JERRY LILLY,

Grievant,

v. DOCKET NO. 98-DNR-011

DIVISION OF NATURAL RESOURCES,

Respondent.

DECISION

This grievance was filed by Grievant Jerry Lilly against Respondent Division of Natural Resources on or about December 22, 1997, alleging he should have received pay for travel time to and from his home in the Fayetteville/Oak Hill area to Hawks Nest Lodge, and to and from his home to the Charleston office.

Grievant was advised by Cordie O. Hudkins, Chief, by letter dated December 23, 1997, that part-time, hourly employees such as Grievant did not have access to the grievance procedure. He was advised of the same by John B. Radar, Director, by letter dated January 26, 1998. Grievant submitted a grievance form to Level IV on January 12, 1998. On February 5, 1998, Respondent requested that the grievance be dismissed on the grounds that Grievant was a seasonal employee of the Parks and Recreation Section of the Division of Natural Resources, not hired for permanent employment, and as such, could not, by statute, file a grievance. A Level IV hearing was held on March 10, 1998, for the sole purpose of taking evidence on Grievant's employment status. It is clear from the evidence that Grievant was hired as a seasonal, temporary employee, and as such, he may not file a grievance. Accordingly, this case need not be remanded to Level I, but will be dismissed.

The following Findings of Fact are made based upon the record developed at the March 10, 1998 Level IV hearing.

Findings of Fact

1. Grievant was first employed by the Division of Natural Resources ("DNR") as a seasonal

employee on an hourly basis, in 1996. The letter dated March 19, 1996, offering him employment advises him the employment as a temporary construction inspector is an appointment for not more than ten months in a calendar year, and reappointment for the following year depends on a variety of circumstances, including work performance and funding. The hourly employment form signed by Stephen DeBarr, Grievant's supervisor, on March 26, 1996, indicates Grievant is a seasonal employee expected to work no more than 1733 hours per calendar year.

2. Grievant was paid for 1956 hours during 1996, according to his pay stubs, and was employed continuously from April 1996, through January 15, 1997. Grievant's time sheets for 1996 show he worked fewer than 1733 hours.

3. Grievant was employed again as a seasonal employee in late April 1997, and worked from April 23, 1997, through October 31, 1997, and worked fewer than 1733 hours.

4. Grievant was not hired off the register. While employed by DNR, he received no sick or annual leave benefits, no holidays, and no health insurance or retirement benefits.

5. Grievant understood he was a seasonal, temporary employee.

Discussion

W. Va. Code § 29-6A-2(e) defines "employee" for purposes of access to the grievance procedure for state employees as:

> any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by the board of regents or by any state institution of higher education, members of the department of public safety, any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature.

Persons hired for seasonal, temporary employment, even if employed full-time, and who have no sick or annual leave benefits, no state health insurance coverage, and no retirement benefits, are not hired for permanent employment, and cannot file a grievance. Roberts v. W. Va. Division of Culture and History, Docket No. 95-C&H-302 (Apr. 30, 1997); Cook v. W. Va. Parkways Authority, Docket No. 96-PEDTA-295 (Aug. 26, 1996); Taylor v. W. Va. Division of Natural Resources/Pipestem State Park, Docket No. 95-PEDTA-023 (Apr. 11, 1995).

Grievant argued that because Respondent had employed him for more than 1733 hours during 1996, this should affect his status. Respondent had cited W. Va. Code § 29-6-4(c)(15) in support of

its position, believing Grievant had worked fewer than 1733 hours during each calendar year. That provision specifically exempts from the classified service "[s]easonal employees in the state forests, parks, and recreational areas working less than 1,733 hours per calendar year." While the number of hours Grievant worked during 1996 may have affected his status in the classified service during 1996, his employment ended January 15, 1997, and he did not grieve that event. He was then reemployed a second time as a seasonal, temporary employee, and worked fewer than 1733 hoursduring 1997. This grievance arose during 1997, and the number of hours Grievant worked during 1996 has no effect on his status during 1997.

Grievant was hired as a temporary, seasonal employee during 1997, and no action was ever taken by DNR to change that status. Grievant was still a temporary, seasonal employee, he knew this, and agreed to be so employed. See Lowry, et al., v. W. Va. Dept. of Educ., Cedar Lakes Conference Center, Docket No. 96-DOE-130 (Dec. 26, 1996). Accordingly, he cannot, by statute, file a grievance.

The following Conclusion of Law supports the Decision reached.

Conclusions of Law

Because Grievant was a temporary, seasonal employee, he is not covered by the grievance statute and cannot file a grievance. Roberts v. W. Va. Division of Culture and History, Docket No. 95-C&H-302 (Apr. 30, 1997); Cook v. W. Va. Parkways Authority, Docket No. 96-PEDTA-295 (Aug. 26, 1996); Taylor v. W. Va. Division of Natural Resources/Pipestem State Park, Docket No. 95-PEDTA-023 (Apr. 11, 1995).

Accordingly, this grievance is **DISMISSED** from the docket of this Grievance Board.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 26, 1998