RONALD CAIN and DEWEY MOLISEE,

Grievants,

v v.

Docket No. 99-BOT-331

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Ronald Cain and Dewey Molisee (Grievants) were employed by Respondent West Virginia University (WVU), through its in-house temporary service, Mountaineer Temps (Temps), as Laborers and General Trades Helpers. They filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., apparently alleging that they were employed by Temps in violation of applicable policies. (See footnote 1) Grievant Cain's grievance was denied at Level I, by Guy R. Varchetto, on April 29, 1999. (See footnote 2) The grievance was advanced to Level II where an evidentiary hearing was held on July 14, 1999. Grievants were represented at this hearing by Diane Parker, and WVU was represented by Beverly Kerr, Esq. The grievance was denied at Level II by Vice President for Administration, Finance and Human Resources Scott C. Kelley on July 26, 1999. The record reflects no Level III proceedings.

The parties agreed that the grievance could be submitted at Level IV based uponthe record developed at the lower levels. The parties were given until October 29, 1999, to submit proposed findings of fact and conclusions of law. (See footnote 3) WVU, through its counsel Samuel R. Spatafore, Esq., did so, and this grievance became mature for decision on that date. The facts in this matter are undisputed. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants were hired as temporaries by Temps for a three-month period beginning May 4, 1998. They were assigned as Laborers, at pay grade five, to the metal shop at WVU's Health Sciences Center (HSC).

2. Temps' policy provides that such three-month temporary assignments may be renewed twice, for a maximum time of nine months. Grievants' assignments as Laborers were renewed according to this policy.

3. Grievants were good employees who learned significant new skills while installing metal ductwork at HSC.

4. As a result of their progress, on August 3, 1998, Grievants were reclassified by Temps as General Trades Helpers, at pay grade nine. Grievants' hourly pay increased from $5.84 to $7.12. They continued to work in the metal shop at HSC.

5. Grievants' new temporary assignments extended to April 16, 1999.

6. Employees hired through Temps are not eligible for conversion to regularemployee status at WVU, but must apply for available positions at WVU as outsiders.

7. On April 1, 1999, Grievant Molisee applied for and received full-time regular employment with WVU.

8. Neither Grievant's employment by Temps exceeded nine months in the same position during a twelve-month period.

9. Temps employees do not receive any benefits, such as paid vacation, sick leave, WVU health and life insurance programs, or holidays.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievants allege they were employed by Temps in violation of applicable policies. As relief, Grievants request that they be hired as regular WVU employees. (See footnote 4) However, Grievants

have failed to prove their entitlement to the relief they seek.

Title 128 of the Legislative Rule, University System of West Virginia Board of Trustees, Series 62, § 2.1.3 (1994), defines a temporary employee as "[a]n employee hiredinto a position expected to last fewer than nine months of a twelve month period." (See footnote 5)

Grievant Cain acknowledged that, when he applied for a position with Temps, he was given an information sheet stating "acceptance of a temporary position does not imply accrual of any entitlement to future regular employment status," and that temporaries "are not eligible for status as an internal." He also understood that, as a temporary, he could not remain in the same position for more than 90 days, unless his assignment was renewed.

He did not. After working approximately 90 days as a Laborer, he was upgraded to a new position as a General Trades Helper, and his hourly pay was increased some twenty-two percent. Although the physical location of his work remained the same, a fact heavily relied upon by Grievant Cain, WVU established that his new position was distinguished from his previous one, not only by its different classification, but by substantially higher skills. He served in his upgraded position for approximately eight and one-half months.

Title 128 of the Legislative Rule, University System of West Virginia Board of Trustees, Series 62, § 14.1 (1994), states that "[u]pgrades result from the process of job evaluation where a determination is made that a significantly higher level of skill, effort, and responsibility exists in the employee's current position. A new pay grade value shall thenbe established. . . ." This happened to Grievants.

It is clear from the record in this grievance that it is actually about WVU's use of temporary workers in general, allegedly to avoid paying benefits, and only incidentally about possible policy violations concerning these two Grievants which, if anything, benefitted them. WVU's Level II decision acknowledges that Grievants "did succeed in identifying a control weakness in the Mountaineer Temps operating procedures that could result. . . . in a University unit using temporary personnel to avoid the costs of full-time employees." However, Grievant Cain has proven no violation of any statute, regulation, or policy by WVU, and has cited nothing in any of the above-cited authorities governing temporary employees which would mandate his instatement into a full-time position. See Hostetter v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-371 (Jan. 20, 1998).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Title 128 of the Legislative Rule, University System of West Virginia Board of Trustees, Series 62, § 2.1.3 (1994), defines a temporary employee as an employeehired into a position expected to last fewer than nine months of a twelve month period, and
states that upgrades result from the process of job evaluation where a determination is made that a significantly higher level of skill, effort, and responsibility exists in the employee's current position.

v.3 3.
Grievant Molisee's grievance is moot.

4. Grievant Cain failed to establish, by a preponderance of the evidence, violations of any statute, regulation, or policy by WVU.

5. Grievant Cain failed to establish, by a preponderance of the evidence, that
he was entitled to instatement into a regular, full-time position at WVU.
Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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. 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.

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ANDREW MAIER **ADMINISTRATIVE LAW JUDGE**

Dated December 9, 1999

Footnote: 1

Grievants' Statement of Grievance reads "See attached letters," but the file in this grievance contains no such letters. As neither party to this consolidated grievance could supply these letters, Grievants' grievance is inferred from the record in its entirety.

Footnote: 2 *Grievants' grievances were apparently consolidated at Level I.*

Footnote: 3

This consolidated grievance was transferred, for administrative purposes, to the undersigned administrative law judge, on October 8, 1999.

Footnote: 4

Because Grievant Molisee has been hired as a regular employee of WVU, his grievance is moot.

Footnote: 5 *There was slight and contradictory evidence at Level II regarding whether Grievants' positions were expected to last more than nine months, and whether this policy applied to Temps during the approximately eleven and one-half months of Grievants' employment by Temps. As this issue is not necessary to the outcome of this grievance, and was not addressed in any post-hearing submissions, it will not be addressed further.*