THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

REBECCA ANN WILSON,
Grievant,

v. **DOCKET NO. 2011-1769-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES, LOTTERY COMMISSION, and DIVISION OF PERSONNEL,
Respondents.

DISMISSAL ORDER

This grievance was filed by Grievant, Rebecca Ann Wilson, on June 6, 2011, against the Lottery Commission and the Division of Personnel, neither of whom is Grievant's employer. Grievant's employer, the Department of Health and Human Resources, was made a party to the grievance. The subject matter of the grievance, as set forth in the lengthy attachment to the grievance form, is the failure of the Lottery Commission to select the Grievant for an investigator position, and the determination that she did not meet the minimum qualifications for the position.

The grievance was dismissed at level one on June 9, 2011. Grievant appealed to level two on June 13, 2011, and a mediation session was held on August 9, 2011. Grievant appealed to level three on August 19, 2011. Respondent Lottery Commission, appeared by counsel, Harden C. Scragg, Jr., Assistant Attorney General, and filed two Motions to Dismiss, one on August 3, 2011, and the second on September 19, 2011, arguing that the grievance procedure was not available to the Grievant because the Lottery Commission is not Grievant's employer, and its failure to select her for a position is not grievable.

Grievant was notified by the Grievance Board that she had the opportunity to respond to the Motions to Dismiss, and that any response would be due by October 6, 2011. Grievant did not respond to the Motions to Dismiss, and this matter became mature for decision on October 6, 2011.

Synopsis

Grievant, an employee of the Department of Health and Human Resources, applied for a position with the Lottery Commission, which is a separate agency not under the direction or control of the Department of Health and Human Resources. Grievant filed a grievance after not being selected for the position. The grievance procedure was put in place to provide a mechanism for resolution of problems which arise in the workplace, between employees and their employer. It does not, by statute, provide a mechanism for a grievant to bring a grievance against a state agency that is not her employer.

The following facts are presumed to be true for purposes of ruling on the Motions to Dismiss, and have not been disputed by Grievant.

Findings of Fact

1. Grievant is employed by the Department of Health and Human Resources.

2. Grievant applied for the position of Lottery Investigator with the West Virginia Lottery Commission, and was not selected for the position.

3. Grievant is not an employee of the West Virginia Lottery Commission or the Division of Personnel, and neither the West Virginia Lottery Commission nor the Division of Personnel is under the direction or control of the Department of Health and Human Resources.

4. The Department of Health and Human Resources played no role in the non-selection of Grievant for the position of Lottery Investigator, or in the determination of whether she was minimally qualified for the position.

Discussion

It is undisputed that Grievant was an employee of the Department of Health and Human Resources at the time she applied for the position which is the subject of this grievance. WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

In turn, the same statute, in subsection (e)(1), defines "[e]mployee" as "any person hired for permanent employment by an employer for a probationary, full- or part-time position." A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). An employee may only file a grievance against his or her employer. W. VA. CODE § 6C-2-2(a)(1). As established by statute, 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. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public *employee* and his or her *employer* to reach solutions to problems which arise within the scope of their employment relationship. W. VA. CODE

§ 6C-2-1(a); *See Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1, *et seq*. The grievance procedure is only available to the Grievant to challenge the actions taken by her employer. *Posey v. W. Va. Univ.*, Docket No. 2009-0745-WVU (Apr. 10, 2009); *Narkevic v. Div. of Corr. and Dep't of Health & Human Res.*, Docket No. 2009-0846-MAPS (Apr. 29, 2009). Since Grievant is not an employee of the West Virginia Lottery Commission, the Grievance Board does not have jurisdiction to adjudicate this dispute. Therefore, the grievance must be dismissed. *Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009).

The following conclusions of law support the dismissal of this grievance.

Conclusions of Law

1. As established by statute, 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. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

2. For the purposes of the grievance procedure, an "employer" is the "state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational

service agency or multi-county vocational center, or agent thereof, using the services of an employee." W. VA. CODE § 6C-2-2(g).

3. The Public Employees Grievance Board is an administrative agency established by the Legislature to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. W. VA. CODE § 6C-2-1(a); *See Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

4. "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority under WEST VIRGINIA CODE §§ 6C-2-1, *et seq*.

5. The Public Employees Grievance Board does not have jurisdiction to resolve a dispute between Grievant and the West Virginia Lottery Commission.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: October 31, 2011