

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES DOZER, JR.,

Grievant,

v.

Docket No. 2016-1238-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,**

Respondent.

DISMISSAL ORDER

Comes now Respondent, Department of Human Resources/William J. Sharpe Jr. Hospital (“DHHR”), by counsel, James (“Jake”) Wegman, Assistant Attorney General, and moves the Public Employees Grievance Board to dismiss a grievance filed by James Dozer, Jr., an employee at William R. Sharpe Jr. Hospital, for lack of jurisdiction.¹ After a careful review of the pleadings and other documentation presented, the undersigned Administrative Law Judge hereby **GRANTS** Respondent’s Motion to Dismiss.

PROCEDURAL HISTORY

Grievant, James Dozer, Jr., is employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital (“DHHR”). Grievant filed a grievance on February 6, 2016, alleging he was “improperly denied a 3% raise”, and requesting to be made whole including back pay with interest. Grievant is represented by Gordon Simmons, UE Local 170, WV Public Workers Union.

The grievance was dismissed by Level One Grievance Evaluator Christina Bailey for lack of jurisdiction by Order dated March 4, 2016. Grievant appealed to Level Two on

¹Michael Bevers, Assistant Attorney General, was reassigned this case from Jake Wegman on or about May 3, 2017.

March 12, 2016. A Level Two Mediation was scheduled for May 12, 2016, and an Order of Unsuccessful Mediation was filed on May 16, 2016. Thereafter, Grievant appealed to Level Three on May 22, 2016. A Level Three hearing was scheduled for September 29, 2016. Respondent filed its Motion to Dismiss on August 17, 2016. Grievant filed his Response on August 19, 2016, requesting that this matter be placed in abeyance pending a decision from the Circuit Court of Kanawha County of a virtually “identical” grievance appeal, styled *Mills v. W. Va. Dept. of Health and Human Svcs./Mildred Mitchell-Bateman Hosp.*, Civil Action No. 15-AA-134.² This matter was placed in abeyance by Order dated September 21, 2016.

The Grievance Board was informed by Katherine A. Campbell, Assistant Attorney General, on March 30, 2018, that a decision had been handed down in *Mills, supra*, on March 23, 2018, and renewed DHHR’s Motion to Dismiss. The Grievance Board informed Mr. Simmons he had until April 10, 2018, to respond to the renewed Motion. No response was received by Mr. Simmons or anyone else on behalf of Grievant.

SYNOPSIS

Grievant is employed by Respondent at William J. Sharpe, Jr. Hospital. Grievant asserts that he was improperly denied a pay increase pursuant to a State Board of Personnel proposal, and that such was also discriminatory. Respondent denies Grievant’s claims and asserts that the Grievance Board lacks jurisdiction to hear this matter pursuant to West Virginia Code § 5-5-4a, and as Grievant is seeking to enforce a circuit court order. Grievant is seeking a pay increase granted by Order of the Circuit

² See, Grievant’s Response to Respondent’s Motion to Dismiss, wherein Mr. Simmons says, “[T]he issue of pay raises and their discriminatory implementation by Respondent is, in substance, identical in both *Mills* and the instant grievance.”

Court of Kanawha County, West Virginia. The Grievance Board lacks jurisdiction to enforce a Circuit Court order, or to compel compliance therewith. Further, West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Therefore, Respondent's Motion to Dismiss should be granted, and this grievance, **DISMISSED**.

FACTUAL BACKGROUND

This grievance arose from a case brought by a group of patients at Huntington State Hospital, which later become Mildred Mitchell-Bateman Hospital ("Bateman Hospital"), "seeking judicial intervention to attempt to improve the poor conditions in West Virginia's mental institutions. *West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities v. E.H., et al.*, 236 W. Va. 194, 778 S.E.2d 643 (2015)." *Mills, supra*.

DHHR agreed to provide pay increases for direct patient care workers at the State's psychiatric facilities, Bateman Hospital and William J. Sharpe, Jr. Hospital. The agreement was memorialized in an *Agreed Order* written by Kanawha County Circuit Court Judge Louis H. Bloom dated July 2, 2009. Subsequently, the West Virginia Legislature enacted *W. Va. Code* § 5-5-4a during an extraordinary session in 2009. The new statute provided funding for increased pay rates to support the recruitment and retention of direct patient care employees at Bateman and Sharpe Hospitals through an appropriation to DHHR. The statute directed the Division of Personnel and DHHR to jointly develop a plan for implementation of the increased pay rates. The statute specifically exempts these actions from the Public Employees Grievance Procedure and from private causes of action. *W. Va. Code* S 5-5-4a(c). *See, Mills, supra*.

DHHR presented its proposed plan to Judge Boom on August 1, 2014. The plan was accepted, and by written *Order* dated August 13, 2014, Judge Bloom ordered DHHR to implement the raises, special hiring rates, and retention incentives. *Mills, supra*. The State Personnel Board approved what became “State Personnel Board Proposal 2668), and it went into effect in January 2015.

Mills filed her grievance on March 3, 2015. It was dismissed at all levels of the grievance process on the basis that the Grievance Board lacked jurisdiction to hear grievances arising from the *Hartley* case and Proposal 2668. The grievance was ultimately appealed to Kanawha County Circuit Court on December 23, 2015. A Final Order Denying Petition for Appeal and Affirming Order of The Public Employees Grievance Board was entered by Kanawha County Circuit Judge Jennifer F. Bailey on March 23, 2018, upholding the Grievance Board’s conclusion that it lacked jurisdiction to hear cases arising from the *Hartley* case and Proposal 2668.

FINDINGS OF FACT

1. Grievant is employed at William J. Sharpe, Jr. Hospital.³
2. DHHR agreed to provide pay increases for direct patient care workers at the State’s psychiatric facilities, Bateman Hospital and William J. Sharpe, Jr. Hospital, as a result of a case brought by a group of patients at Huntington State Hospital, which later become Mildred Mitchell-Bateman Hospital (“Bateman Hospital”), “seeking judicial intervention to attempt to improve the poor conditions in West Virginia’s mental

³ There is no mention of what Grievant’s position at Sharpe is in any of the documentation in this case. The employment categories affected by the *Hartley* pay increases as specifically enumerated. The grievant’s position in *Mills* fell outside of these categories. Since the issue of Grievant’s employment category was not part and parcel of his grievance, the undersigned accepts that Grievant’s employment category also falls outside the enumerated positions affected by the pay increases.

institutions. *West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities v. E.H., et al.*, 236 W. Va. 194, 778 S.E.2d 643 (2015).” *Mills v. Dept. of Health and Human Svcs./Mildred Mitchell-Batement Hosp.*, Docket No. 2015-0945-DHHR (Dec. 1, 2015); *aff’d Cir. Ct. Kan. Cty., Civil Action No. 15-AA-134* (Mar. 23, 2018).

3. On October 10, 2014, the State Personnel Board held a special meeting to consider Respondent’s proposal regarding the implementation of recruitment and retention incentives as well as special hiring rates for direct care employees of Mildred Mitchell-Bateman and William R. Sharpe, Jr. Hospitals. The details of this proposal, commonly referred to as Proposal 2668, were set forth in a letter from DHHR to Jason C. Pizatella, Chairman of the State Personnel Board, dated October 10, 2014. *Mills, supra*.

5. The October 10, 2014, letter to Chairman Pizatella states in the first paragraph that the proposal was being submitted pursuant to “an order issued by Kanawha County Circuit Court Judge Bloom on August 1, 2014.” The letter further referred to the proposal as being “court ordered.” Health service workers were among the classifications designated to receive pay increases in Respondent’s proposal to the State Personnel Board. *Mills, supra*.

7. The State Personnel Board approved Respondent’s Proposal 2668 at its meeting on or about October 10, 2014. The pay increases proposed therein were implemented in or about January 2015. *Mills, supra*.

8. Grievant did not receive a pay increase.

DISCUSSION

Respondent argues that the Grievance Board lacks jurisdiction to hear this matter as it seeks to enforce a circuit court order, and as the pay increase sought is exempted from the grievance procedure by West Virginia Code § 5-5-4a. Grievant asserts that he should have received a pay increase in January 2015 when the health service workers received raises. The issue in *Mills, supra*, and the instant case is identical, to-wit: Whether the Grievance Board has jurisdiction to consider issues of discrimination in awarding *Hartley* pay increases. The Grievant admits the two cases are identical, and there are no material questions of fact to be decided.

“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).

West Virginia Code § 5-5-4a specifically exempts pay increases granted pursuant thereto from the jurisdiction of the Grievance Board. Specifically, it states, in part, as follows:

. . . 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) (2014).

The Grievance Board has previously recognized that it lacks jurisdiction to enforce the pay increases and employment requirements granted pursuant to this statute. See *Miser, et al., v. Dep't of Health & Human Res.*, Docket No. 2013-1324-CONS (May 6, 2014); *Albright, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 2013-1413-CONS (June 17, 2014); *Latif, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 2013-2243-CONS (June 18, 2014); *DaSilva, et al., v. Dep't of Health and Human Res./William R. Sharpe, Jr. Hospital and Div. of Personnel*, Docket No. 2014-0733-CONS (July 25, 2014).

Further, the Grievance Board lacks jurisdiction to enforce an order of a circuit court. "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.*, Docket No. 2013-1324-CONS (May 6, 2014). See also *Albright, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 2013-1413-CONS (June 17, 2014); *Latif, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 2013-2243-CONS (June 18, 2014); *DaSilva, et al., v. Dep't of Health and Human Res./William*

R. Sharpe, Jr. Hospital and Div. of Personnel, Docket No. 2014-0733-CONS (July 25, 2014).

The Grievance Board also lacks jurisdiction to hear Grievant's discrimination claim. A similar issue was addressed in the case of *Latif, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 2013-2243-CONS (June 18, 2014). In addressing the discrimination and/or favoritism claims of the grievants, the administrative law judge stated as follows: "[g]rievants attempt to frame their grievances 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 Hartley salary adjustments from the West Virginia Public Employees Grievance Board's jurisdiction in W. Va. Code §§ 5-5-4 & 5-5-4a. It is clear however, that the raises the other psychiatrists employed at Bateman received were given pursuant to the Hartley case. Any differences created between their salaries and Grievants' salaries as a 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" *Id.*

The issue in *Mills, supra*, and the instant case is identical, to-wit: Whether the Grievance Board has jurisdiction to consider issues of discrimination in awarding *Hartley* pay increases. The parties admit the two cases are identical, and there are no material questions of fact to be decided. Therefore, based on the Circuit Court's decision in *Mills, supra*, the Grievance Board lacks jurisdiction in this matter, and the grievance must be 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. Respondent has the burden of proving by a preponderance of the evidence that its motion to dismiss should be granted. “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. “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)).

4. 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).

5. The Legislature provided for pay increases and employment requirements

to support the recruitment and retention for certain types of employees at William Jr. Sharpe, Jr. Hospital, but specifically exempted the implementation of these pay increases and employment requirements from the grievance process. See W. Va. Code § 5-5-4a.

6. “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.*, Docket No. 2013-1324-CONS (May 6, 2014). See also *Albright, et al., v. Dep’t of Health and Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 2013-1413-CONS (June 17, 2014); *Latif, et al., v. Dep’t of Health and Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 20132243-CONS (June 18, 2014); *DaSilva, et al., v. Dep’t of Health and Human Res./William R. Sharpe, Jr. Hospital and Div. of Personnel*, Docket No. 2014-0733-CONS (July 25, 2014).

7. Although issues involving compensation are grievable, the compensation Grievant challenges in this grievance was granted either as a result of an order of the circuit court in the *Hartley* case, or the enactment of W. Va. Code § 5-5-4a. Further, the salaries involved in the Grievant’s discrimination claim are inherently part of the *Hartley* case. Therefore, the Grievance Board lacks jurisdiction to hear this grievance. See *Mills, supra*.

WHEREFORE, Respondent’s Motion to Dismiss is hereby **GRANTED**.

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).

DATED: April 27, 2018

Mary Jo Swartz
Administrative Law Judge