

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SANDRA JEFFRIES, et al.,  
Grievants,**

**v.**

**Docket No. 2019-1703-CONS**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
WILLIAM R. SHARPE, JR. HOSPITAL,  
Respondent.**

**DISMISSAL ORDER**

Grievants<sup>1</sup> filed their grievance at level one of the grievance process on June 4, 2019, against Respondent, Department of Health and Human Resources (“DHHR”). Grievants state, “Working in pay grade above HSW [Health Service Workers], HSA [Health Service Assistants] and HST [Health Service Trainees] and not being given pay raises as HSW, HAS and HST. Recreation Department has similar and like duties as classified HSW, HAS and HST plus additional responsibilities and should be titled as direct care.” As relief, Grievants seek “[t]o be made whole with raises and backpay including interest. Place under nursing and classify recreation staff as direct care.”

Respondent dismissed the grievance for lack of jurisdiction by order dated July 1, 2019. Grievants appealed to level two on July 2, 2019. Following mediation, an *Order of Unsuccessful Mediation* was issued on November 26, 2019. Grievants appealed to level three of the grievance process on December 2, 2019. Respondent filed *Respondent’s Motion to Dismiss* on October 12, 2021. At the request of Grievants’ representative due to several emergency circumstances, the time to file a response to the motion to dismiss

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<sup>1</sup> Sandra Jeffries, Kathy Neal, William Davis, Earl T. Heater, Brodriquez Boswell, Larry Cook, James K. Lewis, Sam Hughes, Shelly Henry, Tammy Posey, and Kenneth Tippins.

was extended several times. On January 21, 2022, Grievants filed their *Answer to Respondent's Motion to Dismiss*. Grievants appear by representative, Michael L. Hansen, UE Local 170, West Virginia Public Workers Union. Respondent appears by counsel, Mindy M. Parsley, Assistant Attorney General. This matter is now mature for decision.

### **Synopsis**

Grievants are employed by Respondent as Recreation Specialists at William R. Sharpe, Jr. Hospital. Grievants protest Respondent's failure to provide the same pay raises to Grievants that are being given to employees in direct care positions. Differences in pay between direct care employees and other employees were created by a combination of legislative, judicial, and state personnel board action. West Virginia Code § 5-5-4a removed jurisdiction from the Grievance Board to hear any grievance arising from the implementation of the direct care employee pay rates. Therefore, Respondent's motion to dismiss should be granted, and this grievance, dismissed.

The following Findings of Fact are made based on the documentation submitted by the parties.

### **Findings of Fact**

1. Grievants are employed by Respondent at William R. Sharpe, Jr. Hospital as Recreation Specialists.
2. Grievants have not received the same pay increases that Health Service Workers, Health Service Assistants, and Health Service Trainees have received.

3. Differences in pay between direct care employees, such as Health Service Workers, Health Service Assistants, and Health Service Trainees, and Respondent's other employees were created by a combination of legislative, judicial, and state personnel board action.

4. As part of this action, West Virginia Code § 5-5-4a directed Respondent to "develop pay rates and employment requirements to support the recruitment and retention of [employees involved in direct care of patients] and specifically removed the implementation of these pay rates from the Grievance Board's jurisdiction.

### **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. "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. § 159-1-6.2

In this case, Respondent asserts that the Grievance Board lacks jurisdiction to hear the grievance as West Virginia Code § 5-5-4a removed the implementation of the direct care pay rates from the jurisdiction of the Grievance Board. At level one, Grievants opposed the dismissal of the grievance alleging that the grievance was actually a matter of discrimination for which the Grievance Board would retain jurisdiction. In their current response, Grievants state, “The Respondent has provided information that may not necessarily be presented by the Grievants at a Level 3 hearing. The Grievants should be allowed to present their case to the WVPEGB for determination by the assigned ALJ.”

As to Grievants’ assertion they are entitled to a hearing, “[a]n administrative law judge may, in the judge’s discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. . . .” W. VA. CODE ST. R. § 159-1-6.6.1. Factual development in this case is not necessary. Whether the Grievance Board has jurisdiction to hear this matter is a question of law, not fact. The underlying circumstances of the grievance have been the subject of litigation for years all the way through the West Virginia Supreme Court of Appeals and was thoroughly explained by that Honorable Court in *W. Va. Dep’t of Health & Human Res. v. E.H.*, 778 S.E.2d 643 (W. Va. 2015).

“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 Grievance Board’s jurisdiction is limited to hearing grievances, defined as “a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation. . . .” W. VA. CODE § 6C-2-2(i)(1).

In this case, the Legislature very clearly removed jurisdiction from the Grievance Board to hear any grievance arising from the implementation of the direct care employee pay rates. The statute reads in its entirety as follows:

(a) The Legislature finds that Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital have extreme difficulty in recruiting and retaining physicians, physician specialists, nurses, nursing directors, health service workers, health service assistants, health service associates and other employees who assist in the direct provision of medical care to patients in those facilities.

(b) The West Virginia Division of Personnel and the Department of Health and Human Resources jointly shall develop pay rates and employment requirements to support the recruitment and retention of physicians, physician specialists, nurses, nursing directors, health service workers, health service assistants, health service associates or other positions at Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital. Pay rates shall reflect the regional market rates for relevant positions. The pay rates and employment requirements shall be put into effect by July 1, 2009.

(c) Funding for the pay rates and employment requirements shall be provided from the appropriation to the Department of

Health and Human Resources. Due to the limits of funding, the implementation of the pay rates and employment requirements shall not be subject to the provisions of article two, chapter six-c of this code [West Virginia Public Employees Grievance Procedure]. The provisions of this section are rehabilitative in nature and it is the specific intent of the Legislature that no private cause of action, either express or implied, shall arise pursuant to the provisions or implementation of this section.

W. VA. CODE § 5-5-4a.

The situation of which Grievants complain, that they are being denied the raises that direct care employees are being given, is simply a continuation of the effect of the pay rates implemented as a result of West Virginia Code § 5-5-4a, for which the Grievance Board has consistently dismissed grievances for lack of jurisdiction. See *Albright, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2013-1413-CONS (June 17, 2014); *DaSilva, et al. v. Dep't of Health and Human Res./ William R. Sharpe, Jr. Hosp.*, Docket No. 2014-0733-CONS (July 25, 2014); *Whitmore v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0858-DHHR (June 9, 2015); *Workman, et al. v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0887-CONS (July 7, 2015); *Hamilton v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0837-DHHR (Sept. 10, 2015); *Brillantes v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-1079-DHHR (Oct. 23, 2015); *Mills v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0945-DHHR (Dec. 1, 2015).

As to Grievants argument that they should be permitted to pursue the grievance under the theory of discrimination, the Grievance Board has directly addressed that argument in a previous grievance finding:

Grievants attempt to frame their grievances as general allegations of 'discrimination' or 'favoritism' as those terms are defined in W. Va. Code § 6C-2-2(d) & (h), in an effort to avoid the Legislature's action of removing grievances related to *Hartley* salary adjustments from the West Virginia Public Employees Grievance Board's jurisdiction in W. Va. Code §§ 5-5-4 & 5-5-4a. It is clear however, that the raises the other psychiatrists employed at Bateman received were given pursuant to the *Hartley* case. Any differences created between their salaries and Grievants' salaries as a result of those raises, are inherently part of the *Hartley* matter which the Legislature removed from the Grievance Board's jurisdiction. Accordingly, West Virginia Public Employees Grievance Board lacks jurisdiction in this matter . . . .

*Latif, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2013-2243-CONS (June 18, 2014).

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.

2. “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. “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. § 159-1-6.2.

4. “An administrative law judge may, in the judge's discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. . . .” W. VA. CODE ST. R. § 159-1-6.6.1.

5. “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 Grievance Board’s jurisdiction is limited to hearing grievances, defined as “a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements



applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation. . . .” W. VA. CODE § 6C-2-2(i)(1).

6. West Virginia Code § 5-5-4a reads in its entirety as follows:

(a) The Legislature finds that Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital have extreme difficulty in recruiting and retaining physicians, physician specialists, nurses, nursing directors, health service workers, health service assistants, health service associates and other employees who assist in the direct provision of medical care to patients in those facilities.

(b) The West Virginia Division of Personnel and the Department of Health and Human Resources jointly shall develop pay rates and employment requirements to support the recruitment and retention of physicians, physician specialists, nurses, nursing directors, health service workers, health service assistants, health service associates or other positions at Mildred Mitchell-Bateman Hospital and William R. Sharpe, Jr. Hospital. Pay rates shall reflect the regional market rates for relevant positions. The pay rates and employment requirements shall be put into effect by July 1, 2009.

(c) Funding for the pay rates and employment requirements shall be provided from the appropriation to the Department of Health and Human Resources. Due to the limits of funding, the implementation of the pay rates and employment requirements shall not be subject to the provisions of article two, chapter six-c of this code [West Virginia Public Employees Grievance Procedure]. The provisions of this section are rehabilitative in nature and it is the specific intent of the Legislature that no private cause of action, either express or implied, shall arise pursuant to the provisions or implementation of this section.

7. The Grievance Board has consistently dismissed grievances for lack of jurisdiction that involved the pay rates implemented as a result of West Virginia Code § 5-5-4a. See *Albright, et al., v. Dep’t of Health and Human Res./Mildred Mitchell-Bateman*

*Hosp.*, Docket No. 2013-1413-CONS (June 17, 2014); *DaSilva, et al. v. Dep't of Health and Human Res./ William R. Sharpe, Jr. Hosp.*, Docket No. 2014-0733-CONS (July 25, 2014); *Whitmore v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0858-DHHR (June 9, 2015); *Workman, et al. v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0887-CONS (July 7, 2015); *Hamilton v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0837-DHHR (Sept. 10, 2015); *Brillantes v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-1079-DHHR (Oct. 23, 2015); *Mills v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2015-0945-DHHR (Dec. 1, 2015).

8. Framing the pay increases as discriminatory does not cure the Grievance Board's lack of jurisdiction when the pay increases were given pursuant to the Hartley case and were removed from the Grievance Board's jurisdiction by West Virginia Code § 5-5-4a. *Latif, et al., v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2013-2243-CONS (June 18, 2014).

9. It is not necessary to conduct a hearing in this matter as the motion to dismiss involves only a question of law.

10. The Grievance Board lacks jurisdiction to hear this matter, so the grievance must be dismissed.

Accordingly, the 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2018).

**DATE: March 7, 2022**

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