

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA WILLIS,

Grievant,

v.

Docket No. 2021-2085-DVA

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

DISMISSAL ORDER

Grievant, Lisa Willis, is employed as a registered nurse by Respondent, Department of Veterans Affairs, at the West Virginia Veterans Nursing Facility. Between April and June of 2020, Respondent provided COVID-19 hazard pay to outside workers employed by staffing agencies at its facility. Respondent did not provide COVID-19 hazard pay to Grievant or other State employees apparently performing the same jobs at the facility as the outside workers. On January 14, 2021, Grievant grieved this alleged discrepancy.¹ As relief, Grievant requested the COVID-19 hazard pay that was given to outside workers.

On February 5, 2021, a level one conference occurred, and on February 17, 2021, Respondent dismissed the grievance as untimely. Grievant appealed to level two on March 2, 2021. On November 5, 2021, a level two order was issued. Grievant appealed to level three on November 21, 2021. On May 23, 2022, a level three hearing was held

¹A separate grievance with the same claim was filed by Terri Ham. This was consolidated with Grievant's claim under Docket No. 2021-2086-CONS. Ms. Ham later withdrew her grievance and was dismissed as a party through an Order Dismissing Party on June 8, 2021. Whereupon the current grievance was returned to its original case styling.

remotely before the undersigned. Grievant appeared and was represented by Michael Hanson, UE Local 170. Respondent appeared by Sherri Reed and was represented by Mark Weiler, Assistant Attorney General. During the hearing, the undersigned mentioned the possible lack of jurisdiction under the COVID-19 Jobs Protection Act. On June 6, 2022, Respondent filed a Motion to Dismiss based on the same. Grievant requested and was given until June 17, 2022, to respond but did not do so.

Synopsis

Grievant is employed as a registered nurse by Respondent, Department of Veterans Affairs, at the West Virginia Veterans Nursing Facility. Respondent uses a combination of its own employees and those of outside staffing agencies to staff the facility. During the COVID-19 pandemic, Respondent avoided COVID-19 staffing shortages by providing COVID-19 hazard pay to outside staffing agencies but not to its own employees. Grievant claims that equity entitles her to COVID-19 hazard pay. The COVID-19 Jobs Protection Act protects certain employers, including State entities, from litigation related to COVID-19. As this matter relates to COVID-19, it must be DISMISSED for lack of jurisdiction.

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

Findings of Fact

1. Grievant is employed as a registered nurse by Respondent, Department of Veterans Affairs, at the West Virginia Veterans Nursing Facility
2. This grievance emanates from Respondent's attempt, between April and June 2020, to avert Covid-19 staffing shortages at its nursing facility by providing COVID-19 hazard pay to outside staffing agencies.

3. Respondent did not provide COVID-19 hazard pay to its own employees.

4. In 2021, the West Virginia Legislature enacted the COVID-19 Jobs Protection Act, effective retroactively to January 2020, to protect State entities and others in their response to COVID-19.

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.

This grievance stems from Respondent's attempt between April and June of 2020 to avert staffing shortages related to COVID-19 through COVID-19 hazard pay. Respondent gave this hazard pay to outside staffing agencies but not to its own employees. Grievant concedes that Respondent did not violate West Virginia law but contends she is entitled to COVID-19 hazard pay as a matter of equity.

In 2021, the West Virginia legislature retroactively enacted the COVID-19 Jobs Protection Act 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 State entities. 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.

As a State entity, Respondent is the type of entity the West Virginia Legislature sought to protect when it enacted the COVID-19 Jobs Protection Act. Respondent’s action in providing Covid-19 hazard pay to outside staffing agencies was an attempt to avert staffing shortages caused by the COVID-19 pandemic. As such, it was action taken in response to the COVID-19 pandemic. As the COVID-19 Jobs Protection Act prohibits claims arising from a response by a State entity to COVID-19, and does so retroactively to January 2020, the Grievance Board lacks jurisdiction to consider this grievance. Thus, this grievance is 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. 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).

3. 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.

4. The Act defines “person” to include State entities. W. VA. CODE § 55-19-3.

5. 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.

6. The COVID-19 Jobs Protection Act applies to claims before the Grievance Board. *Worley v. Jackson County Board of Education*, Docket Number 2022-0349-JacED (Jan. 14, 2022).

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

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Intermediate Court of Appeals.² 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

²On 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.

appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: July 6, 2022

Joshua S. Fraenkel
Administrative Law Judge