

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JORDONNE BOSTIC,
Grievant,**

v.

Docket No. 2022-0135-MISC

**ADJUTANT GENERAL'S OFFICE/
MOUNTAINEER CHALLENGE ACADEMY,
Respondent.**

DISMISSAL ORDER

On August 11, 2021, Grievant, by counsel, filed a grievance against Respondent protesting her termination from employment with the Mountaineer Challenge¹ Academy. By letter dated August 20, 2021, the Grievance Board notified the parties that it did not appear the Grievance Board had jurisdiction to hear the grievance and allowed Grievant an opportunity to respond. By letter dated August 30, 2021, Respondent, by counsel, asserted that the Grievance Board has no jurisdiction to hear the grievance and moved for its dismissal. By letter dated August 30, 2021, Grievant, by counsel, acknowledged the Grievance Board's letter and asserted no further argument in support of jurisdiction. Grievant appears by counsel, Ambria M. Britton, Klie Law Offices, PLLC. Respondent appears by counsel, LTC Scott Applegate, Deputy Staff Judge Advocate.

Synopsis

Grievant was employed by the West Virginia Military Authority at the Mountaineer Challenge Academy. Grievant's employment was specifically exempted from the grievance procedure by statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance is dismissed.

¹ The spelling is stylized to indicate the association with the National Guard.

After review of the submissions of the parties, the undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant was employed at the Mountaineer ChalleNGe Academy.
2. The Mountaineer ChalleNGe Academy is operated by the Adjutant General under the provisions of the National Guard Youth Challenge Program.
3. The West Virginia Military Authority is the governmental instrumentality by which the Adjutant General administers programs and hires employees.

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 (2018). "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.

"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). "'Employer'" means 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." W. VA. CODE § 6C-2-2(g).

Grievant was employed at the Mountaineer ChalleNGe Academy. The Mountaineer ChalleNGe Academy is operated by the Adjutant General under the provisions of the National Guard Youth Challenge Program. W. VA. CODE § 15-1B-24; 32 U.S.C. § 509. The West Virginia Military Authority is the governmental instrumentality by which the Adjutant General administers programs and hires employees. W. VA. CODE § 15-1J-4. As such, persons employed at the Mountaineer ChalleNGe Academy are employed by the West Virginia Military Authority.

West Virginia Military Authority employees are "exempt from both the classified services category and the classified exempt services category as set forth in section four,

article six, chapter twenty-nine of this code.” W. VA. CODE § 15-1J-5(a)(1). “Each employee shall be deemed an at-will employee who may be discharged or released from his or her respective position without cause or reason.” W. VA. CODE § 15-1J-5(a)(3). “Due to the at-will employment relationship with the authority, its employees may not avail themselves of the state grievance procedure as set forth in § 29-6A-1 et seq. of this code. . . .” W. VA. CODE § 15-1J-4(d)(11). Therefore, the Grievance Board lacks jurisdiction to hear grievances by West Virginia Military Authority employees. *Pack v. Adjutant General's Office*, Docket No. 2020-1522-MAPS (Aug. 20, 2020).

As Grievant was employed by the West Virginia Military Authority, which employment is specifically exempted from the grievance procedure by 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 (2018).

2. “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 (2018).

3. “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.

4. "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)).

5. "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). "Employer" means 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." W. VA. CODE § 6C-2-2(g).

6. The Mountaineer ChalleNGe Academy is operated by the Adjutant General under the provisions of the National Guard Youth Challenge Program. W. VA. CODE § 15-1B-24; 32 U.S.C. § 509.

7. The West Virginia Military Authority is the governmental instrumentality by which the Adjutant General administers programs and hires employees. W. VA. CODE § 15-1J-4.

8. Persons employed at the Mountaineer Challenge Academy are employed by the West Virginia Military Authority.

9. West Virginia Military Authority employees are “exempt from both the classified services category and the classified exempt services category as set forth in section four, article six, chapter twenty-nine of this code.” W. VA. CODE §15-1J-5(a)(1). “Each employee shall be deemed an at-will employee who may be discharged or released from his or her respective position without cause or reason.” W. VA. CODE §15-1J-5(a)(3). “Due to the at-will employment relationship with the authority, its employees may not avail themselves of the state grievance procedure as set forth in §29-6A-1 et seq. of this code. . . .” W. VA. CODE §15-1J-4(d)(11).

10. The Grievance Board lacks jurisdiction to hear grievances by West Virginia Military Authority employees. *Pack v. Adjutant General's Office*, Docket No. 2020-1522-MAPS (Aug. 20, 2020).

11. As Grievant’s employment is specifically exempted from the grievance procedure by 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, 2021



Billie Thacker Catlett
Chief Administrative Law Judge