THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JUDY NEAL, ET AL.,

Grievants,

v. **DOCKET NO. 03-RS-001**

DIVISION OF REHABILITATION

SERVICES and

DIVISION OF PERSONNEL,

Respondents.

DISMISSAL ORDER

This grievance was filed August 30, 2002, and has been held in abeyance at level four since January 2003, pending Grievants' attempts to resolve the issue through the legislature. (See footnote 1) The underlying grievance claims Grievants, all involved in rehabilitation counseling and related services, are discriminated against compared to Teachers at the West Virginia Rehabilitation Center. Pursuant to W. Va. Code § 18-10A-2a, “rehabilitation teachers shall be paid at the equivalent rate of pay of teachers” employed by the county board of education in the county where the rehabilitation teacher works. Grievants, on the other hand, are classified employees of the State, and are paid according to the classified employees compensation plan, as implemented by the Division of Personnel under the authority of W. Va. Code § 29-6-10(2).

Respondents have filed various Motions to Dismiss, asserting Grievants have failed to state a claim upon which relief can be granted. Respondents contend Grievants are properly paid according to their classifications, the teachers they compare themselves to are not similarly situated, and that neither the employer nor the Division of Personnel have theauthority to grant the relief sought, as the authority to make the change requested rests solely with the legislature.

The Procedural Rules of the West Virginia Education and State Employees Grievance Board permit an administrative law judge to dismiss a grievance if no claim upon which relief can be granted

is stated. 156 C.S.R. 1 § 4.11 (1995); *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996).

Pursuant to W. Va. Code § 29-6A-2(I), a grievance is a

> claim by one ore more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

"Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant is not grievable. W. Va. Code §§ 29- 6A-2(g) and (I); *See Smith v. Dep't of Health and Human Res.,* Docket NO. 05-HHR-218 (Aug. 5, 2005.)" *Brining v. Div. of Corrections/Parole Services and Div. of Personnel*, Docket No. 05- CORR-284 (Dec. 7, 2005.)

Here, the relief Grievants seek is not available through the Grievance Procedure. The Grievance Board does not have the authority to order the Division of Personnel to deviate from its statutory mandate, nor to compel the legislature to enact legislation similar to W. Va. Code § 18-10A-2a for the benefit of Grievants. It appears the proper route for resolving this issue is the one Grievants have been undertaking while this grievance has been on hold. For the foregoing reasons, the Motion to Dismiss is hereby **GRANTED**, and this matter is hereby **DISMISSED** and stricken from the docket of the Grievance Board.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 record can be prepared and properly transmitted to the appropriate circuit court.

November 1, 2006

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

A level four hearing was convened in July 2005 and continued to August 2006. Discussed both times was Respondents' Motion to Dismiss.