

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD B. SMITH,

Grievant,

v.

Docket No. 2018-0868-LewED

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievant, Richard B. Smith, submitted a level one grievance against Respondent, Lewis County Board of Education, dated January 10, 2018.¹ On the grievance form, Grievant wrote “[s]ee attached” in the statement of grievance section and in the relief section. He attached a one-page document on which he wrote the following²:

Grievance Board Info:

Grievance being filed after going to the LC Board of education meeting Dec. 11, 2017 then asking for an appeal with the PEIA. PEIA returned is the appeal information on Dec. 29, 2017 and we were advised to start working on the grievance.

Statement of Grievance:

Protesting a decision of the Lewis County Board of Education for denying Mr. Smith to use his sick leave/personal days toward insurance since he was having to retire because of a disability with his feet.

Misinformed on how to complete retirement disability forms and process.

¹ The signature on the grievance form is dated January 10, 2018. However, the grievance form was received by the Grievance Board on January 11, 2018, which is considered as the filing date.

² This is a direct quote from the statement of grievance and includes typographical errors appearing on the original document.

Misinformed on what the process should have been with the LCBOE while waiting on the WV retirement board approval for disability.

Misinformed on what needed to go in the letter that was written when he was retiring and leaving his possession of bus driver.

Discriminated do (sic) to past Issues brought to the board.

Discriminated against when asked a question when issues came up with our PEIA in Sept. 2017.

BOE's refusal to talk to us about award the use of sick days for insurance.

Relief Sought:

Board allow Mr. Smith's annual sick leave to be used toward his insurance premium as was talked about for his disability retirement.

Lewis Co. School Board pay Mr. Smith from Sept. 1, 2017 To the date of this settled

Lewis Co. School Board pay Mr. Smith Insurance from Sept. 1, 2017 To the date of this settled

The Lewis Co. School Board of Education need to educate the employees that handle the PEIA and Retirement filings correctly so no other employee must go through this.

The grievance was dismissed at level one by decision dated January 17, 2018. Grievant appealed to level two on January 23, 2018. Respondent filed a Motion to Dismiss on February 5, 2018, alleging "lack of jurisdiction, failure to state a claim upon which relief can be granted, and timeliness." On February 5, 2018, the Grievance Board contacted counsel for Grievant by electronic mail, attaching a copy of the motion, and informed him that if he wished to respond to the motion, he was to do so in writing before close of business February 20, 2018. The Grievance Board later extended this submission date to February 27, 2018. Counsel for Respondent was copied on these

emails. Counsel for Grievant submitted Grievant's Response to the Respondent's Motion to Dismiss by email on February 27, 2018, and a hardcopy was received by mail on March 1, 2018. Respondent appears by counsel, Denise M. Spatafore, Esq., Dinsmore & Shohl LLP. Grievant appears by counsel, Rich McGervey, Esq., West Virginia School Service Personnel Association.

Synopsis

Grievant was not an employee of Respondent at the time he filed this grievance. As such, Grievant lacks standing to pursue a grievance against Respondent. Further, to the extent that Grievant is seeking an order from the Grievance Board compelling Respondent, PEIA, or the Consolidated Public Retirement Board to allow him to use his accrued sick leave to pay his insurance premium, such relief is wholly unavailable through the grievance procedure. Accordingly, 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. Grievant was employed by Respondent as a bus operator until on or about August 16, 2017.

2. On August 16, 2017, Grievant submitted a letter to the Lewis County Bus Garage and Respondent stating as follows:

On Feb. 16, 2017 Dr. [redacted] removed me from driving bus due to issues with my feet. As of today, Aug 16, 2017 my condition has not gotten any better. I must put my health first for my family. So, Today Aug 16, 2017 will be my last day of employment with the Lewis Co. School board.

Sincerely,
Richard B. Smith

Emp#: [redacted]
Date: Aug. 16, 2017³

Grievant signed this letter with his initials R. S. This letter was stamped as being received by Respondent on August 16, 2017. Another signature appears at the bottom of the page. While the signature is illegible, the first and last initials appear to be T. C. and is dated 8/16/17. This is not Grievant's signature.

3. Grievant appears to have submitted a second letter on the same date to the Lewis County Bus Garage and Respondent which states as follows:

On Feb. 16, 2017 Dr, [redacted] removed me from driving bus due to issues with my feet. As of today Aug 16, 2017 my condition has not gotten any better. I must put my health first for me and my family.

On, Aug 17, 2017 I will be retiring from my passion of Lewis Co. Bus Driver with the Lewis Co. School board. Thank you for the opportunity to work for you the past 22 years. It gave me the change to meet several families from the area that I consider today as family.

My wife, Renee Smith, will be picking up all the retirement papers needed by the Lewis Co. School board on Thursday, Aug. 31, 2017 that she dropped off on Aug. 16, 2017 as we have an appointment at the retirement board.

It has been a pleasure working with each of you at the Lewis Co. Bus Garage. Best of Luck to everyone!

Sincerely,

Richard B. Smith
Emp#: [redacted]
Date: Aug. 16, 2017⁴

³ See, Exhibit B, Respondent's Motion to Dismiss. This is a direct quotation from the letter and contains typographical errors made therein.

⁴ See, Exhibit F, Grievant's Response to the Respondent's Motion to Dismiss. This is a direct quotation from the letter and contains typographical errors made therein.

Grievant signed this letter with his initials, R. S. This letter is not stamped as received, but the same illegible signature of T.C. dated 8/16/17 is located the bottom of the page. This letter is not referenced in Respondent's Motion to Dismiss.

4. It is unknown why there are two letters and to whom they were delivered. Further, the purpose of these letters is unknown, as well as whether they had been requested, and if so, by whom.

5. Grievant's retirement was listed on the Board Agenda for its August 28, 2017 meeting. Respondent sent Grievant a letter dated August 30, 2017, which states that "[t]he Lewis County Board of Education met on August 28, 2017, and accepted your retirement as Bus Operator, Lewis County Schools, effective August 17, 2017."⁵

6. Respondent has acknowledged that Grievant was planning to retire, but asserts that the first August 16, 2017, letter is a resignation letter.

7. Apparently, things did not go as Grievant had anticipated. Grievant did not receive his retirement benefits from the Consolidated Public Retirement Board until November 2017, and he was not allowed to use his accrued sick leave to pay toward his insurance premiums.

8. It appears that the retirement board and/or PEIA's decision not to allow Grievant to use his accrued sick leave to pay toward his insurance premiums may be the result of the gap between the end of Grievant's employment and the approval of his disability retirement benefits.

⁵ See, Grievant's Exhibits D and E, Grievant's Response to Respondent's Motion to Dismiss.

9. Grievant appeared at Respondent's regular December 2017 board meeting and requested that the Board reinstate his employment retroactive to August 2017. Respondent has declined that request.

10. Grievant filed this grievance in January 2018.

11. Grievant has not been employed by Respondent since August 16, 2017.

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. § 156-1-6.2 (2008). When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See, Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally, Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996). "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)). The Grievance Board’s authority is granted by W. VA. CODE § 6C-2-1, *et seq.* to resolve grievances, which are defined and limited by that statute.

The Public Employees Grievance Procedure was established to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. See W. VA. CODE § 6C-2-1(a); *Wilson v. Dep’t of Health and Human Res.*, Docket No. 2011-1769-DHHR (Oct. 31, 2011). WEST VIRGINIA CODE § 6C-2-2(e)(1) defines “employee” for the purposes of the grievance procedure, as follows: “[e]mployee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). WEST VIRGINIA CODE § 6C-2-2(g) defines “employer” for the purposes of the grievance procedure, as follows:

[a] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.

A “grievance” is “a claim by an employee.” See W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. See W. VA. CODE § 6C-2-2(a)(1).

“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). 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).

It is undisputed that Grievant filed this grievance several months after he left employment with Respondent. The parties dispute whether Grievant retired or resigned from his employment with Lewis County Schools. For the purposes of this grievance, it does not matter whether Grievant retired or resigned. The fact remains that Grievant was not an employee when he filed this grievance. Only an employee may file a grievance. Pursuant to W. VA. CODE § 6C-2-2, as Grievant was not an employee of Respondent, he lacked standing to file a grievance.

Grievant claims that Respondent wrongfully reported to the retirement board that he had resigned, instead of retiring, which caused him to be unable to use his accumulated sick leave to pay for his insurance premiums during retirement. Grievant asserts that only Respondent can correct this problem with the retirement board to resolve this matter. Again, the Grievance Board is not the proper forum for this claim as Grievant is not now, and was not then, an employee of Respondent when he filed his grievance. The Grievance Board simply has no authority to hear this claim. To the extent that Grievant may be seeking an order from the Grievance Board directing PEIA or the Consolidated Public Retirement Board to allow him to use his accrued sick leave for payment toward his insurance premium, such relief is wholly unavailable through the

grievance procedure. Grievant is not now, and upon information and belief, never was employed by PEIA or the Consolidated Retirement Board. Accordingly, 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. § 156-1-6.2 (2008).

2. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep’t of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally, Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996). “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)). The Grievance Board's authority is granted by W. VA. CODE § 6C-2-1, *et seq.* to resolve grievances, which are defined and limited by that statute.

4. The Public Employees Grievance Procedure was established to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. See W. VA. CODE § 6C-2-1(a); *Wilson v. Dep't of Health and Human Res.*, Docket No. 2011-1769-DHHR (Oct. 31, 2011).

5. WEST VIRGINIA CODE § 6C-2-2(e)(1) defines "employee" for the purposes of the grievance procedure, as follows: "[e]mployee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

[a] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.

6. "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).

7. Grievant is not now, and was not then, employed by Respondent at the time he filed this grievance. Accordingly, Grievant lacks standing to pursue this grievance against the Respondent. To the extent Grievant seeks an order compelling Respondent, PEIA, or the Consolidated Public Retirement Board to allow him to use his accrued sick

leave to pay toward the cost of his insurance premium, such relief is wholly unavailable to the Grievant through the grievance procedure.

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 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: March 28, 2018.

Carrie H. LeFevre
Administrative Law Judge