 13, 2017.

A mediation was conducted at Level Two. By Order dated January 30, 2018, the grievances were placed in abeyance until March 30, 2018, to “allow the parties additional time to exchange information and review documents.” An Order of Unsuccessful Mediation was entered on April 3, 2018. Grievants appealed to Level

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<sup>1</sup> In addition to Robin Davis the grievants are: Justin Carter, Cindy Herrera, Jessica Welker-Rees, John Herrera, Jeffrey Bentley, Melissa Smith-McDonald, Jeannie Herrera, Ashley Nicole Jarrell, and James Matthews Kouns.

Three on the same day. Respondent filed a Motion to Dismiss on June 8, 2018. The Grievance Board notified Grievants of the motion and set the date of response to be no later than June 25, 2018. No response has been received and this matter is now mature for a ruling on the Motion to Dismiss.<sup>2</sup>

### **Synopsis**

Grievants contest their exclusion from pay increases received by other employees of Respondent at Mildred Mitchell-Bateman Hospital with whom they feel they are similarly situated. These pay increases were received either due to the enactment of a particular statute or under a Circuit Court settlement agreement and Order in an ongoing lawsuit. The statute specifically exempts the implementation of its pay increase from the grievance process. The Grievance Board lacks jurisdiction to enforce a Circuit Court settlement agreement or Order. Accordingly, Respondent's Motion to Dismiss is GRANTED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievants are employed by the DHHR as psychiatrists at Mildred Mitchell-Bateman Hospital (Bateman).
2. In an ongoing Circuit Court lawsuit, commonly referred to as the Hartley case, Respondent had entered into a settlement agreement that would provide pay

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<sup>2</sup> Grievants are represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent is represented by Katherine A. Campbell, Assistant Attorney General.

increases to certain types of employees of Bateman, which agreement was memorialized in an agreed order.

3. Shortly before the entry of the agreed order, the legislature enacted a statute, which Respondent alleges was for the effectuation of the *Harley* agreed order. The statute required DHHR to adjust rates of pay for some employees at Bateman to better support recruitment and retention. The statute specifically exempts pay increases granted under the statute from the grievance process. See W. VA. CODE § 5-5-4a.

4. After passage of the statute, some employees at Bateman who Respondent identified as involved in direct patient care, received salary increases, while other employees at Bateman did not. Grievants did not receive these salary increases.

5. Grievants are now contesting the fact that they did not receive these increases by filing grievances with the West Virginia Public Employees Grievance Procedure.

### **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.*" Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008). This issue before the undersigned is Respondent's Motion to Dismiss. The burden of proof is on the Respondent to demonstrate that the motion should be granted by a preponderance of the evidence.

"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 including: (i) Any violation, misapplication or misinterpretation regarding compensation. . . ." W. VA. CODE § 6C-2-2(i)(1).

Although issues involving compensation and discrimination are generally grievable, the pay increases Grievants allege they were denied were granted by an order of the Circuit Court in the *Hartley* case. The Grievance Board lacks jurisdiction to hear grievances related to raises granted in that case. The Legislature expressly exempted actions pursuant to W. VA. CODE § 5-5-4a from the jurisdiction of the Grievance Board. The statute specifically states:

Due to the limits of funding, the implementation of the pay rates and employment requirements shall not be subject to the provisions of article two, chapter six-c of this code. The provisions of this section are rehabilitative in nature and it is the specific intent of the Legislature that no private cause of action, either express or implied, shall arise pursuant to the provisions or implementation of this section.

W. VA. CODE § 5-5-4a(c). Further, the Grievance Board lacks jurisdiction to enforce the Circuit Court order. "The Circuit Court is a court of general jurisdiction and is the court

of appeal from Grievance Board decisions. An inferior court has no authority to enforce the order of a superior court. . . . The Grievance Board lacks the authority to even enforce its own orders; that power being reserved to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5(a).” *Miser et al. v. Dep’t of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2013-1324-CONS (May 6, 2014).

Attempts to frame grievances related to the *Hartley* Order as general allegations of “discrimination” or “favoritism” as those terms are defined in W. VA. CODE § 6C-2-2 (d) & (h), in an effort to avoid the Legislature’s action of removing grievances related to *Harley* salary adjustments from the West Virginia Public Employees Grievance Board’s jurisdiction in W. VA. CODE §§ 5-5-4 & 5-5-4a have been rejected. *Latif, et al. v. Dep’t of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2013-2243-CONS (June 18, 2014). Any differences created between direct care giver salaries and Grievants’ salaries as result of those raises, are inherently part of the *Hartley* matter which the Legislature removed from the Grievance Board’s jurisdiction. Accordingly, West Virginia Public Employees Grievance Board lacks jurisdiction in this matter and the consolidated grievances must be DISMISSED. *Miser et al., supra*.

### **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.*” Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008).

2. "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)).

3. 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 including: (i) Any violation, misapplication or misinterpretation regarding compensation. . . ." W. VA. CODE § 6C-2-2(i)(1).

4. "The Circuit Court is a court of general jurisdiction and is the court of appeal from Grievance Board decisions. An inferior court has no authority to enforce the order of a superior court. . . . The Grievance Board lacks the authority to even enforce its own orders; that power being reserved to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5(a)." *Miser et al. v. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2013-2243-CONS (May 6, 2014).

5. Although issues involving compensation, discrimination and favoritism are generally grievable, the pay increases Grievants allege they were denied were granted either as a result of the enactment of West Virginia Code section 5-5-4a or the order of the Circuit Court in the *Hartley* case. The Grievance Board lacks jurisdiction to hear the grievance in either situation. *Miser et al. v. Dep't of Health & Human Res./Mildred*

*Mitchell-Bateman Hosp.*, Docket No. 2013-2243-CONS (May 6, 2014); *Latif, et al. v. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2013-2243-CONS (June 18, 2014).

Accordingly, the consolidated grievances are 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* 156 C.S.R. 1 § 6.20 (2008).

**DATE: JULY 10, 2018.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**