

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**LOWELL T. STOUT, II,**

**Grievant,**

**v.**

**Docket No. 2021-2515-HarED**

**HARRISON COUNTY BOARD OF EDUCATION,**

**Respondent.**

**Dismissal Order**

Grievant, Lowell Stout, employed by the Harrison County Board of Education, filed this grievance on or about June 25, 2021. Grievant alleges that he should not have had his incentive pay deducted when five sick days were used during a COVID-19 quarantine from March 7, 2021 to March 17, 2021. This action was denied at level one on July 7, 2021, by Superintendent Dora L. Stutler, following a conference. A level two mediation session was conducted on December 10, 2021. A level three evidentiary hearing was conducted before the undersigned on March 29, 2022, by Zoom video. Grievant appeared in person and was not represented. Respondent appeared by its counsel, Denise M. Spatafore, Dinsmore & Shohl LLP. This matter became mature for consideration on June 30, 2022, after the parties were provided an opportunity to respond to an order raising, *sua motu*, the Grievance Board's lack of jurisdiction. No response to the order was provided by the parties.

**Synopsis**

Grievant is employed by the Harrison County Board of Education as a cook/cafeteria manager. Respondent provides its employees with an incentive program

in which employees receive bonus pay if they use less than five days of leave per school year. Grievant argues that he should not have had his incentive pay deducted for five sick days he used during a COVID-19 quarantine. Respondent counters that it was following health department directives in requiring a quarantine period when an employee was exposed to the virus. Respondent acknowledged that, at the beginning of the pandemic, federal funding made it possible to not count absences of employees against their accrued leave. When federal funds were no longer provided, employees used sick leave when exposed to COVID-19 in personal exposure situations. While lack of jurisdiction was not raised by the parties, the undersigned may take notice of lack of jurisdiction on its own motion. The West Virginia Legislature passed the COVID-19 Jobs Protection Act and removed jurisdiction from the Grievance Board to hear claims arising out of facts related to the Covid-19 pandemic. Grievant's claim has clearly arisen out of the COVID-19 pandemic and the legislature has removed such cases from the Grievance Board's jurisdiction.

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

### **Findings of Fact**

1. Grievant is employed by the Harrison County Board of Education as a cook/cafeteria manager.
2. Respondent provides its employees with financial compensation pursuant to a Personnel Leave Incentive Program. Employees receive bonus pay if they use less than five days of leave per school year. Service personnel may receive a maximum benefit of \$1,200 for using no leave days, with \$105 being deducted from the amount of each leave day used, up to the maximum of five days.

3. During the COVID-19 pandemic, the Families First Coronavirus Response Act provided federal funds to employers due to the consequences of employee absences caused by the virus.

4. Through the end of December 2020, expanded leave benefits were provided to employees, and absences were not counted against their accrued leave for COVID-19 exposure, contraction or quarantine. These benefits ended on December 31, 2020, when federal funds were no longer provided.

5. After the Families First Coronavirus Response Act benefits expired, Respondent notified employees that, as of January 2021, employees would not be charged sick leave or have their incentive pay impacted for work-related exposure to COVID-19. For situations involving personal exposure, employees would have to use their accumulated personal/sick leave, and incentive pay would be impacted by any related absences.

6. The Harrison County Health Department issued quarantine requirements for individuals exposed to COVID-19, in which people with confirmed exposure were advised to quarantine and stay away from work for a period of ten days.

7. Grievant was exposed to the virus by his daughter, an employee of the Board of Education, and required to quarantine from January 12, 2021, to January 22, 2021. Because this was considered work exposure, he was not charged leave days for this absence.

8. Grievant was exposed to COVID-19 by a relative and was required to quarantine from March 7, 2021, to March 17, 2021. This was considered home exposure

and Grievant was required to use five days of personal leave for the absences. Pursuant to Respondent's policy, Grievant was not eligible for personal leave incentive pay.

### **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).

"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.

Grievant argues that he was penalized twice in the instant case. Grievant was forced to use sick leave for his March 2021 absence, and he was then denied incentive pay as a result. Grievant believes that, since he had not tested positive for COVID-19 and was willing to work, he should not have been required to quarantine and use his leave days. Respondent counters that it has consistently followed all recommendations and directives issued by the Center for Disease Control and Prevention and the local health department related to COVID-19. Respondent applied COVID-19 related procedures to all employees, and many were negatively impacted after federal funding expired. The record demonstrates that many employees were required to use their accrued leave as of 2021 and did not receive incentive pay as a result.

While not addressed by the parties, the undersigned recognizes that the instant grievance must be dismissed for lack of jurisdiction by application of the COVID-19 Jobs Protection Act ("JPA"). Through passage of the COVID-19 JPA, 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. 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.

“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). In *Worley*, the Grievance Board found that the COVID-19 Jobs Protection Act (Act) applies to claims before the Grievance Board. By clear language, “[n]otwithstanding any law to the contrary, except as provided by this article,” the Legislature has removed such grievances from the Grievance Board’s jurisdiction.

Respondent is the type of entity the West Virginia Legislature sought to protect when it enacted the COVID-19 Jobs Protection Act. Respondent’s actions were taken in response to the COVID-19 pandemic. As the COVID-19 Jobs Protection Act prohibits claims arising from a response by a school system to COVID-19, and does so

retroactively to January 2020, the Grievance Board lacks jurisdiction to consider this grievance. Accordingly, this grievance is dismissed.

The following Conclusions of Law support the dismissal of this case.

### **Conclusions 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. “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.

3. “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded . . .” W. VA. CODE § 6C-2-1(a). Grievant’s claim has clearly arisen out of the COVID-19 pandemic and the legislature by, statute has removed such cases from the Grievance Board’s jurisdiction.

4. The COVID-19 Jobs Protection Act removes jurisdiction of the Grievance Board over this grievance.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Intermediate Court of Appeals.<sup>1</sup> Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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: July 26, 2022**

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**Ronald L. Reece**  
**Administrative Law Judge**

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<sup>1</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 W. VA. 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.