

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ERICA HAMPTON, ET AL.,
Grievants,**

v.

Docket No. 2021-0923-CONS

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

DISMISSAL ORDER

Grievants, Erica Hampton, Leigh Dawn McGuinness, Shelly McClung, Caron Miller, and Sandra Michelle Jarrell were employed by Respondent, Raleigh County Board of Education, at the time of the filing of the grievance.¹ On October 2, 2020, Grievants, by their then representative, filed this grievance against Respondent 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.

For relief, Grievants sought, "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."

Following the February 12, 2021 level one conference, a level one decision was rendered on February 22, 2021, denying the grievance. Grievants appealed to level two

¹ Grievant Jarrell is no longer employed by Respondent.

on March 5, 2021. On May 6, 2021, Respondent filed *Respondent's Motion to Dismiss Grievances as Untimely*. As the motion was filed just one day prior to the scheduled mediation in this matter, the motion could not be addressed at level two. Grievants appealed to level three of the grievance process on May 20, 2021. Respondent renewed its motion to dismiss on June 9, 2021. A limited evidentiary hearing was held on the motion to dismiss on October 29, 2021 and December 17, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievants Hampton, McClung, and Miller appeared. Grievant McGuiness appeared for the first day of hearing but not the second day of hearing. Grievant Jarrell did not appear. On January 24, 2022, the Grievance Board received the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

On January 14, 2022, the Grievance Board issued its decision in *Worley v. Jackson County Board of Education*, Docket Number 2022-0349-JacED finding 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. As it appeared the Grievance Board lacked jurisdiction to hear the instant grievance by action of the Act, the undersigned issued an order on March 7, 2022, raising the jurisdictional issue and providing the parties an opportunity to respond. Respondent, by counsel, filed its response on March 14, 2022. Grievants filed their response, by counsel, on March 21, 2022. Grievants are represented by representative, Ben Barkey, West Virginia Education Association and by counsel, Andrew J. Katz, The Katz Working Families Law Firm, LC. Respondent is represented by counsel, George "Trey" B. Marrone, Bowles Rice LLP.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the time of the filing of the grievance, Grievants were all employed by Respondent, Raleigh County Board of Education. Grievant Jarrell is no longer employed by Respondent.

2. Grievants McGuiness and Jarrell were employed as classroom teachers. Grievants Hampton, Miller, and McClung were employed as counselors.

3. During the 2020 – 2021 school year, as a result of the coronavirus pandemic, Respondent offered students the option of receiving instruction through a virtual model or a blended model.

4. Students who chose a blended model received two days of in person instruction in addition to virtual instruction. Students who chose a virtual model received solely virtual instruction.

5. Respondent's plan for this delivery of instruction was adopted on July 28, 2020.

6. The plan was published to social media and Respondent's website on July 30, 2020.

7. Under the plan, students were required to make their selection between the two models prior to the beginning of the school year and could not change their selection once made.

8. Counselors reported to work on August 6, 2020, and teachers on August 17, 2020.

9. Teachers were provided training on the blended model on August 24, 2020.
10. A primary job responsibility of counselors is to enroll students in their classes.
11. On August 30, 2020, Counselors were provided a list of the students that chose the virtual model of instruction.
12. Students returned to school on September 8, 2020.
13. On September 11, 2020, despite the prior plan that did not allow students to change their selection of instruction model once made, Respondent reopened enrollment to allow students who had selected the virtual model to change to the blended model.
14. In 2021, the West Virginia Legislature enacted the Covid-19 Jobs Protection Act, effective retroactively from January 2020, 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).

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.

In its motion to dismiss, Respondent raised the affirmative defense of timeliness and it was on this issue that the evidentiary hearing was held in this matter. However, following the hearing in this matter, the Grievance Board issued its decision in *Worley v. Jackson County Board of Education*, Docket No. 2022-0349-JacED (Jan. 14, 2022). In *Worley*, the Grievance Board recognized that the Grievance Board lacked jurisdiction over certain claims due to the COVID-19 Jobs Protection Act. Consequently, the undersigned *sua sponte* raised the jurisdictional issue and provided the parties an opportunity to respond.

Grievants mischaracterize the same as a Rule 12(b)(6) motion. The Rules of Civil Procedure do not apply to this administrative procedure and the Grievance Board is not a party to this action. Rather, as an adjudicating body, the Grievance Board follows the direction of the West Virginia Supreme Court of Appeals to "take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein." Syl. Pt. 2, *In re Boggs' Estate*, 135 W.Va. 288, 63 S.E.2d 497 (1951). "The urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void." *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (2005);

State ex rel. Universal Underwriters Ins. Co. v. Wilson, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017). Although not a court, the same reasoning applies to the Grievance Board as an adjudicating body.

“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” as “an individual, partnership, corporation, association, state, county, or local governmental entity, or other entity, including, but not limited to, a school, a college or university, an institution of higher education, religious organization, or nonprofit charitable organization.” W. VA. CODE § 55-19-3(11). 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, Grievant presents arguments not made before the Grievance Board in *Worley*. Grievant argues that the Act is inapplicable or, alternately, that the Act is unconstitutional.

Grievants argue that the Act is inapplicable because their claim does not arise from “the actual, alleged, or possible exposure to, or contraction of, COVID-19.” This reading does not address the remainder of the definition of “arising from COVID-19” to include “other actions in response to COVID-19” such as “implementing policies and procedures designed to prevent or minimize the spread of COVID-19” and “[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. Grievants’ claim protests 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. Grievants' claimed damages arise directly from Respondent's COVID-19 response.

As to Grievants' assertion that the Act is unconstitutional, 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.

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2). The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

Respondent asserts that the grievance is untimely because Grievants were aware of the requirements of the re-entry plan, at latest, when they reported to work in August 2020. Grievants assert that that the plan changed on September 11, 2020, when

Respondent allowed students to change their enrollment and that is the date from which the timeframe would run.²

If Grievants had grieved only the failure to post positions, then the grievance would be untimely as Grievants were aware of the initial requirements of the plan when they returned to work in August. However, Grievants also alleged, “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.” In considering the motion to dismiss, the grievance statement must be construed in the light most favorable to Grievants.

Because the Board's dismissal rule is similar to the granting of a Rule 12(b)(6) motion under the West Virginia Rules of Civil Procedure, we apply our traditional standard to determine if the dismissal was proper. This standard was stated in Syl. pt. 2 of *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148 (1981) . . . Because of our policy of favoring the determination of actions on the merit, we generally view motions to dismiss with disfavor, and therefore, construe the complaint in the light most favorable to the plaintiff and consider its allegations as true. *Garrison v. Herbert J. Thomas Mem. Hosp. Ass'n*, 190 W. Va. 214, 219, 438 S.E.2d 6, 11 (1993). Syl. pt. 3, *Chapman v. Kane Transfer Co. Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 96, 479 S.E.2d 602, 606 (1996).

Construing the grievance statement in the light most favorable to Grievants, the action of which Grievants complain was not final until the September 11, 2020 change in the plan. Grievants testified that the decision to allow students to change their enrollment

² Grievants also alleged that the chaos of the situation was enough that it should be viewed as a continuing practice that could be grieved at any time but it is unnecessary to evaluate that assertion based on the determination that the grievance was timely filed otherwise.

on September 11, 2020, created a significant change in Grievants' obligations. As Grievants filed within fifteen days of September 11, 2020, the grievance was filed timely.

Respondent, Raleigh 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, although Respondent failed to prove Grievants' claims were untimely.

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. "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. The Grievance Board may “take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein.” Syl. Pt. 2, *In re Boggs' Estate*, 135 W.Va. 288, 63 S.E.2d 497 (1951).

3. “The urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void.” *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (2005); *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017).

4. “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).

5. 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).

6. 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.

7. The Act defines “person” as “an individual, partnership, corporation, association, state, county, or local governmental entity, or other entity, including, but not limited to, a school, a college or university, an institution of higher education, religious organization, or nonprofit charitable organization.” W. VA. CODE § 55-19-3(11).

8. 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.

9. 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).

10. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

11. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are

extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

12. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

13. In considering the motion to dismiss, the grievance statement must be construed in the light most favorable to Grievants.

Because the Board's dismissal rule is similar to the granting of a Rule 12(b)(6) motion under the West Virginia Rules of Civil Procedure, we apply our traditional standard to determine if the dismissal was proper. This standard was stated in Syl. pt. 2 of *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148 (1981) . . . Because of our policy of favoring the determination of actions on the merit, we generally view motions to dismiss with disfavor, and therefore, construe the complaint in the light most favorable to the plaintiff and consider its allegations as true. *Garrison v. Herbert J. Thomas Mem. Hosp. Ass'n*, 190 W. Va. 214, 219, 438 S.E.2d 6, 11 (1993). Syl. pt. 3, *Chapman v. Kane Transfer Co. Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 96, 479 S.E.2d 602, 606 (1996).

14. Respondent failed to prove the grievance was untimely filed.

15. 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 30, 2022

Billie Thacker Catlett
Chief Administrative Law Judge