

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**COLLEEN JOAN WORLEY,
Grievant,**

v.

Docket No. 2022-0349-JacED

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

DISMISSAL ORDER

Colleen Joan Worley (“Grievant”) was suspended without pay for six working days on which she refused to comply with a face covering requirement imposed by her employer, Jackson County Board of Education (“Respondent”), to mitigate the spread of COVID-19. In her level three grievance appeal from Respondent’s October 19, 2021 ratification of the suspension, and in her remarks to Respondent just prior to the ratification vote, Grievant conceded she did not comply with the mandatory face covering policy. As relief, Grievant seeks “to have the six days of suspensions expunged from my file and receive my pay, which was withheld, at no fault of my own.”

On December 23, 2021, Respondent, by counsel Howard E. Seufer, Jr., Esquire, moved to dismiss this grievance for failure to state a claim upon which relief may be granted. In its Motion to Dismiss, Respondent argued that dismissal is appropriate because, notwithstanding any law to the contrary, Grievant’s claim is precluded by West Virginia law, specifically the COVID-19 Jobs Protection Act. On December 27, 2021, this Grievance Board provided the *pro se* Grievant the opportunity to respond to the Motion to Dismiss by January 12, 2022. Grievant’s argument that “[n]o one has been

given the authority to force another adult to use a medical device against their will” was well presented. Accordingly, the Motion to Dismiss is mature for consideration.

Synopsis

Respondent moves the Grievance Board to dismiss this grievance matter. The record includes Grievant’s acknowledgement and recognition that her allegations stem from Respondent’s COVID-19 face covering rule and Grievant’s failure to comply. The COVID-19 Jobs Protection Act establishes an absolute defense against claims based on an employer’s implementation of policies and procedures designed to prevent or minimize the spread of COVID-19 and dictates the grievance be dismissed as a matter of law. Grievant’s allegations and acknowledgements of record tend to place this matter within the auspices of the COVID-19 Jobs Protection Act. The Grievance Board lacks jurisdiction in this matter. Accordingly, this grievance is dismissed.

Findings of Fact

1. On March 16, 2020, a State of Emergency was declared for all counties in West Virginia in order to prepare for and respond to the outbreak of a respiratory disease caused by the novel coronavirus known as COVID-19.

2. On July 7, 2020, West Virginia Governor Jim Justice issued an Executive Order mandating face coverings in confined, indoor spaces for the purpose of preventing the spread of COVID-19.

3. On June 20, 2021, by Executive Order 20-21, Governor Justice lifted the statewide indoor face covering requirement for all state residents regardless of vaccination status. However, Executive Order 20-21 continued to permit school systems to require individuals to wear a face covering.

4. In the fall of 2021, the West Virginia Department of Education issued a school recovery and guidance document (the “Guidance Document”) which stated that “face coverings at county board discretion” were a key COVID-19 mitigation strategy for schools.

5. In 2021, the Legislature enacted the COVID-19 Jobs Protection Act, effective retroactively from January 1, 2020, recognizing that the “novel coronavirus, also known as COVID-19, has been deemed a pandemic.”

6. The Legislature stated that the purpose of the COVID-19 Jobs Protection Act was to provide assurances that the reopening of the state would not create risk of claims, lawsuits, or liability related to losses or damages arising from COVID-19.

7. On October 19, 2021, Grievant filed the instant grievance related to Grievant’s admitted failure to comply with Respondent’s face covering policy in response to COVID-19 and seeking, “to have the six days of suspensions expunged from my file and receive my pay, which was withheld, at no fault of my own.”¹

Discussion

The Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board grants to the administrative law judge the authority and discretion to control the processing of each grievance and to take such actions deemed appropriate. 156 C.S.R. 1 § 6.2 (2018) "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

¹ Grievant’s January 12, 2022, written response to the motion to dismiss tends to additionally clarify and/or adjust the relief requested to the degree, “I am requesting lost wages for four of the six days the health department took to make their final approval of my exemption.”

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 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).

An administrative law judge may dispose of a grievance through an appealable dismissal order. 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." 156 C.S.R. 1 § 6.11 (2018). Further, "because it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley, et al. v. Dep't of Transp.*, 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).' *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Respondent seeks to have this grievance dismissed for failure to state a claim under West Virginia law upon which relief may be granted. Respondent contends that Grievant's written appeal and her remarks at the October 19, 2021 hearing demonstrate that Grievant refused to comply with the mandatory face covering policy passed by the Jackson County Board of Education. Grievant's allegations and acknowledgements of

record tend to place this matter within the auspices of the COVID-19 Jobs Protection Act. Respondent has asserted the instant grievance must be dismissed for lack of jurisdiction. For this reason, it is unnecessary to establish further facts via evidentiary hearing. By her own concession, the loss Grievant allegedly suffered arose as a direct result of Respondent's COVID-19 policy and Grievant's noncompliance with the policy. Accordingly, the COVID-19 Jobs Protection Act dictates the grievance be dismissed, notwithstanding any law to the contrary.

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. By the clear language, "[n]otwithstanding any law to the contrary, except as provided by this article," the Legislature specified that the COVID-19 Jobs Protection Act was to supersede other statutes. In addition, the Legislature made the language of the COVID-19 Jobs Protection Act sufficiently broad to extend its protection to West Virginia schools and boards of education, as political subdivisions of the state.

Herein, Jackson County Board of Education, Respondent, is recognized as the type of entity the West Virginia Legislature sought to protect when it enacted the COVID-19 Jobs Protection Act. Grievant's claim is based on the reasonable actions of Respondent in response to state and local orders and guidelines related to COVID-19, namely the implementation of policies and procedures designed to prevent or minimize the spread of COVID-19. Because the COVID-19 Jobs Protection Act prohibits claims arising from reasonable COVID-19 response, the instant grievance is effectively

precluded by state law. Therefore, the Grievance Board lacks jurisdiction in this matter, Respondent's motion is proper and the grievance must be dismissed.

The following Conclusions of Law support the dismissal of this grievance:

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).

2. "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)).

3. The COVID-19 Jobs Protection Act provides:

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 (emphasis added).

4. "Arising from COVID-19" means any 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 such loss, damage, physical injury, or death would not have occurred, including, but not limited to:

Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;

Monitoring, collecting, reporting, tracking, tracing, disclosing, or investigating COVID-19 exposure or other COVID-19 related information;

Actions 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.

5. “Person” means 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 (emphasis added).

Accordingly, in light of the foregoing, Respondent’s Motion to Dismiss is **GRANTED** and this matter is **STRICKEN** from the Docket of the Grievance Board. Additionally, the level three hearing previously scheduled for February 3, 2022, has been cancelled.

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 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: January 14, 2022

Landon R. Brown
Administrative Law Judge