

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROY CLIFFORD MASSEY, IV,
Grievant,**

v.

Docket No. 2021-2166-FayCH

**FAYETTE COUNTY HEALTH DEPARTMENT,
Respondent.**

DISMISSAL ORDER

Roy Clifford Massey, IV, Grievant, filed a grievance against Fayette County Health Department, Respondent, on December 28, 2020, protesting the termination of his employment. Grievant's statement of grievance in its entirety is nearly two pages long.¹ Grievant provides he was, "dismissed from the Fayette County Health Department due to an alleged 'conflict of interest' on or about December 11, 2020. Grievant has been involved in efforts to open a private medically assisted substance abuse treatment program since August 2020." Respondent informed Grievant it "intended to open a similar public program in Fayette County" and that his continued employment would be in conflict should he decide to work with the aforementioned private program. Further, Grievant highlights that "neither public nor private substance abuse treatment facility is currently active, there is absolutely no present conflict of interest in regard to this matter." Grievant submits that he was wrongfully terminated and requests relief in the form of immediate reinstatement of his position, along with back pay for the time he has been unemployed by this termination.

¹ Grievant's two page statement of grievance is not reproduced here in its entirety, it is recognized and incorporated herein by reference. See grievance form.

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process. A phone conference was held with the parties on March 2, 2021. Prior to the level three hearing, on or about March 10, 2021, Respondent filed a Motion to Dismiss asserting that this Grievance Board is without jurisdiction to hear this grievance and moved for its dismissal. On March 23, 2021, the date of the scheduled level three hearing, it was discussed and determined it would be prudent for the parties to formally address the issue of jurisdiction, whether this matter is proper before this body. Parties were provided with additional time to brief the pending motion to dismiss and the jurisdiction issue. Grievant is represented by legal counsel Evan J. Dove, Clay Law Firm, PLLC. Respondent is represented by legal counsel Elizabeth K. Campbell, Harrah Law Firm, PLLC. The consideration of this motion became mature on or about April 9, 2021, upon receipt of the last of the parties' proposed written arguments.

Synopsis

Grievant, a former employee of Fayette County Health Department, Respondent, filed a grievance before the West Virginia Public Employees Grievance Board. Grievant protested the termination of his employment. The purpose of applicable West Virginia Grievance Statutes is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia. The scope of the authority of the Grievance Board is limited to that set forth in grievance statutes and applicable case law. Respondent highlights that, given the circumstances of this matter, the Grievance Board is without proper authority to adjudicate this grievance. Respondent

moves for the dismissal of this grievance. In the circumstances of this matter, Respondent is not a recognized employer under the purview of this agency, and accordingly subject to the grievance procedure. This Grievance Board lacks jurisdiction in this matter. Accordingly, Respondent's Motion to Dismiss should be granted and this grievance DISMISSED.

After a detailed review of the record, the undersigned Administrative Law Judge in receipt of the submissions and subsequent arguments of the parties makes the following Findings of Fact with regard to the pending Motion to Dismiss

Findings of Fact

1. In January of 2020, Grievant was informed by the Administrative Director of the Health Department that he was being hired to serve as a "Harm Reduction Coordinator" as a full-time position.²

2. The position of Harm Reduction Coordinator is not classified as a civil service position. Upon hiring Grievant as a full-time permanent employee, there was no written job description, or a set of expectations and rules of employment concerning Grievant's position.

3. The Fayette County Health Department's Board of Directors discussed the idea of separating from the Division of Personnel (DOP).³ In a meeting on September 24,

² Grievant was originally hired on a temporary basis on December 17, 2018, and signed a "Temporary Appointment Agreement" form. This Agreement outlines the rights that Grievant had or did not have with regard to his employment with the Fayette County Health Department. In the Agreement, paragraph seven states that Grievant understands he "does not have the right of appeal before the State Personnel Board or Public Grievance Board."

³ The exact date is unclear but both Grievant and/or Respondent acknowledge such discussion back to 2018.

2019, the Board decided to go forward with severing the relations between the Health Department and the state merit-based system and charged the Director of Administration with that task. On October 7, 2019, public notice of the issue of the Health Department leaving the DOP was published for discussion at the county commission meeting on October 11, 2019. Said county commission meeting was open to the public, and in that meeting the County Commission gave the Fayette County Health Department permission to leave the state merit-based system, DOP.

4. On December 3, 2019, Respondent informed DOP that their relationship was over and DOP acknowledged the same in a letter to the Health Department on January 9, 2020. See exhibits of record.⁴ Also see DOP list of “Non-Covered Agencies” available online at https://personnel.wv.gov/job_seekers/Pages/agencycoverage.aspx.

5. Grievant was aware that Respondent would no longer be apart of the Division of Personnel system when he was hired as a full-time Harm Reduction Coordinator. Under DOP classification, there was no position identified as a Harm Reduction Coordinator. Grievant was aware, informed and/or had personal knowledge that Respondent was able to offer the full-time employment to Grievant partly because the Health Department left the Division of Personnel system.

6. Respondent is an autonomous county health board as defined by Statute with a Board of Directors that make all of the hiring and firing decisions internally.

⁴ The undersigned, in review of the December 3, 2019 correspondence, is perplexed by Respondent’s representation, evident in the document, “the health department will continue working within the parameters of the West Virginia Public Employees Grievance Board,” and it’s current position that this Board lacks jurisdiction to hear and rule on the instant grievance matter.

7. Prior to hiring Grievant, Respondent entered into an agreement with Fayette, Monroe, Raleigh, and Summers Health Systems, Inc. (FMRS), with the intention to refer clients suffering from opioid addictions between the two organizations. Respondent planned to run and/or operate a medically assisted treatment (MAT) program.

8. Notably, Grievant intends to open his own MAT program in the future.

9. Grievant informed and/or Respondent became aware that Grievant was discussing, (contemplating) participating in a private for profit venture that tended to compete with one or more mission concepts of Respondent's services.

10. On, or about, September 8, 2020, Respondent informed Grievant that his afterhour efforts to open a MAT program were a "conflict of interest" with his employment.

11. Grievant adjusted the opening site of his planned MAT program to Nicholas County, West Virginia, which reportedly would be approximately thirty (30) minutes outside of the jurisdiction of Respondent.

12. Respondent informed Grievant that he could not continue to work for Respondent if he continued with plans to be a principal participating with an independent for profit (his) MAT program.

13. Respondent met with Grievant again on November 12, 2020, and informed him that he needed to abandon all thoughts of opening his MAT. Respondent considered it to be a conflict of interest.

Discussion

The scope of the authority of the Grievance Board is limited to that set forth in the grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY (Eighth Edition 2004). The Public Employees Grievance Procedure was established to allow public employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); See *Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).⁵

"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

⁵ "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.

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). “‘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).

Currently at issue is Respondent’s Motion to Dismiss. The burden of proof is on Respondent to demonstrate that the motion should be granted by a preponderance of the evidence. “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). Grievant, as a former employee of Fayette County Health Department, filed a grievance before the West Virginia Public Employees Grievance Board. Grievant protested the termination of his employment. Respondent asserted this grievance should be dismissed for lack of jurisdiction. Grievant was an employee of a Health Department that was not a part of the state merit-based system. See FOFs, *supra*. Respondent persuasively highlights that this Grievance Board does not have proper authority to adjudicate this matter.

The instant County Health Department, Respondent is an autonomous county health board as defined by Statute with a Board of Directors that make all of the hiring and firing decisions internally without input from any elected public official. At the time of Grievant's employment, Grievant was an employee of a Health Department that was not a part of the state merit-based system.⁶

In the 1994 case of *State Dep't of Admin., Div. of Personnel v. State Dep't of Health & Human Resources/Div. of Health*, 192 W. Va. 202 , 451 S.E.2d 768 (1994) the West Virginia Supreme Court held that "An employee of a county health department who is a member of the state merit system is subject to the grievance procedures for state employees and may accordingly file grievances pursuant to West Virginia Code § 29-6A-1 to 11 (1992) before the West Virginia Education and State Employees Grievance Board." In this case an employee of a local health department was afforded the right to file a grievance in this Court because of that health department's participation in the DOP. The undersigned is persuaded in the case at bar, that Grievant was an employee of a health department that was not a part of the state merit-based system, fortified by Respondent's deliberate positive steps to remove itself from participation and/or from the authority of the Division of Personnel. In the circumstances of this matter, Respondent is not a recognized "employer" under the purview of this agency, and accordingly subject

⁶ The undersigned considered but ultimately is not persuaded by Grievant's argument that Respondent exercised certain control over Grievant's employment with implied conditions pursuant to W. VA. CODE § 6B-1-3, and Respondent has substantially failed to adopt and/or produce a required merit based system pursuant to W. VA. CODE § 16-2-11(b)(2), accordingly Grievant was a State employee subject to the rights and protection afforded to employees under the Division of Personnel's rule. See *State Dep't of Admin., Div. of Personnel v. State Dep't of Health & Human Resources/Div. of Health*, *supra*.

to the grievance procedure. The jurisdiction of the Public Employees Grievance Board is limited to the grant of authority under WEST VIRGINIA CODE § 6C-2-1 *et seq.* See *Clutter v. Dep't of Agriculture*, Docket No. 2009-1372-AGR (May 28, 2009). Accordingly, in the circumstances of this matter, this Grievance Board lacks jurisdiction and the proposed grievance will be dismissed.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. "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)).

2. The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). "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).

3. "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). The administrative law judge may dispose of a grievance through an appealable dismissal order. W.VA. CODE ST. R. § 156-1-6.19.3.

4. “‘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).

5. Standing is a party’s right to make a legal claim or seek judicial enforcement of a duty or right. BLACK’S LAW DICTIONARY (Eighth Edition 2004). The Public Employees Grievance Procedure was established to allow public employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

6. In the circumstances of this matter, Respondent is not a recognized “employer” under the purview of this agency, and accordingly subject to the grievance procedure. *State Dep’t of Admin., Div. of Personnel v. State Dep’t of Health & Human Resources/Div. of Health*, 192 W. Va. 202 , 451 S.E.2d 768, 1994 W. Va. LEXIS 183 (1994).

7. In the circumstances of this matter, this Grievance Board lacks jurisdiction and the grievance must be dismissed.

Accordingly, the Motion to Dismiss is **GRANTED** and the matter is **DISMISSED** from the docket of this Grievance Board.

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 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 (2018).

Date: May 14, 2021

Landon R. Brown
Administrative Law Judge