

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**GWEN LEIGH BRYANT,  
Grievant,**

**v.**

**Docket No. 2020-0898-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
BUREAU FOR PUBLIC HEALTH,  
Respondent.**

## **DISMISSAL ORDER**

Grievant, Gwen Bryant, is employed by Respondent, Department of Health and Human Resources (“DHHR”), in the Bureau for Public Health. Ms. Bryant filed a level one grievance dated February 7, 2020 alleging: “01/22/2020 I was denied the opportunity to purchase my active duty military service under PERS, WV Code § 5-10-15, for the second time.” As relief, Grievant seeks:

The opportunity to purchase my active duty military service under PERS. The award of any additional costs accrued above what the calculation to purchase my military service would have been at the time of my hire. Establish a process that guarantees the State Department of Personnel uphold West Virginia legislation by ensuring that all eligible State employee veterans receive comprehensive and timely information concerning military credit and West Virginia Retirement Benefits.

On February 10, 2020, a management representative of Respondent filed a motion to dismiss to which Grievant responded on February 13, 2020. On February 18, 2020, the level one hearing officer dismissed the grievance stating, “Because this matter relates to retirement, the authority to act lies with PERS, and is not vested with the employer. Therefore, the issue is not grievable under [W.Va. Code § 6C-2-2(i)(2)].”

Grievant appealed to level two and a mediation was held on August 10, 2020. Grievant appealed to level three on August 21, 2020. Respondent filed a Motion to Dismiss dated December 2, 2020, and Grievant filed a Response to the Motion dated December 6, 2020. This matter is now mature for a ruling on the motion.

### **Synopsis**

Grievant seeks to gain retirement credit as a State employee for her military service. She does not include the Public Employees Retirement Board as a respondent and seeks her remedy from her employer, DHHR. Respondent is not vested with the authority to provide any of the remedies sought by Grievant. This action does not meet the definition of “grievance” as set out in the provisions of W. VA. CODE § 6C-2-1 *et seq.* The Grievance Board does not have jurisdiction to resolve Grievant’s complaint. The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, Gwen Bryant, is employed by Respondent, DHHR, in the Bureau for Public Health.
2. On May 17, 2019, Grievant reached out to Human Resources (HR) staff within the Office of Maternal Child, and Family Health (OMCFH) concerning buying credit toward retirement for her military service.
3. Grievant was referred to the West Virginia Public Employees Retirement System (“PERS”) concerning applying for the military service credit.

4. Grievant contacted PERS and a representative with PERS provided Grievant with the form to apply for military service credit for retirement. The representative also informed Grievant that the form must be submitted within the first 12 months of employment. At that time, Grievant had been employed by Respondent for more than twelve months.

5. Grievant forwarded the PERS form to human resources in OMCFH and inquired about further assistance with the matter. OMCFH Human Resources checked with the DHHR Office of Human Resources Management and payroll, all of whom reported, "this is written in code, so they cannot allow any exceptions...".

6. On December 12, 2019, Grievant's position was reallocated. She successfully applied for the promotion.

7. Grievant sent an email to OMCFH Human Resources dated January 17, 2020, inquiring about issues related to the application for the promotion including applying for military service buy back, since she was required to re-apply for the position.

8. On January 22, 2020, Grievant received a reply from OMCFH Human Resources indication that the previous answer had not changed.

9. Ms. Bryant filed the grievance described above on February 7, 2020. She specifically chose to not include PERS as a party.

10. The remedy sought by Grievant was the following:

The opportunity to purchase my active duty military service under PERS. The award of any additional costs accrued above what the calculation to purchase my military service would have been at the time of my hire. Establish a process that Guarantees the State Department of Personnel uphold West Virginia legislation by ensuring that all eligible State employee veterans receive comprehensive and timely

information concerning military credit and West Virginia Retirement Benefits.

11. Respondent played no part in the application, granting or denying Grievant's request for military service retirement credit through PERS other than informing her of the statutory requirement that the application had to be submitted within the first 12 months of employment.

### **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." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge's discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. See *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

Respondent alleges that the Grievance Board does not have jurisdiction to resolve this matter because it involves a pension matter and Respondent has no authority or ability to grant any of the relief requested by the Grievant. Respondent also argues that the grievance was not timely filed. 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).

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).

W. VA. CODE § 6-2-2(i)(2) defines what a grievance is and what it is not. Related to the second category, the statute states:

"Grievance" does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen, chapter five of this code, retirement or any other matter in which the authority to act is not vested with the employer.

This matter relates solely to Grievant's request to receive credit for her years of military service to enhance her retirement benefits. Such service credit may only be granted by PERS through the Consolidated Public Retirement Board. Respondent is not vested with the authority to grant the relief Grievant seeks. The Grievance Board does not have jurisdiction to grant the relief sought by Grievant because her complaint does not meet the definition of a "grievance" against her employer as set out in W. VA. CODE § 18A-2-2(i)(2).

Grievant cites *Cook v. Logan County. Bd. of Educ.*, Docket No. 2019-0726-LogED (Dec. 30, 2019), for the proposition that the Grievance Board does have jurisdiction in this case. In *Cook* the Administrative Law Judge found that the Grievance Board had jurisdiction in that specific case relating to a grievant's pension. The matter involved a teacher who had been unable to work due to a compensable work-related injury. When off work due to this injury, she did not automatically receive retirement credit and wanted to receive such credit. She had the option to buy back the time off on the work-related injury in order to receive the retirement credit for that time period. However, the employer incorrectly calculated the amount owed and she ended up owing more money to the Teachers Retirement System. Her grievance requested that her employer pay the outstanding difference. The Grievance Board found that it had jurisdiction because the Grievant asserted no claim against PERS, and given the way Grievant "framed the issues of her grievance, Respondent is vested with the authority to act on Grievant's claim, not the Retirement Board."

This case differs from *Cook* in a very significant way. In that case, the employer made a calculation mistake which meant that Grievant had to pay more to receive the retirement credit for her time off on workers compensation. Grievant was not seeking the retirement credit in her grievance which could only be granted by the Teachers Retirement Board. Rather she was seeking reimbursement from her employer for the increased cost of those benefits due to the miscalculation by the Respondent's agent.

In the present case, Respondent took no action whatsoever in the application for Grievant's military service credit. Unlike in *Cook*, Respondent made no errors. Grievant seeks to receive the service credit which she cannot receive due to a specific statutory

provision. W. Va. Code § 5-10-15(b)(10) specifically requires that “[t]o receive credit, a member must submit a request to purchase military service credit to the board . . . within the twelve consecutive month period required by this subsection, as applicable.” Grievant did not meet that requirement and Respondent is not vested with the authority to grant the remedy Grievant seeks; “The opportunity to purchase my active duty military service under PERS,” nor “any additional costs accrued above what the calculation to purchase my military service would have been at the time of my hire.” Neither can DHHR require the Division of Personnel to give notice to veterans who become employed by the State of their rights regarding military service credit toward retirement. Accordingly, the Motion to Dismiss is **GRANTED** and the grievance is **DISMISSED**.

### **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.*” Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge’s discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. *See Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

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).

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)).

4. “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).

5. W. VA. CODE § 18A-2-2(i)(2) states:

“Grievance” does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen, chapter five of this code, retirement or any other matter in which the authority to act is not vested with the employer.

6. Respondent is not vested with the authority to grant the relief Grievant seeks. The Grievance Board does not have jurisdiction to grant the relief sought by Grievant because her complaint does not meet the definition of a “grievance” against her employer as set out in W. VA. CODE § 18A-2-2(i)(2).

Accordingly, the Motion to Dismiss is **GRANTED** and the 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* 156 C.S.R. 1 § 6.20 (2018).

**DATE: FEBRUARY 4, 2021**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**