

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

EMMA BERGER,

Grievant,

v.

Docket No. 2019-0297-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,**

Respondent.

DISMISSAL ORDER

Grievant, Emma Berger, submitted a level one grievance against Respondent, Department of Health and Human Resources (DHHR), Mildred Mitchell-Bateman Hospital (MMBH) dated August 16, 2018,¹ stating as follows: “[w]as informed when off for over 2 months, by Vickie Crager, short term disability doesn’t kick in until off payroll for 1 month total. After, talking [illegible] Crystal Hylton informed I was lied too (sic). When asked for paperwork (sic) was not given to me.” As relief sought, Grievant stated, “Holiday, Annual, Sick time returned, paid for time without pay & interest, situation rectified.”

The parties agreed in writing to waive the grievance to level three on February 19, 2019. Respondent, by counsel, Katherine A. Campbell, Esq., Assistant Attorney General, filed a Motion to Dismiss on April 1, 2019, arguing that the grievance did not meet the statutory definition of a grievance, failure to state a claim upon which relief can be granted or remedy wholly unavailable, and untimeliness. On that same date, Respondent served the same on Grievant as *pro se*. On April 2, 2019, the Grievance Board contacted Gordon Simmons, UE Local 170, West Virginia Public Workers Union, believing him to be

¹ While the statement of grievance is dated August 16, 2018, it was postmarked August 23, 2018, which is considered the filing date.

Grievant's representative, by electronic mail, attaching a copy of the motion, and informed him that if Grievant wished to respond to the motion, he was to do so in writing before close of business April 16, 2019. Grievant, at a personal email address provided by Grievant on her statement of grievance, was included on this email, as well. Soon after, Respondent, by counsel, raised the issue as to whether Grievant had a representative. The email the Grievance Board sent to Grievant's listed personal email was returned as undeliverable. As such, the Grievance Board emailed a copy of Respondent's Motion to Dismiss to Grievant at her State of West Virginia email address and informed her that if she wished to respond to the motion, she was to do so in writing before close of business April 16, 2019. At that time, the level three hearing was scheduled to be held on June 17, 2019.

No responses to the Motion to Dismiss were received by April 16, 2019. Upon review of the Notice of Hearing, it appeared that Mr. Simmons was not copied on the Notice of Hearing scheduling the level three hearing for June 17, 2019. Accordingly, this ALJ called for a telephonic hearing to address the issues of Grievant's representation and the Motion to Dismiss. On May 7, 2019, the Grievance Board notified Mr. Simmons, Ms. Campbell, and Grievant that a telephonic hearing would be held on May 9, 2019, to address these outstanding issues. On May 8, 2019, Mr. Simmons emailed the Grievance Board and Ms. Campbell, stating that he would be representing Grievant at the level three hearing and moved to continue the June 17, 2019, hearing.

The telephonic hearing was held as scheduled on May 9, 2019, at which Mr. Simmons and Ms. Campbell appeared. By Order entered June 3, 2019, Mr. Simmons was added to the case as Grievant's representative, Grievant, by representative, was

granted until May 20, 2019, to respond to the Motion to Dismiss, and the June 17, 2019, hearing was continued as Mr. Simmons was not available on that date. On July 3, 2019, the parties were informed that this ALJ, upon her review of the Motion to Dismiss and the issues raised therein, was holding Respondent's Motion to Dismiss in abeyance pending the presentation of evidence at the level three hearing. Based upon the availability provided by counsel for Respondent and Grievant's representative, the level three grievance hearing was then scheduled to be conducted on February 10, 2020. Mr. Simmons left UE Local 170, West Virginia Public Workers Union in or about October 2019.

On February 10, 2020, Grievant, Grievant's representative, then Gary DeLuke, UE Local 170, West Virginia Public Workers Union, Katherine A. Campbell, Esq., Assistant Attorney General, counsel for Respondent, and Tamara Kuhn, Respondent's representative, appeared for the level three hearing. Whereupon, the parties asked that the matter be held in abeyance for sixty calendar days to allow them time to attempt to resolve the matter with the DHHR's Office of Human Resources Management (OHRM) and the disability insurance company. If the parties failed to reach a resolution, the matter was to be rescheduled for hearing.

In March 2020, in-person operations of the Grievance Board were halted as a result of the COVID-19 pandemic. As of July 23, 2020, the parties had not notified the Grievance Board about the resolution of the grievance. On that date, Grievance Board staff email the parties for a status update. At that time, Mr. DeLuke advised that the matter "should get resolved," but that it was "taking longer than expected, largely due to the pandemic." On October 14, 2020, Grievance Board staff again email the parties for

status. At that time, Ms. Campbell stated that Respondent believed the matter was “resolved” and that it “should be withdrawn.” However, Mr. DeLuke replied that “this matter has still not been resolved, but the insurance company is still working things out with the grievant. I am confident we will find a resolution here, and I share everyone’s frustration with how long this is taking.” On October 15, 2020, this ALJ extended the abeyance period until November 30, 2020. The parties were informed of this by email on that same date, which also stated, in part, “[t]he parties shall immediately inform the Grievance Board in writing if this matter is settled.” The parties were further instructed to inform the Grievance Board of status on November 30, 2020, in the event they had not resolved the grievance, and if they failed to provide an update on that date, the matter would be scheduled for a level three hearing at the Grievance Board’s discretion.

On November 20, 2020, Respondent, by counsel, via email, informed the Grievance Board that the matter was not resolved and that Mr. DeLuke had reported to Respondent’s counsel that “[t]he grievant is still trying to get the necessary information from her medical provider to Standard Insurance.” Respondent stated that it believed the matter should be dismissed, but that it had no objection to another abeyance. Accordingly, this ALJ extended the abeyance period to December 21, 2020.

On December 21, 2020, Respondent, by counsel, emailed the Grievance Board and Mr. DeLuke stating, in part, that “DHHR contends that this matter should be dismissed as we have fulfilled our obligation, and the matters involved long term disability insurance which is not in the jurisdiction of the WV Grievance Board.”

Mr. DeLuke left UE Local 170, West Virginia Public Workers Union on or about December 31, 2020. As of January 13, 2021, the Grievance Board had received no notice

of appearance or correspondence from the Union regarding who would be handling this matter instead of Mr. DeLuke. Accordingly, Grievance Board staff emailed Samantha Crockett, UE Local 170, West Virginia Public Workers Union, to find out who, if anyone, would be handling this matter in lieu of Mr. DeLuke. Ms. Crockett informed the Grievance Board that a new representative, Vinnie O'Connor, would be handling the grievance when he arrived at the end of January 2021. In response, Grievance Board emailed Ms. Crockett, copying Grievant at her personal email address and counsel for Respondent stating, in part, “. . .someone from the Union is required to provide an update as to whether or not this matter has been resolved **by close of business on January 15, 2021.** . . .” In response to this email, on that same date, Ms. Crockett informed the Grievance Board by email, copying counsel for Respondent, that she would reach out to Grievant that day to determine status. On January 14, 2021, Ms. Crockett again emailed the Grievance Board, copying counsel for Respondent and stated as follows: “I have spoken with Emma today and she stated it has not been resolved and she would like to move forward with this grievance.”

On February 3, 2021, Respondent, by counsel, renewed its Motion to Dismiss. By email dated February 11, 2021, to Mr. O'Connor, Grievant was given until February 26, 2021, to respond in writing to the renewed Motion to Dismiss. Further, the email stated, “[p]lease note a level three hearing will not be scheduled until a ruling has been made on the motion. The administrative law judge will decide whether to dismiss the grievance based on the submissions of the parties and will not hold a hearing on the motion. Failure to respond may result in the grievance being dismissed.” As of this date, Grievant has

submitted no response to Respondent's renewed Motion to Dismiss. This matter became mature for decision on February 26, 2021.

Synopsis

Grievant is employed by Respondent as an RN Nurse III. Grievant filed this grievance alleging that someone who worked in Respondent's human resources department lied to her about how her short term disability benefits worked which resulted in her having to use accrued annual leave and sick leave to cover some of an extended absence, as well as having to go without pay during some of this absence. At the heart of this grievance is a dispute between Grievant and her disability insurance company regarding coverage for the time period she was off work. Respondent has no authority over the insurance company and no authority to determine insurance coverage. Therefore, Respondent has proved by a preponderance of the evidence that Grievant's claim does not meet the definition of a grievance, that Grievant has failed to state a claim upon which relief can be granted, and that any decision on the merits of this claim would be an advisory opinion. 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 is employed by Respondent as a Registered Nurse, Nurse III.
2. Grievant was off work for a period of time for which she used accrued annual leave and sick leave. Also, Grievant went without pay during a portion of her time off because she had no accrued leave use for the same.

3. Grievant has an optional short-term disability policy which she purchased through the Public Employees Insurance Agency (PEIA). Such is one of many optional benefits PEIA offers to employees. Based upon the undisputed information provided, Standard Insurance Company issued the policy.

4. Grievant is not employed by Standard Insurance Company.

5. Respondent has no authority to act with respect to the short-term disability insurance policy. Respondent has no authority to determine coverage under the policy and no authority over Standard Insurance Company.

6. Grievant has raised no claims of discrimination, favoritism, harassment, or reprisal. Grievant's only claim relates only to coverage under her short-term disability policy.

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). 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.” *Id.* WEST VIRGINIA CODE § 6C-2-2(g) defines “employer,” for the purposes of the grievance procedure, as “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.” *Id.* Further,

(1) “Grievance” means 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, hours, terms and conditions of employment, employment status or discrimination;
- (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;
- (iii) Any specifically identified incident of harassment;
- (iv) Any specifically identified incident of favoritism; or
- (v) Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee.

(2) “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.

W. VA. CODE § 6C-2-2(i).

“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 (2018). 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).

Grievant appears to claim that she was unable to use her short-term disability insurance for a time period she was off work because someone in Respondent's human resources office lied to her. Grievant has raised no claims of discrimination, favoritism, harassment, reprisal, or any other claim in her grievance. However, during the time this matter has been pending, it has become apparent from the parties' email communications with the Grievance Board that resolution of this matter depends entirely upon Grievant and her short-term disability policy insurer. Respondent has no control over the insurer, and the insurer is not Grievant's employer. Grievant failed to respond to Respondent's renewed Motion to Dismiss during the specified time period, and has not otherwise attempted to contradict Respondent's claims made therein.

Pursuant to WEST VIRGINIA CODE § 6C-2-2(i), claims relating to public employees insurance in accordance with WEST VIRGINIA CODE § 5-16-1 *et seq.*, or any other matter in which the employer is not vested with the authority to act, do not meet the criteria for being a grievance. Grievant's short-term disability insurance is an optional benefit for state employees offered through the PEIA. It appears that PEIA has contracted with Standard Insurance Company to offer this optional benefit, and such would, therefore, relate to WEST VIRGINIA CODE § 5-16-1 *et seq.*, in which optional insurance benefits are mentioned. Grievant has not attempted to refute Respondent's claim that it has no authority to act with respect to determining coverage under the short-term disability policy.

For these reasons, Grievant's claim does not meet the definition of a grievance pursuant to WEST VIRGINIA CODE § 6C-2-2, and Grievant has failed to state a claim upon which relief may be granted. Accordingly, any ruling issued by the undersigned regarding

the issue raised by Grievant would merely be a prohibited advisory opinion. Therefore, 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 (2018).

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. "'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 of any other matter in which the authority to act is not vested with the employer." W. VA. CODE § 6C-2-2(i)(2).

7. "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 (2018).

8. Respondent has proved by a preponderance of the evidence that Grievant's claim does not meet the definition of a grievance and that Grievant has failed to state a claim upon which relief may be granted. Therefore, any decision on the issue raised would be a prohibited advisory opinion.

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, 2018).

DATE: April 6, 2021.

Carrie H. LeFevre
Administrative Law Judge