

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**LISA DEWITT, et al.,
Grievants,**

v.

Docket No. 2021-1061-CONS

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

DISMISSAL ORDER

Between October 13, 2020 and November 4, 2020, Grievants filed this action against their employer, Preston 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)(I)(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.

Grievants' requested relief is "placement in original positions 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."

The grievances were consolidated by the agreement of the parties at level one of the grievance process. Following a level one conference, the grievance was denied on November 23, 2020. Grievants appealed to level two on November 23, 2020. Following a mediation conducted on March 5, 2021, Grievants appealed to level three on March 16, 2021. On June 10, 2021, Respondent filed *Respondent's Motion to Dismiss* asserting

the grievance must be dismissed as moot. Grievants, by representative, requested an extension and continuance of the scheduled level three hearing to allow Grievants time to retain counsel. On October 26, 2021, Grievants' counsel filed a notice of appearance and request for an additional extension. On November 4, 2021, Grievants, by counsel, filed *Grievants Response to, and Motion for Denial of, Respondent's Motion to Dismiss*. On January 31, 2022, Respondent filed *Respondent's Motion to Dismiss or, in the Alternative, Motion to Strike*, asserting the Grievance Board lacked jurisdiction to hear the grievance due to the COVID-19 Jobs Protection Act. On February 18, 2022, Grievants, by counsel, filed *Grievants Response to, and Motion for Denial of, Respondent's Motion to Dismiss or, in the Alternative, Motion to Strike*. Respondent appears by counsel, Kimberly S. Croyle, Bowles Rice, LLP. Grievants appear by counsel, T. Nicole Saunders-Meske, Saunders-Meske, PLLC.

Synopsis

Grievants allege Respondent assigned them to positions for which they did not apply for requiring them to perform remote teaching duties. Respondent moved the Grievance Board to dismiss the grievance as barred by the COVID-19 Jobs Protection Act. The record is undisputed that this grievance arises out of Respondent's response to the COVID-19 pandemic and an effort to stem the spread of the virus. Grievants argued that the Act is unconstitutional or, alternately, inapplicable. The COVID-19 Jobs Protection Act applies to the grievance as the grievance does not truly allege a violation of contract. The Grievance Board lacks jurisdiction to determine the constitutionality of the Act or hear the grievance. Respondent's motion to dismiss must be granted and the grievance must be dismissed.

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

Findings of Fact

1. This grievance is comprised of the consolidated grievances of Lisa DeWitt, Summer Lipscomb, Timothy Mitten, Jodi Myers, Amanda Rehe, Nancy Stacy, Milisa Thorn, Alex Voldeck, Mary Ziegler, Ashley Burnside, Cassandra Sisler, Tammy Ashcraft and Kacey Mihoces.

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

3. Grievants assert alleged violations of West Virginia law and alleged illegal 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. On February 19, 2021, the Preston County Board of Education voted unanimously for all students to return to school in-person in a four-day instructional model beginning on March 1, 2021.

6. In 2021, the West Virginia Legislature enacted the Covid-19 Jobs Protection Act, effective retroactively from January 2020, to provide assurances that the reopening of the state would not create 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 has asserted the instant grievance must be dismissed for lack of jurisdiction by action of the COVID-19 Jobs Protection Act.¹ 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 the grievance is excluded from the Act due to the parties' contractual relationship.

“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.”

¹ Respondent also asserted that the grievance was moot and that the relief sought was speculative but as the Grievance Board does not have jurisdiction to hear the grievance, Respondent's other arguments will not be addressed.

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 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, Grievants present arguments not made before the Grievance Board in *Worley*. Grievants argue that the Act is unconstitutional or, alternately, that the Act is inapplicable.

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.

Grievants alternately argue that the Act is inapplicable as the grievance relates to Grievants' 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 undersigned notes that the statement of 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. Indeed, 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. They allege 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.

Respondent, Preston 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 must be 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;

. . .

(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.

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 violation 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: March 29, 2022

Billie Thacker Catlett
Chief Administrative Law Judge