**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BETTY WHITE, ET AL.,**
**Grievants,**

**v.** **Docket No. 2013-0703-CONS**

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

## DISMISSAL ORDER

On October 19, 2012, Grievants[1] all filed grievances against their employer, Respondent, Department of Health and Human Resources, protesting pay equity raises given to some employees within the same classifications as Grievants, but not to Grievants. As relief sought, Grievants requested to receive the same raise plus interest. The grievances were consolidated into the above-styled grievance on October 30, 2012.

The parties waived level one on November 13, 2012. Level two mediation was conducted, and Grievants perfected their appeal to level three on March 19, 2013. On July 24, 2013, Respondent filed a Motion to Dismiss the grievance. A level three hearing was held on August 23, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievants were represented by Betty White and Katrina Napier. Respondent was represented by counsel, Michael E. Bevers, Assistant Attorney General. It became apparent during the hearing that the Division of Personnel ("DOP") was a necessary party to the action. By order entered September 6, 2013, DOP was joined as a necessary party. On October 11, 2013, DOP, by counsel, moved

[1] The Grievants are: Tracy Angle, Karen Billheimer, Clarence Dillon, Janie Driggs, Ashley Elam, Brenda Francis, Fred Francis, Sean Hamilton, Amber Hammonds, Betty Jarvis, Leila Jones, Tracy Long, Bobbie McMillian, Katrina A. Napier, Suzanne Palton, Melinda Patrick, Paula Salcedo, Rose Spears, Betty Ann White, Lisa Winter, Margie Woods.

to dismiss the grievance as the remedy requested is "wholly unavailable" from the Grievance Board.

## Synopsis

Grievants did not receive a pay equity pay increase that was approved by the Equal Pay Commission for other employees holding the same classifications as Grievants. Although the Division of Personnel made recommendations to the Equal Pay Commission regarding the pay increases, only the Equal Pay Commission had the authority to act on the pay increases. Matters in which the authority to act is not vested with a grievant's employer are specifically outside of the Grievance Board's authority. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, dismissed.

The undersigned makes the following Findings of Fact:

## Findings of Fact

1. Grievants are all employed by Respondent as either Economic Service Workers or Family Support Specialists.

2. In October 2012, the Equal Pay Commission ("EPC") approved salary adjustments for employees in certain job classifications, including the classifications of Grievants.

3. The EPC was established by the Legislature to address complaints of gender based pay disparity in state government. The pay raises authorized by the EPC in this instance are to ensure fair compensation to those employees in female dominated[2] classifications.

[2] Classifications in which greater than 80% of the employees are female.

4. The DOP is not a part of the EPC, but the EPC must seek input from the Director of DOP. The DOP developed certain criteria under which employees in certain classifications would be eligible for pay equity pay increases and identified the specific employees who would qualify under these criteria. The DOP presented its findings and methodology to the EPC. The EPC adopted the recommendations of the DOP to implement the pay equity awards for 2012. DHHR had no input in the decision of the EPC.

5. Grievants were not eligible to receive the pay increase under the criteria recommended by the DOP and adopted by the EPC.

**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 (2008). This issue before the undersigned is Respondent DOP's Motion to Dismiss. "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.

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)). The Grievance Board's authority is granted by W. VA. CODE § 6C-2-1, *et seq.* to resolve grievances, which are defined and limited buy that statute. Specifically, in relation to this grievance,

> "Grievance" does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen, chapter five of this code, retirement *or any other matter in which the authority to act is not vested with the employer*.

W. VA. CODE § 6C-2-2(i)(2) (emphasis added).

In this case, Grievants allege that the DOP failed to give them pay equity pay increases. The DOP asserts that it only made recommendation to the EPC, and only the EPC, and not the DOP, had the authority to act to provide pay increases. The undisputed facts show that DOP developed the criteria to determine which specific individuals would receive the pay equity pay increase, and then made its recommendation to the EPC. The EPC then approved the recommendation of the DOP and the pay increases were distributed according to DOP's recommendation.

The EPC was created by the Legislature, along with legislation recognizing gender pay disparity and finding that it is the public policy of the state to provide equal pay for equal work, regardless of gender. W. VA. CODE § 21-5E-1, *et seq.* The EPC is tasked with reporting to the Legislature the findings of its study of both the methodology and funding of the implementation of the prohibition of gender discrimination under the act. W. VA. CODE § 21-5E-6. The DOP is not a member of the EPC, but the EPC must seek input from the DOP's Director. W. VA. CODE § 21-5E-5(b).

It is immaterial that the DOP made the recommendation to the EPC of the criteria to determine the distribution of the pay increases. The statute makes clear that it was

only the EPC that had the authority to accept or reject that input. Matters in which the authority to act is not vested with the employer are specifically outside of the Grievance Board's authority. As the EPC, which is not Grievants' employer, is the entity which had the authority to act on the pay increases, this matter is excluded from the grievance process.

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 (2008).

2. "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. 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)).

4. "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 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); *Spence*, *supra*.

5. The Grievance Board's authority is granted by W. VA. CODE § 6C-2-1, *et seq.* to resolve grievances, which are defined and limited by that statute. Specifically, in relation to this grievance,

> "Grievance" does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen, chapter five of this code, retirement *or any other matter in which the authority to act is not vested with the employer*.

W. VA. CODE § 6C-2-2(i)(2) (emphasis added).

6. This matter is excluded from the grievance process as the authority to act to provide pay equity pay increases was vested in the Equal Pay Commission, which is not Grievants' employer.

Accordingly, this 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 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 (2008).

**DATE: November 7, 2013**

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**Billie Thacker Catlett**
**Administrative Law Judge**