

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**GARY F. SPENCER, JR.,
Grievant,**

v.

Docket No. 2019-0091-AUD

**STATE AUDITOR'S OFFICE,
Respondent.**

DISMISSAL ORDER

On July 17, 2018, Grievant, Gary F. Spencer, Jr., filed a grievance against Respondent, the State Auditor's Office, challenging the termination of his employment. On July 19, 2018, Respondent, by counsel, filed *West Virginia State Auditor's Office Motion to Dismiss* asserting the grievance must be dismissed for lack of jurisdiction and failure to state a claim. On July 26, 2018, Grievance Board staff forwarded a copy of Respondent's motion to Grievant by email, stating that any response to the motion must be made in writing by August 9, 2018, that a decision on the motion would be made based on the submissions of the parties without further hearing, and that failure to respond may result in dismissal of the grievance. Grievant did not file a response to the motion. Grievant appears *pro se*¹. Respondent appears by counsel, Lisa A. Hopkins, General Counsel, and Michael B. Nusbaum.

Synopsis

Grievant was employed by the State Auditor's Office and filed this grievance protesting the termination of his employment. The State Auditor is a constitutional officer and employees of constitutional officers are not entitled to the grievance procedure unless their employment is covered under the civil service system. In his statement of grievance,

¹ "For one's own behalf." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Grievant did not assert his employment was covered under the civil service system. Respondent, in its motion to dismiss asserted Grievant's employment was at-will. Grievant failed to respond to dispute Respondent's assertion that his employment was at will or to assert that his employment was covered under the civil service system. Grievant is not an employee as defined by the grievance procedure statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance must be dismissed.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant was employed by the State Auditor's Office as an at-will employee.
2. Grievant filed this grievance on July 17, 2018, challenging the termination of his employment.
3. The State Auditor is a constitutional officer.
4. On July 19, 2018, Respondent, by counsel, filed *West Virginia State Auditor's Office Motion to Dismiss* asserting the grievance must be dismissed for lack of jurisdiction and failure to state a claim.
5. On July 26, 2018, Grievance Board staff forwarded a copy of Respondent's motion to Grievant by email, stating that any response to the motion must be made in writing by August 9, 2018, that a decision on the motion would be made based on the submissions of the parties without further hearing, and that failure to respond may result in dismissal of the grievance.
6. Grievant did not file a response to the motion.

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 (2018). “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “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. § 156-1-6.11.

Respondent asserts the grievance must be dismissed for lack of jurisdiction and failure to state a claim as the State Auditor is a constitutional officer not subject to the grievance process. Despite notice and opportunity to be heard, Grievant failed to respond to the motion to dismiss.

"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 purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a). "'Employee' 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). "'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(e)(3).

The State Auditor is a constitutional officer. W.VA. CONST. art. VII, § 1. In his statement of grievance, Grievant did not assert his employment was covered under the civil service system. Respondent, in its motion to dismiss asserts Grievant's employment was at-will. Grievant failed to respond to dispute Respondent's assertion that his employment was at will or to assert that his employment was covered under the civil service system. Therefore, Grievant is not an employee as defined within the grievance procedure statute. 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. § 156-1-6.2 (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 purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a).

4. “‘Employee’ 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).

5. “‘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(e)(3).

6. The State Auditor is a constitutional officer. W.VA. CONST. art. VII, § 1.

7. As Grievant is not an employee as defined by the grievance procedure statute, the Grievance Board lacks jurisdiction in this matter, and the grievance must be dismissed.

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 also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 14, 2018

Billie Thacker Catlett
Chief Administrative Law Judge