

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MYCAH AUVILLE,  
Grievant,**

**V.**

**DOCKET NO. 2022-0593-WooED**

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

**DISMISSAL ORDER**

Grievant, Mycah Auville, is employed by Respondent, Wood County Board of Education. On January 27, 2022, Grievant filed a lengthy statement of grievance<sup>1</sup> alleging, essentially, that she feared reprisals due to a citizen's complaint she had filed regarding her daughter. Grievant asserts that the principal of her daughter's school had "spoken ill" of Grievant and that, if the principal should do so again, it may impact Grievant's application for an administrative position or future evaluations. She asserts that the citizen's complaint meeting was "tense" and "there is nothing keeping" the meeting attendees from talking about Grievant or discussing the meeting. Grievant alleged this could negatively influence administrators in future hiring decisions or, if she did receive an administrative position, then "there is potential that the people working for me will do things to interfere with my duties." In explaining her relief sought, Grievant stated:

I have no guarantee when, if, how, and from whom reprisals will occur. I have no way to monitor the hiring process for Wood County Schools. I need an independent way to validate job openings, the decision process of who gets an interview, the interview itself, and the post interview hiring process. I want documentation kept at WCS that when and if adverse action happens, an investigation into the person filing the

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<sup>1</sup> Due to its length, the grievance statement is not reproduced herein but is incorporated in its entirety by reference.

action to ensure its validity prior to anything that happens against me.

On February 3, 2022, Respondent, by counsel, filed *Respondent's Motion to Dismiss* asserting the grievance must be dismissed as Grievant had failed to state a claim upon which relief could be granted and sought a remedy wholly unavailable to her as Grievant is seeking an advisory opinion from the Grievance Board. Grievant filed her *Discussion and Rebuttal by the Grievant* on February 17, 2022, opposing the motion to dismiss. Grievant appears *pro se*.<sup>2</sup> Respondent appears by counsel, Richard Boothby, Bowles Rice, LLP.

### **Synopsis**

Grievant is employed by Respondent as a teacher. In her grievance filing, Grievant asserted she may be subject to reprisal in the future based on her filing of a citizen's complaint against Respondent. As relief, she sought preemptive actions to prevent this possible reprisal. Respondent moved to dismiss the grievance for failure to state a claim upon which relief may be granted and as the relief requested is wholly unavailable. Respondent's motion must be granted as the grievance alleged no injury in fact, was speculative and premature, and requested remedies that are wholly unavailable. Accordingly, the 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 teacher.

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<sup>2</sup> For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6<sup>th</sup> ed. 1990).

2. In her grievance filing, Grievant asserted she may be subject to reprisal in the future based on her filing of a citizen's complaint as a parent against Respondent. As relief, she sought preemptive actions to prevent this possible reprisal.

3. At the time of filing, Grievant did not allege that any reprisal had yet taken place.

4. In her response to the motion to dismiss, Grievant asserted that, after the grievance was filed, a job was posted for which she applied and was not granted an interview.

### **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.

As a preliminary matter, Grievant asserts the grievance may not be dismissed by a "level 3 administrative law judge." The Grievance Board "maintain[s] jurisdiction over procedural matters in the grievance process." W.VA. CODE § 6C-3-2(1). The Grievance Board's procedural rule permits the dismissal of a grievance, as discussed above, within

the general authority of a Grievance Board administrative law judge. W. VA. CODE ST. R. § 156-1-6. Section six of the procedural rule, which contains the provisions regarding dismissal of grievances, is entitled “Level Three *and Administrative Law Judge Authority Generally*.” (emphasis added). The motion to dismiss is properly before the undersigned.

Respondent asserts the grievance must be dismissed for failure to state a claim upon which relief may be granted and as the relief requested is wholly unavailable. Although no reprisal had taken place at the time of the grievance filing, Grievant now asserts that, after the grievance was filed, a job was posted for which she applied and was not granted an interview.

“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 West Virginia Public Employees Grievance Procedure defines a grievance as follows:

“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.

W. VA. CODE § 6C-2-2(i)(1).

The Grievance Board has continuously refused to deal with issues when the relief sought is “speculative or premature, or otherwise legally insufficient.” *Dooley v. Dept. of Trans./Div. of Highways*, 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). Typically, a Grievant must show “an injury-in-fact, economic or otherwise” to have what “constitutes a matter cognizable under the grievance statute.” *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). This Grievance Board does not issue advisory opinions. *Biggerstaff v. Mingo County Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003); *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Dooley v. Dept. 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).

In this case, at the time of the grievance filing, no adverse action had been taken against Grievant as a result of her citizens’ complaint. Grievant clearly states in her filing that no reprisal had yet occurred: “I have no guarantee when, if, how, and from whom reprisals will occur.” Instead, Grievant sought relief to preemptively prevent any possible reprisal. Therefore, Grievant alleged no injury in fact and the grievance is speculative and premature.

In addition, the relief Grievant seeks is unavailable. Grievant seeks “an independent way to validate job openings, the decision process of who gets an interview, the interview itself, and the post interview hiring process” and “documentation kept at WCS that when and if adverse action happens, an investigation into the person filing the action to ensure its validity prior to anything that happens against me.” The Grievance Board's role is only to determine if a violation, misapplication, or misinterpretation of applicable provisions has occurred that resulted in an actual injury to the employee and provide remedy to that injury.

Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a “make-whole” remedy, intended to restore the grievant to his or her rightful place as an employee. *Matney v. Dep't of Health & Human Res.*, Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Barker v. Lincoln County Bd. of Educ.*, Docket No. 98-22-496 (Mar 30, 1999). See *Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ.*, Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ.*, Docket No. 97-40-459 (Dec. 3, 1997); *Frost v. Bluefield State College*, Docket No. 2017-0472-BSC (Dec. 7, 2017). Grievant, instead, is asking the Grievance Board to preemptively impose procedural requirements on Respondent to prevent an injury or to investigate or order an investigation. The grievance procedure statute does not confer investigatory powers upon the Grievance Board itself or provide the Grievance Board authority to order an investigation be conducted. *Hick. v. Div. of Highways*, Docket No. 2018-0824-DOT (May 30, 2018).

Grievant has now alleged in her response to the motion to dismiss that she was denied an interview for a position after the grievance was filed. While Grievant asserts

this event was related to the previous circumstance, the actual failure to grant her an interview is a separate claim which would entail different relief. Therefore, the appropriate procedure regarding that claim would be for Grievant to file a separate grievance seeking relief for that injury, although it appears the time for filing a grievance regarding the interview may have expired. As Grievant has asserted that claim on the record in this grievance, believing her preemptive filing would preserve her claim, it would be proper to enlarge her time in which to file a grievance protesting the refusal to grant her an interview. The grievance process is not “to be a procedural quagmire where the merits of the cases are forgotten.” *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990). The West Virginia Supreme Court of Appeals has applied a flexible interpretation of the grievance procedures to that end. See *Duruttia v. Board of Educ.*, 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity); *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event); *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims). Thus, if Grievant wishes to seek a remedy for Respondent’s alleged failure to grant her an interview, she may do so within fifteen days of receipt of this order.

The following Conclusions of Law support the decision reached.

## **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.

2. The Grievance Board “maintain[s] jurisdiction over procedural matters in the grievance process.” W.VA. CODE § 6C-3-2(1).

3. The Grievance Board’s procedural rule permits the dismissal of a grievance at level one by a Grievance Board administrative law judge within the administrative law judge’s general authority. W. VA. CODE ST. R. § 156-1-6.

4. Respondent’s motion to dismiss is properly before the undersigned.

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)).

6. The West Virginia Public Employees Grievance Procedure defines a grievance as follows:

“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.

W. VA. CODE § 6C-2-2(i)(1).

7. This Grievance Board has continuously refused to deal with issues when the relief sought is “speculative or premature, or otherwise legally insufficient.” *Dooley v. Dept. of Trans./Div. of Highways*, 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). Typically, a Grievant must show “an injury-in-fact, economic or otherwise” to have what “constitutes a matter cognizable under the grievance statute.” *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987).

8. This Grievance Board does not issue advisory opinions. *Biggerstaff v. Mingo County Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003); *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Dooley v. Dept. 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).

9. Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a “make-whole” remedy, intended to restore the grievant to his or her rightful place as an employee. *Matney v. Dep’t of Health & Human Res.*, Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Barker v. Lincoln County Bd. of Educ.*, Docket No. 98-22-496 (Mar 30, 1999). See *Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ.*, Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ.*, Docket No. 97-40-459 (Dec. 3, 1997); *Frost v. Bluefield State College*, Docket No. 2017-0472-BSC (Dec. 7, 2017).

10. The grievance procedure statute does not confer investigatory powers upon the Grievance Board itself or provide the Grievance Board authority to order an investigation be conducted. *Hicks v. Div. of Highways*, Docket No. 2018-0824-DOT (May 30, 2018).

11. Respondent’s motion to dismiss must be granted as the grievance alleged no injury in fact, was speculative and premature, and requested remedies that are wholly unavailable.

12. Grievant may seek a remedy for Respondent’s alleged new failure to grant her an interview by filing a grievance for that injury and her time to file should be enlarged to fifteen days following receipt of this order.

Accordingly, the 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: March 21, 2022**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**