

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**J. L. ABBOTT, et al.,
Grievants,**

v.

Docket No. 2021-0928-CONS

**MARION COUNTY BOARD OF EDUCATION,
Respondent.**

DISMISSAL ORDER

Between October 7, 2020 and October 19, 2020, a set of Grievants¹ represented by the West Virginia Education Association (WVEA) filed related grievances against Respondent, Marion County Board of Education, stating,

WV 6C-2-2 (i)(1)(i), (ii), (iv), (V). WV 18A-2-2 Employment Contract. WV 18A-2-7(a), (b), and (e). WV 18A-4-7a (g)(l)(c) and (d). Due to the COVID pandemic, teachers have been illegally reassigned to positions for which they did not apply. The positions themselves (remote teaching or both remote teaching and in-person teaching) should have been posted with the necessary information to identify which method of teaching was expected. The Board of Education has piled on obligations to the point that the teacher has a difficult time completing their assigned duties. There was also lack of planning and training for these new positions.

As relief, the WVEA Grievants requested: "Placement in original position or assignment. Distance Learning position to be bid as a separate contract, either extracurricular or a new full-time position. Payment for extra time needed to complete the assignment at the teacher's hourly rate plus all related benefits." These grievances were

¹There are thirty-nine Grievants represented by the West Virginia Education Association whose names are incorporated herein by reference.

consolidated under *J.L. Abbott et al. v. Marion County Board of Education*, Docket No. 2021-0928-CONS. A level one conference occurred for the WVEA Grievants on October 21, 2020. A decision denying the grievance was issued on or about November 16, 2020. On November 16, 2020, the WVEA Grievants appealed to level two. On March 12, 2021, the WVEA Grievants participated in a mediation and, on April 5, 2021, appealed to level three.

On or about October 22, 2020, a set of Grievants² represented by the American Federation of Teachers–West Virginia (AFT-WV) filed related grievances against Respondent protesting their assignment to remote/virtual learning duties without their consent. For relief, the AFT-WV Grievants requested: “Removal of either the in person instructional duties or the remote/virtual instructional duties and compensation for the time both were performed. Reduction of the overall instructional duties to a manageable level with compensation for the time that the excessive workload was performed.” In the alternative, the AFT-WV Grievants sought: “Execution of a mutually agreed upon extracurricular assignment detailing compensation and maximum hours retroactive to the commencement of performance of remote or virtual learning duties in addition to in person instructional duties by Grievants.” The AFT-WV grievances were consolidated into *Crystal Adkins et al. v. Marion County Board of Education*, Docket No. 2021-1203-CONS. A level one conference occurred for the AFT-WV Grievants on November 23, 2020. A decision denying the grievance was issued on or about December 14, 2020. The AFT-WV Grievants appealed to level two and, on March 18, 2021, participated in mediation. The AFT-WV Grievants appealed to level three on April 5, 2021.

²There are one hundred and twenty Grievants represented by the American Federation of Teachers–West Virginia whose names are incorporated herein by reference.

On May 14, 2021, the AFT-WV consolidated grievance was merged into the WVEA consolidated grievance that constitutes the above styled action. On February 22, 2022, Respondent, appearing by attorneys Richard Boothby and Joshua Cottle, Bowles Rice LLP, filed *Respondent's Motion to Dismiss*, asserting that the Public Employees Grievance Board lacked jurisdiction to hear the grievance under the COVID-19 Jobs Protection Act. On March 16, 2022, the AFT-WV Grievants, appearing by attorney Jeffrey Blaydes, filed a *Brief In Opposition to Respondent's Motion to Dismiss*. On March 16, 2022, the WVEA Grievants, appearing by attorney Andy Katz, filed *The West Virginia Education Association Grievants' Reply to Respondent's Motion to Dismiss*. On April 7, 2022, Respondent filed *Respondent's Amended and Updated Reply in Support of its Motion to Dismiss*.

Synopsis

Grievants are employed as teachers by Respondent, Marion County Board of Education. During the COVID-19 pandemic, Grievants were assigned additional duties involving remote teaching. Grievants allege these are positions for which they did not apply. This assignment of additional duties was in response to the pandemic and an attempt by Respondent to stem the spread of COVID-19. As this grievance does not allege a violation of contract, the COVID-19 Jobs Protection Act (Act) applies. Grievants argue that the Act is both inapplicable and unconstitutional. However, the Act explicitly deprives the Grievance Board of jurisdiction over this grievance. Further, the Grievance Board does not have authority to address the constitutionality of a statute. Thus, this grievance is DISMISSED.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievants are employed as teachers by Respondent, Marion County Board of Education.

2. This grievance arises from the online/remote instruction and/or the combination of remote and in-person instruction that was necessitated by the COVID-19 pandemic.

3. Grievants alleged violations of West Virginia law in their reassignment to positions for which they did not apply.

4. Grievants complain of the obligations associated with remote and hybrid instruction, as well as the lack of planning for the modified instruction necessitated by the pandemic.

5. In 2021, the West Virginia Legislature enacted the Covid-19 Jobs Protection Act, effective retroactively to January 2020, recognizing that the “novel coronavirus, also known as COVID-19, has been deemed a pandemic.”

6. The Legislature stated that the purpose of the COVID-19 Jobs Protection Act is to provide assurances that the reopening of the State would not create the risk of claims, lawsuits, or liability related to losses or damages arising from COVID-19.

Discussion

“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. “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. “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. § 156-1-6.11.

Respondent asserts this grievance must be dismissed for lack of jurisdiction by action of the COVID-19 Jobs Protection Act. Grievants do not dispute the grievance arose from the response to the COVID-19 pandemic, but assert that the Jobs Protection Act is unconstitutional and that contractual relationships are excluded from the Act.

“Through passage of the COVID-19 Jobs Protection Act, the Legislature recognized a need for the state of West Virginia to reopen its businesses, schools, and churches in the wake of the COVID-19 lockdown without threat of claims or civil litigation.” *Worley v. Jackson County Board of Education*, Docket Number 2022-0349-JacED (Jan. 14, 2022). The purpose of the Act is to “eliminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.” W. VA. CODE § 55-19-2(b)(1). The Act states:

Notwithstanding any law to the contrary, except as provided by this article, there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage,

physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.

W. VA. CODE § 55-19-4. The Act defines “person” to include county governmental entities and schools. W. VA. CODE § 55-19-3. The Act defines “arising from COVID-19” as:

[A]ny act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:

(A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;

. . .

(I) “[a]ctions taken in response to federal, state, or local orders, recommendations, or guidelines lawfully set forth in response to COVID-19.”

W. VA. CODE § 55-19-3.

In *Worley*, the Grievance Board found that the COVID-19 Jobs Protection Act applies to claims before the Grievance Board. In *Dewitt, et al. v. Preston Cnty. Bd. of Education.*, Docket No. 2021-1061-CONS (March 29, 2022), a case identical to the current action, the Grievance Board held that the Jobs Protection Act precludes this sort of claim.

Further, the Grievance Board is not empowered to determine the constitutionality of statutes. *Akers v. West Virginia Dep’t of Highways*, Docket No. 89-DOH-605 (May 22, 1990), *rev’d on other grounds* by 425 S.E.2d 840, 188 W.Va. 698 (1992) (finding the statutory provision at issue to be unconstitutional). The power to determine the constitutionality of a statute belongs to the judicial branch of the government. *State ex rel. Farley v. Brown*, 151 W. Va. 887, 893, 157 S.E.2d 850, 854 (1967). The Grievance

Board is an administrative body within the executive branch of government. Therefore, Grievants' argument that the Act is unconstitutional is preserved for appeal but will not be further addressed.

Here, Grievants also argue that the Act is inapplicable, as their grievance relates to their contractual relationship with Respondent. The Act states, "Nothing in this article shall be construed to affect any duties, rights, benefits, or any other term or condition arising from a contractual relationship." W. VA. CODE § 55-19-9(c). The grievance did list "18A-2-2 Employment Contract" as one of the statutes alleged to have been violated. As teachers, Grievants are employed under statutorily-prescribed contracts. However, a careful review of the grievance shows that Grievants' allegations do not assert violation of their contracts but rather violations of statute. In arguing that their contracts were violated by "reassignment," Grievants were required to point to the provision of West Virginia Code that prescribes job posting requirements and not the provisions of their contracts. Grievants do not allege that Respondent reassigned them to a position other than teacher, only that they were required to perform remote teaching instead of, or in addition to, in-person teaching. Grievants do not allege that their contract days of employment were reduced or that their contractual pay was changed. Grievants "duties, rights, and benefits" in this case arise from statute, not contract, thus the exception for contractual relationships do not apply.

By the clear language, "[n]otwithstanding any law to the contrary, except as provided by this article," the Legislature has removed such grievances from the Grievance Board's jurisdiction. Respondent, Marion County Board of Education, is recognized as the type of entity the West Virginia Legislature sought to protect when it enacted the

COVID-19 Jobs Protection Act. Grievants' claims protest the remote instruction procedures Respondent put into place to prevent or minimize the spread of COVID-19 in response to state and local orders and guidelines related to COVID-19. As the COVID-19 Jobs Protection Act prohibits claims arising from COVID-19 response, the instant grievance is effectively precluded by state law. Therefore, Respondent's motion must be granted and the grievance dismissed.

The following Conclusions of Law support the dismissal of this grievance

Conclusions of Law

1. "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. "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. "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. § 156-1-6.11.

2. "Through passage of the COVID-19 Jobs Protection Act, the Legislature recognized a need for the state of West Virginia to reopen its businesses, schools, and churches in the wake of the COVID-19 lockdown without threat of claims or civil litigation."

Worley v. Jackson County Board of Education, Docket Number 2022-0349-JacED (Jan. 14, 2022).

3. The purpose of the COVID-19 Jobs Protection Act is to “eliminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.” W. VA. CODE § 55-19-2(b)(1).

4. The Act states:

Notwithstanding any law to the contrary, except as provided by this article, there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.

W. VA. CODE § 55-19-4.

5. “Person” includes county governmental entities and schools. W. VA. CODE § 55-19-3.

6. The Act defines “arising from COVID-19” as:

[A]ny act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:

(A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;

. . .

- (l) “[a]ctions taken in response to federal, state, or local orders, recommendations, or guidelines lawfully set forth in response to COVID-19.”

W. VA. CODE § 55-19-3.

7. “Nothing in this article shall be construed to affect any duties, rights, benefits, or any other term or condition arising from a contractual relationship.” W. VA. CODE § 55-19-9(c).

8. The Grievance Board is not empowered to determine the constitutionality of statutes. *Akers v. West Virginia Dep’t of Highways*, Docket No. 89-DOH-605 (May 22, 1990), *rev’d on other grounds* by 425 S.E.2d 840, 188 W.Va. 698 (1992) (finding the statutory provision at issue to be unconstitutional). The power to determine the constitutionality of a statute belongs to the judicial branch of the government. *State ex rel. Farley v. Brown*, 151 W. Va. 887, 893, 157 S.E.2d 850, 854 (1967).

9. Although Grievants are employed under a contract, Grievants do not allege violation of their contracts but rather violations of statute.

10. The Grievance Board lacks jurisdiction to hear the grievance, as the grievance is effectively precluded by state law.

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 Dismissal 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: April 26, 2022

Joshua S. Fraenkel
Administrative Law Judge