

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**EARL HEATER, et al.,
Grievants,**

v.

Docket No. 2018-0579-CONS

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

DISMISSAL ORDER

On October 13, 2017, Grievants filed this action against their employer, William R. Sharpe, Jr. Hospital, alleging, “pay inequality. Grievants are direct care.” Grievants seek, “To be made whole in ever way including direct care pay with back pay and interest.” At Level One, Respondent’s representative filed a Motion to Dismiss this grievance on the grounds that this matter is outside the jurisdiction of the Grievance Board. The Grievance Evaluator dismissed the grievance for lack of jurisdiction pursuant to WEST VIRGINIA CODE § 5-5-4a. A mediation session was conducted on February 9, 2018. Thereafter, Grievants appealed to Level Three. Respondent once again renewed its Motion to Dismiss on March 22, 2018. Grievants filled their response to this Motion to Dismiss on April 6, 2018. The matter is now mature for a ruling by the undersigned. Grievants appear by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Katherine A. Campbell, Assistant Attorney General.

Synopsis

Grievants are employed by Respondent as Recreation Specialists at the William R. Sharpe, Jr. Hospital. Grievants assert that they were improperly denied a pay increase pursuant to a State Board of Personnel proposal. Respondent denies Grievants' claim and asserts that the Grievance Board lacks jurisdiction to hear this matter pursuant to WEST VIRGINIA CODE § 5-5-4a, and Grievants are seeking to enforce a circuit court order. The Grievance Board lacks jurisdiction in this matter. WEST VIRGINIA CODE § 5-5-4a specifically exempts pay increases granted pursuant thereto from the grievance process. Accordingly, this grievance is dismissed.

The following Findings of Fact are based upon the record and proposals.

Findings of Fact

1. Grievants are employed by Respondent at the William R. Sharpe, Jr. Hospital. Grievants are classified as Recreation Specialists.
2. By order of the Circuit Court of Kanawha County, West Virginia, entered August 14, 2014, in the case of *E.H., et al., v. Martin, et al.*, Civil Action No. 81-MISC-585 ("Hartley case"), Respondent was ordered to implement pay raises, special hiring rates, and incentives to recruit full-time direct-care employees at Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital. Said pay increases and employment requirements had been previously authorized by WEST VIRGINIA CODE § 5-5-4a, which was enacted in 2009.
3. Grievants argue that they are entitled to the Hartley pay increase because they believe that they are considered direct care staff.

4. Respondent maintains that Grievants are not considered direct care staff due to their classification as Recreation Specialists, and are not entitled to the Hartley pay increase.

5. WEST VIRGINIA CODE § 5-5-4a(c) states that, “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.”

Discussion

Respondent requests that the West Virginia Public Employees Grievance Board dismiss this matter from its docket. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.11(2008), “[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” In instances where “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 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).

As defined by statute, a grievance must allege “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). The scope of the authority of the Grievance Board

is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-3 (2008).

Respondent argues that the Grievance Board lacks jurisdiction to hear this matter as it seeks to enforce a circuit court order, and the pay increase sought is exempted from the grievance procedure by WEST VIRGINIA CODE § 5-5-4a. Grievants assert that they are continuously engaged in the direct care of patients and are an indispensable component of patient treatment, yet have been excluded by Respondent from numerous pay adjustments intended for direct patient care employees.

WEST VIRGINIA CODE § 5-5-4a specifically exempts pay increases granted to direct care employees from the jurisdiction of the Grievance Board. 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.

The Grievance Board has previously recognized that it lacks jurisdiction to enforce the pay increases and employment requirements granted pursuant to this statute. See *Karp, et al. v. Dep't of Health & Human Res./William R. Sharpe, Jr. Hospital*, Docket No. 2016-0426-CONS (Jan. 27, 2016); *Miser, et al. v. Dep't of Health & Human Res.*, Docket No. 2013-1324-CONS (May 6, 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, supra, DaSilva, supra*. Therefore, 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.*" Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, 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 Legislature provided for pay increases to be paid to certain types of employees at Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital, but specifically exempted the implementation of the pay increases from the grievance process. W. VA. CODE § 5-5-4a.

5. "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).

6. Although issues involving compensation are 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.

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 *a/so* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: May 2, 2018

Ronald L. Reece
Administrative Law Judge