

**THE WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LISA DRISCOLL, et al.,
Grievants,**

v.

Docket No. 2018-0125-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN
AND FAMILIES, BUREAU FOR CHILD SUPPORT ENFORCEMENT, BUREAU FOR
PUBLIC HEALTH, OFFICE OF INSPECTOR GENERAL and LAKIN HOSPITAL,
Respondents.**

DISMISSAL ORDER

Grievances were filed by approximately 127 Grievants against their various employers, the Department of Health and Human Resources, the Bureau for Children and Families, the Bureau for Child Support Enforcement, the Bureau for Public Health, Lakin Hospital and the Office of the Inspector General, dating from July 14, 2017, through March 22, 2018. The grievances were consolidated by Orders dated November 21, 2017, and April 5, 2018 into Docket No. 2018-0125-CONS. All the grievances challenge the conversion of the State payroll "plan" from twice monthly to bi-weekly pay, which began in May of 2017, and generally assert that this conversion resulted in a decrease in Grievants' annual salaries and leave in 2017. More specifically, Grievants allege they have not been compensated for approximately 20 hours of work they performed in 2017. Some Grievants further allege that this constitutes a violation of the Fair Labor Standards Act.

As relief, Grievants generally seek to be paid for 20 hours of work, plus interest, and proper adjustment of their leave benefits. These grievances progressed through levels one and two of the grievance procedure, with the level two held on November 29,

2017. After appeals were made to level three, Respondent, Department of Human Resources (“DHHR”), by counsel, Katherine A. Campbell, Assistant Attorney General, filed a Motion to Dismiss on April 2, 2017. Grievant Lisa Driscoll filed an objection to the Respondent’s Motion to Dismiss on or about Tuesday, April 24, 2018, on behalf of Grievants “in her district,” as well as Mr. Ron Zerkle and Ms. Patricia Hasting.

Synopsis

Grievants assert that the change from twice monthly pay to bi-weekly pay, which occurred in May 2017, caused them to be deprived of pay for 20 hours that they worked during 2017, and prevented proper accrual of their annual leave. The West Virginia State Auditor’s Office and Treasurer’s Office are charged with assuring that State employees are paid their full salaries, not Respondents, and it is the Enterprise Resource Planning Board (“ERP”), comprised of the Governor, Treasurer, and Auditor of the State of West Virginia that required the change in the pay cycle. The grievance procedure permits grievants to pursue grievances against the agency that employs them. However, Respondent employers are not responsible for the change in the payroll schedule and, thus, are without authority to resolve the grievance. Moreover, the Grievance Board does not have jurisdiction to resolve the dispute between Grievants and the ERPB or to provide the requested relief. As such, this grievance must be dismissed.

The following facts are not in dispute.

Findings of Fact

1. The Enterprise Resource Planning Board (“ERP”) is comprised of the

Governor, the State Auditor, the State Treasurer, and a 16-member steering committee.
(W. VA. CODE §1 2-6D-1; See also, *WVOASIS website, Frequently Asked Questions.*)

2. Grievants are not employed by the ERPB, the Governor, the State Auditor or the State Treasurer.

3. Respondent employers do not issue, or direct the issuance of, payroll to their employees. This responsibility lies with the West Virginia State Treasurer and the West Virginia State Auditor, neither of which are under the direction or control of any of Respondents.

4. The West Virginia Governor, the West Virginia State Auditor and the West Virginia State Treasurer are Constitutional Officers.

5. The ERPB made the decision to convert payroll for State employees from twice monthly to bi-weekly pay.

6. This change in the payroll schedule from twice monthly to bi-weekly was subsequently authorized by a statutory amendment enacted by the West Virginia Legislature, and signed into law by the Governor.

Discussion

Grievants assert that due to the May 2017, conversion of the State payroll "plan," from twice monthly pay to bi-weekly pay, they were not compensated for approximately 20 hours of work they performed during 2017, and lost leave for that year. Respondent DHHR contends in its Motion to Dismiss that the Grievance Board previously addressed this same issue, albeit with some different employers, and properly denied the grievance, requiring the Grievance Board to now dismiss this

grievance. See *Bonnie Price, et. al. v. Dep't. of Health and Human Resources/Bureau for Children and Families, Bureau for Public Health, Bureau of Senior Services, Division of Natural Resources, General Services Division and Division of Personnel*, Docket No. 2016-0653-CONS (Aug. 16, 2016). As discussed in *Price, supra.*, the Grievance Board has no authority to adjudicate this grievance.

The Public Employees Grievance Board is limited to the grant of authority provided in W. VA. CODE §§ 6C-2-1, *et seq.* An employee may only file a grievance against his or her employer. W. VA. CODE § 6C-2-2(a)(1). The term employee “does not mean an employee of a constitutional officer unless he or she is covered under the civil service system.” W. VA. CODE § 6C-2-2(a)(3). For the purposes of the grievance procedure, an “employer” is the “state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multi-county vocational center, or agent thereof, using the services of an employee.” W. VA. CODE § 6C-2-2(g). Very clearly, the Grievance Board is only authorized to adjudicate grievances brought by the employee against his employer. See, *Price, Id.* In this matter, Grievants filed their grievances against their various employers, as permitted by statute.

However, as established by statute, any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008). The grievance procedure is ***only available to the grievant to challenge the***

actions taken by his employer. (*Emphasis added.*) See *Posey v. W. Va. Univ.*, Docket No. 2009-0745-WVU (Apr. 10, 2009); *Narkevic v. Div. of Corr. and Dep't of Health & Human Res.*, Docket No. 2009-0846-MAPS (Apr. 29, 2009). Respondent employers in this grievance had no authority or control over the May 2017, conversion to a bi-weekly payroll schedule. Rather, the ERPB made the decision to change the payroll schedule and the Legislature enabled implementation of the change through a statutory amendment.¹ The ERPB, which does not employ any of the Grievants, was created by statute, at W. VA. CODE §12-6D-1:

W. VA. CODE §12-6D-1 West Virginia Enterprise Resource Planning Board created; board composition and purpose; Enterprise Resource planning defined.

(a) As used in this article "enterprise resource planning" means the implementation of software applications to achieve the comprehensive integration of data sources and processes of state agencies into a unified system that includes the state's financial management, procurement, personnel, payroll, budget development and other administrative business processes.

(b) There is created the West Virginia Enterprise Resource Planning Board, whose purpose is to develop, implement and manage the Enterprise Resource Planning System.

(c) The board consists of the Governor, Auditor and the Treasurer, who serve by virtue of their offices and are not entitled to compensation under the provisions of this article.

¹ As noted in *Price, Id.*, under the 2014 amendment to WEST VIRGINIA CODE § 6-7-1, employees "shall be paid at least twice-monthly." This language effectively permits employees to be paid bi-weekly. Following this amendment, the ERPB proceeded with the plan to convert all State payroll to bi-weekly pay.

Furthermore, Respondents did not issue, or direct the issuance of, payroll to their employees, as that is the responsibility of the offices of the West Virginia State Treasurer and Auditor, and neither office is under the direction or control of any Respondents.

In this grievance, as in *Price, Id.*, none of Respondents are empowered to take the necessary action to reimburse Grievants for any pay or leave lost, assuming that Grievants can prove their alleged losses.

The Public Employees Grievance Board is an administrative agency established by the Legislature *to allow a public employee and his or her employer to reach solutions to problems that arise within the scope of their employment relationship. (Emphasis added.)* W. VA. CODE § 6C-2-1(a); *See Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002). The administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). In conclusion, given that Grievants are not employed by the ERPB, the Governor of West Virginia, the West Virginia State Auditor, or the West Virginia State Treasurer, the Grievance Board has no authority to adjudicate this grievance and has no jurisdiction to join the ERPB as a party. *Price, Id. See also, Thompson v. Div. of Corr.*, Docket No. 2014-0386-MAPS (Dec. 3, 2014); *Monroe v. Dep't of Admin./Real Estate Div. and Legislative Servs./Employee Suggestion Award Bd.*, Docket No. 2012-0873-DOA (May 14, 2012); *Clutter v. Dep't of Agric.*, Docket No.

2009-1372-AGR (May 28, 2009); *Brining, supra*; *Rainey, supra*.

Based upon the foregoing, this grievance is **DISMISSED**.

The following conclusions of law support the dismissal of this grievance.

Conclusions of Law

1. As established by statute, any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

2. For the purposes of the grievance procedure, an “employer” is the “state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multi-county vocational center, or agent thereof, using the services of an employee.” W. VA. CODE § 6C-2-2(g).

3. The purpose and composition of the West Virginia Enterprise Resource Planning Board is provided at

W. VA. CODE §12-6D-1. West Virginia Enterprise Resource Planning Board created; board composition and purpose; Enterprise Resource planning defined.

(a) As used in this article "enterprise resource planning" means the implementation of software applications to achieve the comprehensive integration of data sources and processes of state agencies into a unified system that includes the state's financial management, procurement, personnel, payroll, budget development and other administrative business processes.

(b) There is created the West Virginia Enterprise Resource

Planning Board, whose purpose is to develop, implement and manage the Enterprise Resource Planning System.

(c) The board consists of the Governor, Auditor and the Treasurer, who serve by virtue of their offices and are not entitled to compensation under the provisions of this article.

3. The Public Employees Grievance Board is an administrative agency established by the Legislature to allow a public employee and his or her employer to reach solutions to problems that arise within the scope of their employment relationship. W. VA. CODE § 6C-2-1(a); See *Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

4. "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority under WEST VIRGINIA CODE §§ 6C-2-1, *et seq.*

5. The Public Employees Grievance Board does not have jurisdiction to resolve a dispute between Grievants and the ERPB, the Governor of West Virginia, the West Virginia State Auditor, or the West Virginia State Treasurer. *Thompson v. Div. of Corr.*, Docket No. 2014-0386-MAPS (Dec. 3, 2014); *Monroe v. Dep't of Admin./Real Estate Div. and Legislative Servs./Employee Suggestion Award Bd.*, Docket No. 2012-0873-DOA (May 14, 2012); *Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR

(May 28, 2009); *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

Accordingly, this 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 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: May 22, 2018

Susan L. Basile
Administrative Law Judge