

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARL J. COLLINS
Grievant,

v.

Docket No. 2015-1343-CalED

CALHOUN COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant filed a grievance against Respondent, Calhoun County Board of Education, on May 27, 2015. Grievant stated, "I am filing this grievance because I am not receiving Uniformity [o]f Pay. Two instructors have gotten a \$600 supplement and I have not. Uniformity of Pay states that we should receive equal pay for performing like assignments and duties. Refer to Policy 18A-4-5a." As relief, Grievant requested, "I want the same supplement pay as the others."

The grievance was consolidated with numerous other grievances at level one into Docket No. 2015-1718-CONS. A level one hearing was held on July 16, 2015, and the consolidated grievance was denied by an undated decision certified served on November 4, 2015. Grievant, by representative, appealed to level two on November 10, 2015. On his grievance form, Grievant changed the listing of his employer by adding "Calhoun Gilmer Tech Center" in addition to Calhoun County Board of Education. The cover letter by Grievant's representative copies only "Respondent (Boothby, Esq.)." By order of the undersigned dated January 8, 2016, the grievance was severed from the consolidated grievance. On January 15, 2016, the Grievance Board issued a *Notice of Mediation Session* to be held on March 1, 2016. Respondent filed *Respondent's Motion to Dismiss* on January 28, 2016, asserting that the grievance should be dismissed because Grievant

had filed his grievance against the wrong party as Grievant is employed by the Calhoun-Gilmer Career Center and not the Calhoun County Board of Education. Grievant filed no response to the motion. The motion was not addressed prior to the mediation on March 1, 2016.

Administrative Law Judge Landon R. Brown issued an *Order of Unsuccessful Mediation* on March 1, 2016. On March 4, 2016, Grievant filed a level three appeal, again listing both the Calhoun County Board of Education and “Calhoun Gilmer Tech Center” as his employer. In his cover letter, Grievant’s representative states, “I would also respectfully request to add the Calhoun-Gilmer Career and Technical Center Administrative Counsel, as an additional respondent. The Center was listed on the original grievance form as the employee’s work location and the president is also the superintendent of the Calhoun County Board of Education.” On March 10, 2016, Calhoun-Gilmer Career Center, by counsel, filed *Motion of Calhoun-Gilmer Career Center Opposing Grievant’s Motion to Add Career Center as a Respondent at Level Three*. After obtaining acceptable dates from the parties, a telephone conference was scheduled for March 30, 2016 at 10:00 a.m. Respondent and the Calhoun-Gilmer Career Center appeared by counsel, Richard S. Boothby, Bowles Rice LLP, who represents both entities. Grievant’s representative, Ben Barkey, West Virginia Education Association, did not appear, and the telephone conference went forward without his appearance after a fifteen-minute wait for his appearance. Mr. Barkey sent an email to the Grievance Board at 10:50 a.m. apologizing for his failure to appear, explaining that he “had lost track of time,” and requesting that the telephone conference be rescheduled. By a second email

on the same day, Mr. Barkey responded to Respondent's and the Calhoun-Gilmer Career Center's motions.

Synopsis

Grievant filed this grievance against the Calhoun County Board of Education. Grievant is employed by the Calhoun-Gilmer Career Center. The Calhoun-Gilmer Career Center is not a part of the Calhoun County Board of Education and is not under the control of the Calhoun County Board of Education. The grievance must be dismissed as it was filed against an entity that is not Grievant's employer. Grievant did not give notice of his grievance to the chief administrator of his actual employer. Grievant cannot cure this failure by attempting to "add" his actual employer to his grievance at level three of the process. Therefore, *Respondent's Motion to Dismiss* should be granted, and this grievance, DISMISSED.

The following Findings of Fact are made based on the documentation submitted by the parties.

Findings of Fact

1. Grievant is employed by the Calhoun-Gilmer Career Center. Grievant is not employed by the Calhoun County Board of Education.
2. The Calhoun-Gilmer Career Center is not a part of the Calhoun County Board of Education and is not under the control of the Calhoun County Board of Education.
3. Calhoun-Gilmer Career Center has separate funding from the Calhoun County Board of Education.

4. The Calhoun County Board of Education is only the “fiscal agent” that processes payroll checks for the Calhoun-Gilmer Career Center.

5. The Superintendent of the Calhoun County Schools, Timothy Woodward, is also the President of the Calhoun-Gilmer Career Center Administrative Council.

6. Bryan Sterns is the Director of the Calhoun-Gilmer Career Center.

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. § 159-1-6.2 (2008). The issues before the undersigned are Respondent’s *Motion to Dismiss* and the Calhoun-Gilmer Career Center’s *Motion of Calhoun-Gilmer Career Center Opposing Grievant’s Motion to Add Career Center as a Respondent at Level Three*. “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. § 159-1-6.19.2. “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. . . .” W. VA. CODE ST. R. § 159-1-6.19.3.

“An administrative law judge may, in the judge’s discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. . . .” W. VA. CODE ST. R. § 159-1-6.6.1. While there is some factual information in this grievance, Grievant’s

response to the motions do not raise any factual dispute. The motions at issue involve questions of law, not disputed fact, and a hearing to develop a record is not necessary for those determinations.

"Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

"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 jurisdiction is limited to hearing grievances, defined as "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . ." W. VA. CODE § 6C-2-2(i)(1). An "employee" is "any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). An "employer" is "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.” W. VA. CODE § 6C-2-2(g).

Grievant is not an employee of the Calhoun County Board of Education. Grievant is employed by the Calhoun-Gilmer Career Center. The State Board of Education is permitted to “establish, operate and maintain area vocational educational programs” and to “delegate its operational authority for multicounty vocational centers to an administrative council composed of equal representation from each of the participating county boards of education, the superintendent of schools from each participating county, and the state director of vocational education or his or her representative.” W. VA. CODE § 18-2B-2. The Calhoun-Gilmer Career Center is a multi-county vocational center operated by an administrative council under the authority of the State Board of Education. The Calhoun-Gilmer Career Center has its own separate funding. W. VA. CODE § 18-2B-3. The grievance procedure statute also specifically recognizes county boards of education and multicounty vocational centers as separate employers. W. VA. CODE § 6C-2-2(g).

Grievant cannot proceed in his grievance against the Calhoun County Board of Education, which is not his employer. Grievant, however, has also moved to “add the Calhoun-Gilmer Career and Technical Center Administrative Counsel, as an additional respondent.” Asserting that “the Center was listed on the original grievance form as the employee’s work location and the president is also the superintendent of the Calhoun County Board of Education.” The Calhoun-Gilmer Career Center was not listed as Grievant’s employer on his original grievance form. The form filed at level one lists only

the Calhoun County Board of Education as Grievant's employer. The Calhoun-Gilmer Career Center is in no way mentioned. To initiate a grievance, an employee:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing.

W. VA. CODE § 6C-2-4(a)(1). The definition of chief administrator as it relates to the Calhoun-Gilmer Career Center is "the director of a multicounty vocational center who is vested with the authority to resolve a grievance." W. VA. CODE § 6C-2-4(b). Mr. Woodward, was served with the grievance as the Superintendent of Calhoun County Schools and there was nothing in the grievance to indicate Grievant was actually an employee of the Calhoun-Gilmer Career Center. To have filed a grievance against the Calhoun-Gilmer Career Center, Grievant would have been required to file his grievance with the director of the Center, Mr. Sterns, which he did not do.

The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990). The Grievance Board is to adhere to "the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps." *Hale v. Mingo County Bd. of Educ.*, n.10, 199 W. Va. 387, 393, 484 S.E.2d 640, 646 (1997). Requiring Grievant to file a grievance against his actual employer with notification to the chief administrator of that employer is not an unreasonable procedural

obstacle or trap. It is the most basic and simple of requirements. Grievant cannot “add” the Calhoun-Gilmer Career Center as a Respondent at level three of the grievance procedure. Grievant’s motion to do so is denied. Therefore, this 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. § 159-1-6.2 (2008).

2. “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. § 159-1-6.19.2. “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. . . .” W. VA. CODE ST. R. § 159-1-6.19.3.

3. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2008). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

4. “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)).

5. The Grievance Board’s jurisdiction is limited to hearing grievances, defined as “a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . .” W. VA. Code § 6C-2-2(i)(1).

6. An "employee" is “any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). An “employer” is “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.” W. VA. CODE § 6C-2-2(g).

7. To initiate a grievance, an employee:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating

the nature of the grievance and the relief requested and request either a conference or a hearing.

W. VA. CODE § 6C-2-4(a)(1). The definition of chief administrator as it relates to the Calhoun-Gilmer Career Center is “the director of a multicounty vocational center who is vested with the authority to resolve a grievance.” W. VA. CODE § 6C-2-4(b).

8. The grievance must be dismissed as it was filed against an entity that is not Grievant’s employer. Grievant did not give notice of his grievance to the chief administrator of his actual employer. Grievant cannot cure this failure by attempting to “add” his actual employer to his grievance at level three of the process.

Accordingly, the grievance is **DISMISSED**.

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 Dismissal 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 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).

DATE: May 12, 2016

Billie Thacker Catlett
Chief Administrative Law Judge