

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CARL COLLINS,**

**Grievant,**

**v.**

**Docket No. 2022-0334-CGCC**

**CALHOUN-GILMER CAREER CENTER,**

**Respondent.**

**DISMISSAL ORDER**

Carl Collins, Grievant, is employed by Respondent, Calhoun-Gilmer Career Center ("Career Center") as a welding instructor. He filed a Grievance dated October 8, 2021, alleging:

WV Code § 18A-4-10: WV § 6C-2-2 Grievance; US and WV wage and Hour requirements. Grievant unable to attend work due to COVID but provided services (ie worked) from home September 7, 8, 9, 10 and 13. Grievant provided instruction and counseled students everyday. When he received his pay he noticed he had been charged sick leave for days he worked.<sup>1</sup>

Grievant seeks to have the sick leave days restored.

A level one conference was held on November 5, 2021, and a decision denying the Grievance was mailed to the parties on December 6, 2021. Grievant appealed to level two the next day. A mediation was held on March 16, 2022. Grievant appealed to level three on March 22, 2022, and the matter is scheduled for a hearing on July 27, 2022.

Respondent filed a Motion to Dismiss dated April 21, 2022, and Grievant submitted a Response to the Motion to Dismiss on May 13, 2022. Respondent is represented by

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<sup>1</sup> The statement of grievance is set out herein as it appears on the grievance form without alteration.

Richard S. Boothby Esq., Joshua A Cottle, Esq. and Leigh Anne Wilson Esq., Bowles Rice LLP. Grievant is represented by Ben Barkey, West Virginia Education Association. This matter is now mature for a decision of the motion.

### **Synopsis**

Grievant was placed on quarantine after testing positive for COVID-19. Grievant was not allowed to report to work for five days and was not instructed to provide any assistance remotely for his students. Nonetheless, Grievant did assist his students daily pursuant to an on-line platform. Grievant was paid sick leave for the five days and seeks to have his sick leave account credited with the five days he was charged while on quarantine. Respondent moved to dismiss the grievance arguing that when the Legislature passed the COVID-19 Jobs Protection Act it removed jurisdiction from the Grievance Board to hear any claims arising out of facts related to the Covid-19 pandemic.

Grievant argues that the Federal Labor Standards Act preempts the Jobs Protection Act. However, Grievant, as a vocational teacher, is exempt from coverage under the Fair Labor Standards Act provisions related to wage and overtime.

Accordingly, the Motion to Dismiss is Granted.

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 is employed by the Career Center and had around 33 students in his class at the time related to this matter.
2. On Saturday September 4, 2021, Grievant tested positive for COVID-19 and was required to quarantine at home on September 7, 8, 9, 10, and 13, 2021.

3. During Grievant's quarantine period, a math teacher was present in Grievant's welding classroom at the Career Center each day Grievant was absent.

4. On each day Grievant was absent during the quarantine, Grievant voluntarily made himself virtually available to the students via email and the Microsoft virtual meetings platform Teams.

5. No authorized administrator ordered or asked Grievant to perform any work while he was on quarantine. However, his supervisor was included on the Teams meetings notifications each day.<sup>2</sup>

6. Grievant was paid sick leave for every day he was absent due to quarantine for COVID-19. Each one of those days was deducted from his accumulated total of sick leave days.

### **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). 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).

"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. §

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<sup>2</sup> While management did not request or authorize Grievant to work from home while he was on quarantine, they were on, at least, constructive notice that he was working virtually.

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.

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). *Berger v. Dep’t of Health & Human Ser.*, Docket No. 2019-0297-DHHR (Apr 6, 2021).

Respondent has asserted the instant grievance must be dismissed for lack of jurisdiction by application of the COVID-19 Jobs Protection Act (“JPA”). Grievant counters that the claim is based upon the Federal Fair Labor Standards Act (FLSA) and is not

related to Covid-19. Grievant also argues that the FLSA overrides the JPA due the preemption doctrine which requires that federal laws be given precedence over state statutes.

“Through passage of the COVID-19 JPA, 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.” 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 COVID19 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 v. Jackson County Bd. of Educ.*, Docket No. 2022-0349-JacED (Jan 14, 2022), the Grievance Board found that the JPA applies to claims before the Grievance Board and that the Grievance Board lacked jurisdiction to hear a claim protesting a suspension for violation of an employer’s COVID-19 face covering policy. In this case, Grievant presents arguments not made before the Grievance Board in *Worley*. Grievant argues that the Act is unconstitutional or, alternately, that the FLSA overrides the (“JPA”) due the preemption doctrine which requires that federal laws be given precedence over state statutes.

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, Grievant’s argument that the Act is unconstitutional is preserved for appeal but will not be further addressed.

Addressing the FLSA, the wage and overtime provisions of that Act do not apply to Grievant. *US Department of Labor. Wage and Hour Division Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)* states the following:

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; **teachers of skilled and semi-skilled trades and occupations**; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.<sup>3</sup> (Emphasis added)

The highlighted portion of the above section clearly applies to Grievant as a vocational teacher of the welding trade. Since Grievant is excluded from FSLA coverage, the preemption doctrine is not applicable to this case.

“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 . . .” W. VA. CODE

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<sup>3</sup> Fact Sheet #17D provides information on the exemption from minimum wage and overtime pay found in Section 13(a)(1) of the FLSA as defined by Regulations, 29 C.F.R. Part 541, as applied to professional employees.

§ 6C-2-1(a). Grievant's claim has clearly arisen out of the COVID-19 pandemic and the legislature has removed such cases from the Grievance Board's jurisdiction by statute. 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.*" W. VA. CODE ST. R. § 156-1-6.2 (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. "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.



3. 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). *Berger v. Dep't of Health & Human Ser.*, Docket No. 2019-0297-DHHR (Apr 6, 2021).

4. "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)).

5. "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 . . ." W. VA. CODE § 6C-2-1(a). Grievant's claim has clearly arisen out of the COVID-19 pandemic and the legislature by, statute has removed such cases from the Grievance Board's jurisdiction.

6. 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).

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: June 27, 2022**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**