

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SONDRA MULLINS,  
Grievant,**

**v.**

**Docket No. 2022-0348-PutED**

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

**DISMISSAL ORDER**

On October 20, 2021, Grievant filed this action against her employer, Putnam County Board of Education, stating, "Violation of WV § 6C-2-2; WV § 18A-4-10; WV 126CSR51 Contracted COVID at work then forced to use personal leave. Masking deficiencies. No cooperation with health department in violation of regulations requiring same. No alternative method of teaching offered to employee in accordance with WVDE guidance." For relief Grievant requests the return of personal leave.

Following a level one conference, the grievance was denied by an undated decision received by the Grievance Board on December 15, 2021. Grievant appealed to level two on December 20, 2021. On February 1, 2022, Respondent filed *Respondent's Motion to Dismiss and Memorandum of Law in Support Thereof* asserting the grievance must be dismissed for failure to state a claim upon which relief may be granted as the claim is barred by the COVID-19 Jobs Protection Act. On February 2, 2022, Grievant, by representative, filed *Response to Motion to Dismiss* opposing the dismissal of the grievance. Due to an administrative error, the motion to dismiss was not addressed prior to the scheduled mediation in this matter. Following mediation, Grievant appealed to level three on March 2, 2022. Respondent renewed its motion to dismiss on March 3, 2022.

Respondent appears by counsel, George “Trey” B. Morrone III, Bowles Rice, LLP.  
Grievant appears by representative, Ben Barkey, West Virginia Education Association.

### **Synopsis**

Grievant alleges she contracted COVID-19 at work due to Respondent’s failures to follow regulations and the state department of education’s guidance, forcing her to use personal leave. Respondent moved the Grievance Board to dismiss the grievance as barred by the COVID-19 Jobs Protection Act. Grievant argues that the Act is unconstitutional or, alternately, inapplicable. The COVID-19 Jobs Protection Act is applicable to the grievance and Grievant has not alleged facts to support an exception to the Act. 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. Grievant is employed by Respondent as a classroom teacher.
2. Grievant alleges she contracted COVID-19 at work as a result of Respondent’s failure to follow regulations and the guidelines of the state department of education. She seeks the restoration of the personal leave she was required to use during her illness.
3. 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.

Respondent has asserted the instant grievance must be dismissed for failure to state a claim upon which relief may be granted as the grievance is barred by action of the COVID-19 Jobs Protection Act. Grievant asserts that the Jobs Protection Act is unconstitutional, that Respondent is an entity not covered by the Act, and that the grievance meets the exception that actual malice claims are not barred.

“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) (emphasis added). 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;

. . .

- (l) “[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. The Act contains an exception as follows “Excluding the provisions of §55-19-5 and §55-19-6 of this code, the limitations on liability provided in this article shall not apply to any person, or employee or agent thereof, who engaged in intentional conduct with actual malice.” W. VA. CODE § 55-19-7.

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 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, Grievant’s argument that the Act is unconstitutional is preserved for appeal but will not be further addressed.

Grievant alternately argues that the Act is inapplicable because Respondent is not an entity covered by the Act and because the grievance meets the exception for actual malice. Grievant’s assertion that the Act does not apply to Respondent because

Respondent does not provide healthcare and because “entity” is not defined is clearly wrong. The Act prohibits claims against “any person” and defines “person” to include a “county, or local governmental entity, or other entity, including, but not limited to, a school.” W. VA. CODE § 55-19-4; W. VA. CODE § 55-19-3(11). Therefore, Respondent is covered by the Act.

Although Grievant states that the exception for intentional conduct with actual malice applies, there does not appear to be any support for that assertion within the statement of grievance or Grievant’s response to the motion to dismiss. The allegations in the statement of grievance, at most, describe mistake or negligence. Grievant proffered no further facts in her response to the motion that would support an allegation of intentional conduct with actual malice. Allowing the grievance to go forward based on the mere assertion that the exception applies without any proffer of supporting facts would undermine the stated purpose of the Act to shield Respondent from the threat of litigation.

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. As the COVID-19 Jobs Protection Act prohibits claims arising from COVID-19, and Grievant has not alleged facts to support an exception under the Act, 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. 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).

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. “Excluding the provisions of §55-19-5 and §55-19-6 of this code, the limitations on liability provided in this article shall not apply to any person, or employee or agent thereof, who engaged in intentional conduct with actual malice.” W. VA. CODE § 55-19-7.

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. As the COVID-19 Jobs Protection Act prohibits claims arising from COVID-19 against Respondent and Grievant has not alleged facts to support an exception under the Act, the instant 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**

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