

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARILYN COOK,

Grievant,

v.

Docket No. 2019-0726-LogED

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Marilyn Cook, filed this grievance against her employer, Logan County Board of Education, dated January 7, 2019, stating as follows: "Violation of WV § 6C-2-2 Grievance. Grievant was absent on Workers Compensation due to a work injury. She contacted the Logan County Board of Education Payroll [O]ffice to make her retirement payment to get credit for the time she was on Compensation. She made the payment according to the information she received from the board of education agent. The retirement board accepted the payment. A year later she was contacted and advised the payment was not the correct amount and has now been balanced (sic) billed for the difference." As relief sought, "Grievant is requesting the Logan County Board of Education to make the difference in the payment from the figure they gave her to the amount the retirement board is now requesting."

A level one conference was held on January 17, 2019, and denied by decision dated February 7, 2019. Grievant appealed to level two on February 14, 2019. A level two mediation was conducted on April 15, 2019. Grievant perfected her level three appeal on April 26, 2019. Respondent filed a Motion to Dismiss on September 26, 2019, alleging lack of jurisdiction and that "Grievant has suffered no injury which would entitle her to any

relief.” Grievant, by representative, filed Grievant’s Response to Motion to Dismiss on September 30, 2019. A level three hearing was conducted on October 10, 2019, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person and by her representative, Ben Barkey, West Virginia Education Association. Also appearing was Allen Stump, West Virginia Education Association. Respondent appeared by its counsel, Stephanie L. Abraham, Esquire, Abraham Law, PLLC, and by its representative Elizabeth Thompson, Director of Personnel. Respondent’s Motion to Dismiss was heard at the commencement of the October 10, 2019, hearing whereupon this ALJ held the motion in abeyance to be addressed in this decision, and proceeded with the presentation of evidence. This matter became mature for decision on November 12, 2019, upon receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was regularly employed by Respondent as a classroom teacher. Grievant suffered a work-related injury in October 2015 and was required to be off from work until January 2016. During her time off, Grievant received workers’ compensation benefits. Grievant did not automatically receive retirement credit for the time she was off work, but had the option of paying an amount of money to the Retirement Board to receive the credit. An employee in Respondent’s payroll department told Grievant the amount she was to remit to the Retirement Board to “buy back” her retirement credit. This amount wound up being incorrect and additional money was owed to the Retirement Board. Grievant argues that Respondent violated its duties to her and, as such, Respondent should be required to pay the outstanding sum to the Retirement Board. Respondent

denies Grievant's claims and argues it is not responsible for any additional sums due the Retirement Board. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

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 is employed by Respondent as a classroom teacher. In October 2015, Grievant received a compensable work-related injury that required her to be off from work until January 2016. During the time she was off work she received workers' compensation benefits.

2. While Grievant was off work receiving workers' compensation benefits, she did not automatically receive retirement credit for that time. However, she had the option of paying a sum of money to the Retirement Board to "buy back" that time in order to receive the retirement credit for that time period.

3. Grievant contacted Jason Jude, a Board employee who worked in payroll to find out how to buy back her time. Mr. Jude completed the necessary paperwork and told Grievant that she would need to remit \$477.81 to the Retirement Board.

4. Grievant personally remitted the \$477.81 to the Retirement Board as instructed by Mr. Jude.

5. Much later on, after Grievant had returned to work, the Retirement Board contacted her and informed her that she still needed to pay \$988.58 to "buy back" all of the time she had been off on workers' compensation.

6. Mr. Jude's calculation of the sum to be paid to the Retirement Board was

incorrect.

7. Grievant has not paid the additional \$988.58 to the Retirement Board in order to “buy back” the time she was off on workers’ compensation to receive the retirement credit.

Discussion

Motion to Dismiss

“Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2018). Respondent argues that this Grievance Board has no jurisdiction to hear this matter as it concerns retirement, and asserts that “Grievant has received no injury which would entitle her to any relief.” Therefore, Respondent contends that any ruling on the merits of this grievance would result in an advisory opinion. Grievant contends that the Grievance Board has jurisdiction to hear this matter and that she is entitled to the relief she has requested.

West Virginia Code § 6C-2-2(i)(2) states, in part, as follows: “Grievance” does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§§ 5-16-1 *et seq.*], chapter five of this code, retirement or any other matter in which the authority to act is not vested with the employer.” *Id.* Grievant has filed this grievance against her employer, Respondent, arguing that it failed to act with due diligence and due care by incorrectly calculating the amount she was to remit to the Retirement Board. Grievant appears to argue that she has been deprived of the retirement credit as a result of Respondent’s mistake and such entitles her to relief.

While West Virginia Code § 6C-2-2(i)(2) mentions retirement matters in its list of

what is not a grievance, the statute also says, “or any *other* matter in which the authority to act is not vested with the employer.” See *Id.* (Emphasis added). Therefore, this statute presumes that the employer has no authority to act in retirement matters. To be a grievance, the employer must have the authority to act on the claim, not some other outside entity such as the Retirement Board. Herein, Grievant is asserting no claim against the Retirement Board and no claim about its actions regarding her retirement benefits. She seeks no relief from the Retirement Board. Instead, Grievant argues that Respondent incorrectly calculated the sum she was to remit to the Retirement Board, and that Respondent should be required to correct its error by paying the outstanding sum to the Retirement Board. Given the way Grievant has framed the issues of her grievance, Respondent is vested with the authority to act on Grievant’s claim, not the Retirement Board. Whether Grievant is correct in her assertion and whether she is entitled to the relief she seeks goes to the merits of the grievance. Accordingly, the Grievance Board has jurisdiction over this claim. Respondent’s argument that any decision on this matter would result in an advisory opinion also fails because there is relief the Grievance Board can grant if Grievant proves the merits of her claim. Therefore, Respondent has failed to meet its burden. Respondent’s Motion to Dismiss is hereby DENIED.

Merits

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*,

Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues that Respondent owed her a duty of due diligence and due care to provide her the correct amount she was to remit to the Retirement Board to buy back her retirement credit for the time period she was off work. Grievant has offered no statutory or precedential West Virginia case law to support her position. She has only offered some persuasive, out-of-state caselaw. Such is not binding on this Grievance Board.

Respondent argues that Mr. Jude told Grievant the number he gave her was only an estimate, but even if he gave Grievant the incorrect sum, it was a mistake, and Respondent is not bound by it because it would be an *ultra vires* act. “*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep’t of Health and Human Serv.*, Docket No. 95-HHR-277 (Jan. 31, 1996). See *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep’t of Health and Human Res.*, Docket No. 98-HHR-228 (Nov. 30, 1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep’t. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).’ *Buckland v. Division of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008).” *Fields v. Mingo County Bd. of Educ.*, Docket No. 2013-1130-MinED (Feb. 4, 2014).

Whatever the reason, the number Mr. Jude gave Grievant was not correct. Such is not disputed. There is no evidence Mr. Jude acted intentionally, or even how he arrived at the number. Mr. Jude's incorrect calculation amounts to an *ultra vires* act for which Respondent cannot be held responsible. It is noted that Grievant and Mr. Jude disagree as to whether he told her the sum was an estimate. However, there is no need for a credibility determination on this issue because even if Mr. Jude expressly told Grievant it was an estimate, it would still be an *ultra vires* act for which Respondent cannot be legally bound. Accordingly, this ALJ cannot require Respondent to pay the outstanding sum to the Retirement Board to "buy back" Grievant's retirement credit for the time she was off work receiving workers' compensation. Therefore, Grievant has failed to prove by a preponderance of the evidence that Respondent violated any duty to her, and has further failed to prove that she is entitled to the relief she is seeking. This grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

2. Respondent has failed to prove by a preponderance of the evidence its claims of lack of jurisdiction, injury, and relief that can be granted. Therefore, Respondent's Motion to Dismiss is DENIED.

3. "*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.*,

Docket No. 95-HHR-277 (Jan. 31, 1996). See *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.*, Docket No. 98-HHR-228 (Nov. 30, 1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).’ *Buckland v. Division of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008).” *Fields v. Mingo County Bd. of Educ.*, Docket No. 2013-1130-MinED (Feb. 4, 2014).

4. Grievant has failed to prove by a preponderance of the evidence that the Respondent violated any duty to her, and has failed to prove that she is entitled to any relief.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. 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, 2018).

DATE: December 30, 2019.

Carrie H. LeFevre
Administrative Law Judge