

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RENEE ENDICOTT,**

**Grievant,**

**v.**

**Docket No. 2022-0608-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES,**

**Respondent.**

**DISMISSAL ORDER**

On January 31, 2022, Grievant filed this action against her employer, Department of Health and Human Resources, stating,

I was advised via email that there is a new mandate that all State Hospitals and Nursing Home employees be vaccinated. That if I was not vaccinated you will no longer be able to work from Jackie Withrow and will have to work from Charleston, WV. Charleston, WV is at minimum 64 miles/1 hour 20 minutes one way from my home. I'm not a healthcare worker. I work from that location but work under DHHR-OHRM [Office of Human Resources Management].

Grievant's requested relief is "[t]o be placed in a work location closer to home."

Following a level one hearing, the grievance was denied on March 22, 2022. Grievant appealed to level two on March 22, 2022. Following unsuccessful mediation, Grievant appealed to level three on April 28, 2022. On June 9, 2022, Respondent filed *Department Motion to Dismiss* asserting the grievance must be dismissed as moot as Grievant had transferred from her position as a Human Resource Generalist I within the Office of Human Resources Management to a Human Resource Associate within the Bureau for Social Services effective May 21, 2022. Grievant responded by email on June 13, 2022, opposing the motion to dismiss stating, "I was forced to transfer due to the lack

of accommodation to seek medical care financial burden and many other reasons.” Respondent appears by counsel, Mindy M. Parsley, Assistant Attorney General. Grievant appears *pro se*.<sup>1</sup>

### **Synopsis**

Grievant protests a change in her work location. Grievant was employed by Respondent within the Office of Human Resources Management as a Human Resource Generalist I. Grievant was stationed at Jackie Withrow Hospital. Jackie Withrow Hospital employees were required to be vaccinated so Grievant’s work location was changed because she was not vaccinated. Since the grievance was filed, Grievant transferred her employment to the Bureau for Social Services as a Human Resource Associate. Respondent moved the Grievance Board to dismiss the grievance as moot. Respondent proved the grievance is moot as Grievant is no longer employed within the same agency or position. The Grievance Board lacks jurisdiction to hear the grievance as the grievance is effectively precluded by state law. Accordingly, the grievance is dismissed.

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

### **Findings of Fact**

1. At the time the grievance was filed, Grievant was employed by Respondent within the Office of Human Resources Management as a Human Resource Generalist I.
2. Grievant was stationed at Jackie Withrow Hospital.
3. Employees at all state hospitals are now required to be vaccinated against COVID-19.

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<sup>1</sup> For one’s own behalf. BLACK’S LAW DICTIONARY 1221 (6<sup>th</sup> ed. 1990).

4. As Grievant was not vaccinated, Grievant could no longer work at Jackie Withrow Hospital and Respondent changed Grievant's work location to Charleston, West Virginia.

5. Following her grievance filing, on May 5, 2022, Grievant notified Respondent of her intent to transfer to the Bureau for Social Services as a Human Resource Associate, which transfer has now occurred.

### **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 (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. "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 as moot because Grievant transferred to another position at another location following her grievance filing. Grievant opposes the dismissal of her grievance stating that she had been forced to transfer positions.

“Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

At the time the grievance was filed, Grievant was employed by Respondent within the Office of Human Resources Management as a Human Resource Generalist I. Grievant was stationed at Jackie Withrow Hospital and her work location was being moved because state hospital staff is required to be vaccinated and Grievant was not vaccinated. Since the grievance was filed, Grievant has transferred to the Bureau for Social Services and is employed as a Human Resource Associate. As Grievant is no longer employed within the same agency or position, her grievance is moot.

Regardless, the grievance must be dismissed for lack of jurisdiction by action of the COVID-19 Jobs Protection 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.

Respondent, Department of Health and Human Resources, is recognized as the type of entity the West Virginia Legislature sought to protect when it enacted the COVID-19 Jobs Protection Act. Grievant protests a change to her work location due to the vaccine mandate for state hospital employees; a mandate put into place to prevent or minimize the spread of COVID-19 in state hospitals. As the COVID-19 Jobs Protection Act prohibits claims arising from COVID-19 response, the instant grievance is effectively precluded by state law. Therefore, 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 (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. “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. “Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

3. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009).

4. The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

5. Respondent proved the grievance is moot as Grievant is no longer employed within the same agency or position.

6. “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).

7. 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).

8. 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.

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

10. 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.

11. “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).

12. 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 decision to the Intermediate Court of Appeals.<sup>2</sup> Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**DATE: August 4, 2022**

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

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<sup>2</sup> On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.