THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANGELA HOLLANDSWORTH,
Grievant,

v. **Docket No. 2021-0316-DOC**

WORKFORCE WEST VIRGINIA and
DIVISION OF PERSONNEL,
Respondent.

DISMISSAL ORDER

Angela Hollandsworth, Grievant, is employee by Respondent, Workforce West Virginia, ("Workforce") as an Employment Programs Interviewer II. Ms. Hollandsworth filed a level one grievance form dated September 9, 2020, alleging she was "unjustly approved for Parental Leave at an unspecified future date without having applied for it." As relief Grievant seeks "removal of Parental Leave [a]pproval until such time as it is applied or by the Grievant."[1]

A level one hearing was conducted on November 5, 2000. A level one decision denying the grievance was issued on November 18, 2020. Grievant made a timely appeal to level two. By Order dated January 5, 2021, the Division of Personnel ("DOP") was joined as a party respondent and a mediation was scheduled for January 13, 2021. After several continuances were requested and granted for good cause, a mediation was conducted on March 17, 2022. Grievant appealed to level three on March 22, 2022.

Respondent DOP filed a Motion to Dismiss the grievance dated April 8, 2022. The motion was filed on behalf of DOP by Karen O'Sullivan Thornton, Assistant Attorney General. On April 14, 2022, Kimberly Levy, Esquire, sent notice that Respondent

[1] Grievant also generally seeks "[t]o be made whole in every way."

Workforce joined in DOP's Motion to Dismiss. Grievant's representative is Michael Hansen, Project Field Representative with UE Local 170. Mr. Hansen filed a Response to the Motion to Dismiss on April 25, 2022, requesting that the motion be denied. On May 5, 2022, a hearing was held via Zoom, for clarification regarding facts and issues presented by the Motion to Dismiss and Grievant's Response. Grievant, Mr. Hansen, Ms. Levy, and Ms. Thornton attended this hearing by Zoom. This matter is now mature for a decision on the Motion to Dismiss.

Synopsis

Grievant has needed to utilize unpaid leave provided by the federal Family and Medical Leave Act ("FMLA"} as well as the West Virginia Parental Leave Act ("PLA"), to care for her daughter who contracted a life-threatening medical condition. When she first applied for leave, Grievant was allowed to use the PLA leave after she had exhausted her eligibility for FMLA leave in a twelve-month period. During a subsequent twelve-month period, Grievant was informed that a DOP policy provides that Family and Medical Leave Act benefits and Parental Leave Act benefits are utilized concurrently. Therefore, if Grievant exhausted her Family Leave benefits during a twelve-month period, her Parental Leave benefits would also be exhausted.

Grievant seeks a decision finding that the DOP policy is inconsistent with the two leave acts. Respondents argue that such a ruling would be an advisory opinion which the Grievance Board may not issue. Grievant has not been denied leave under either act, therefore, she has not suffered an injury-in-fact and any decision in this matter would be an advisory opinion. Accordingly, the grievance must be dismissed.

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. Angela Hollandsworth, Grievant, is employed by Respondent, WorkForce West Virginia ("WorkForce").

2. Approximately three years ago, Grievant's daughter was diagnosed with a very serious illness. Grievant needed to take leave to care for her.

3. Grievant exhausted her paid leave and applied for additional leave pursuant to the federal Family and Medical Leave Act ("FMLA").

4. When Grievant had exhausted her twelve-month allotment of FMLA leave she was allowed to take additional leave pursuant to the West Virginia Parental Leave Act ("PLA").

5. Grievant was not denied any leave during this period and did not suffer any loss related to her leave.

6. Subsequently, Grievant filed for and received another round leave pursuant to the FMLA.

7. At that time, Grievant was notified of the DOP policy entitled *Family and Medical Leave Act/Parental Leave Act* which states in pertinent part:

> If the paid and/or unpaid leave qualifies under both FMLA and PLA, and/or the Administrative Rule, the leave entitlement under each shall exhaust concurrently.[2]

[2] DOP *Family and Medical Leave Act/Parental Leave Act* policy section II, paragraph C.

8. Grievant was previously allowed to use PLA leave after exhausting her FMLA leave. The leave for these two acts was applied consecutively rather than concurrently. Grievant is concerned that the DOP policy and interpretation of the FMLA and PLA will cause her to be deprived of PLA leave if she should exhaust her FMLA leave during any relevant twelve-month period.

9. Grievant filed a timely grievance dated September 9, 2020, alleging that when she applied for FMLA leave she was approved for PLA leave for which she had not applied. She requests that her PLA leave not be credited as used until she specifically applies for leave under that act.

10. To date, Grievant has not exhausted her FMLA leave during any specific twelve-month period and has not subsequently applied for, or been denied, PLA leave.

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).

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).

Grievant was initially allowed to use PLA leave after exhausting FMLA leave during the same twelve-month period. Accessing the two leave programs consecutively allowed her to remain on unpaid leave to help with her daughter's very serious medical leave. Grievant utilized FMLA leave a second time and was informed that the DOP *Family and Medical Leave Act/Parental Leave Act* policy requires the two leave programs to run concurrently. Grievant is naturally concerned that if she exhausts her intermittent FMLA leave during a twelve-month period any PLA leave will also be exhausted. That situation has not come to pass. Grievant has enough intermediate FMLA leave to get her through the present twelve-month period. Thereafter, she will have a new allotment of FMLA leave for the next twelve-month period. She as not been denied PLA leave nor been required to take a day without leave over the entire time she has needed to help her daughter. She seeks a ruling that the two leave programs may not be required to run concurrently.

Respondent DOP joined by Respondent WorkForce argue that Grievant has not suffered any injury-in-fact, therefore, her grievance is premature. Respondents contend that Grievant is seeking an advisory opinion to hold that her interpretation of the leave acts is right, and the Respondents' interpretation is wrong.

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); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). The Grievance Board's administrative rule states "[t]he Grievance Board will, under no circumstances, issue advisory opinions. W. VA. CODE ST. R. § 156-1-6.21 (July 7, 2008), *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

The Grievance Board has consistently held that "relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993): *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997); *Hines v. Dep't of Health & Human Sers.* Docket No.2020-0633-DHHR (Feb 1. 2021).

Finally, the Grievance Board has continuously refused to deal with issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Dooley v. Dep't. 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).

The only relief Grievant seeks is a determination of whether the DOP *Family and Medical Leave Act/Parental Leave Act* policy is inconsistent with the required application of the FMLA and the PLA. There has been no injury-in-fact because Grievant has not been denied leave under either policy. Any decision based upon these facts would be an advisory opinion which cannot be issued by the Grievance Board.

Accordingly, the Motion to Dismiss is granted and this Grievance is DISMISSED.

Conclusion 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. 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).

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); *Spence v. Div. of Natural Res*., Docket No. 2010-0149-CONS (Oct. 29, 2009). The Grievance Board's administrative rule states "[t]he Grievance Board will, under no circumstances, issue advisory opinions. W. VA. CODE ST. R. § 156-1-6.21 (July 7, 2008), *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

4. The Grievance Board has consistently held that "relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board.") *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993): *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997); *Hines v. Dep't of Health & Human Sers.* Docket No.2020-0633-DHHR (Feb 1. 2021).

5. The Grievance Board has continuously refused to deal with issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Dooley v. Dep't. 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).

6. 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).

7. There has been no injury-in-fact because Grievant has not been denied leave under either policy. Any decision based upon these facts would be an advisory opinion which cannot be issued by the Grievance Board.

Accordingly, the Motion to Dismiss is granted and this Grievance is DISMISSED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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: May 19, 2022

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE