THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BRETT WARD and

JEFF HIGLEY,

Grievants

v.

DOCKET NO. 07-HE-332

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

DISMISSAL ORDER

This grievance was filed by Grievants, Brett Ward and Jeff Higley, on July 17, 2006, against their former employer, West Virginia State University. Grievant Ward's statement of grievance, taken from the grievance form filed at level four (See footnote 1) reads:

> The Board of Governors Policy # 4 was not followed in the process of my position being eliminated. Specifically Section # 2, Section #3 was not properly followed either. There was never an opportunity to bump.

Grievant Higley's statement of grievance is nearly identical. The relief sought by Grievants at level

four is "[a]ccrued sick leave to follow to new position along with annual increment to continue at current rate without interruption." In addition, Grievant Ward seeks "the opportunity to bump to a state position, with bumping rights as stated in the Policy # 4 of the Board of Governors." The grievance was initially filed with the West Virginia Education and State Employees Grievance Board, and was remanded to level one of the grievance procedure on July 19, 2006. Dr. Cassandra B. Whyte, Vice President for Administrative Services, denied the grievance at level one on July 20, 2006, stating that, because Grievants were no longer employees of West Virginia State University, they could not use the grievance procedure. As levels one and two were the same in this grievance, Grievants appealed the level one decision to level three on August 3, 2006. A level three hearing was held on August 17, 2006. Grievants represented themselves, and Respondent was represented by Elaine L. Skorich, Assistant Attorney General. A four page level three recommendation from Hearing Examiner Gregory D. Epps was submitted to West Virginia State University President Hazo W. Carter, Jr., on June 11, 2006. President Carter denied the relief sought by Grievants on June 13, 2007. Grievants appealed to level four on June 21, 2007, and requested that a decision be issued based upon the record developed at level three. Respondent did not object to submission on the record. The deadline for submission of written argument was July 20, 2007. The parties did not submit written argument at level four, and this matter became mature for decision upon receipt of the lower level record on July 24, 2007. This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons on October 26, 2007.

Respondent's Motion to Dismiss the Grievance

On July 5, 2007, Respondent filed an "Objection of Respondent to Jurisdiction of Grievance," arguing the West Virginia Public Employees Grievance Board has no jurisdiction to hear this grievance, and this grievance should be dismissed. Respondentpointed to the passage of Senate Bill 442 (See footnote 2) , by which the West Virginia Education and State Employees Grievance Board, the body which received the appeal to level four, ceased to exist on June 30, 2007. (See footnote 3) Respondent argued that pursuant to *W. Va. Code* § 6C-2-1(e), a grievance appealed to the West Virginia Education and State Employees Grievance Board may proceed after June 30, 2007, under the jurisdiction of the Public Employees Grievance Board, only by mutual agreement of the parties. Apparently, Respondent chose not to agree to let the grievance proceed, and argued the "grievance

should be deemed to have expired on July 1, 2007." Grievants did not respond to this motion.

Prior to entering into a discussion of the statutory language, the undersigned feels compelled to address the fact that the level three hearing on this grievance was held on August 17, 2006, yet the level three decision was not issued until June 13, 2007, ten months after the hearing, and three months after the passage of Senate Bill 442. The statute governing the time period for issuing a decision at level three provides that the level three grievance evaluator has only five days from the hearing to issue a decision. *W. Va. Code* § 29-6A-4. Grievants waived the statutory timelines at level three for issuing adecision; however, this waiver did not give Respondent as long as it chose to issue the decision. Respondent was required to issue the decision within a reasonable period of time. *Shirkey v. Dep't of Transp.*, Docket No. 04-DOH-153D (July 30, 2004). Respondent offered no excuse for the lengthy delay in issuing the level three decision. It is hard to imagine why it would have taken ten months to issue a four page recommended decision which found that the grievance evaluator did not have jurisdiction over the grievance. Grievants could not appeal to level four until they had their level three decision. Now Respondent is attempting to benefit from its own failure to act with a reasonable period of time.

The new statutory language relied upon by Respondent has been misconstrued by Respondent. *W. Va. Code* § 6C-2-1 provides as follows:

> (e) Any grievance proceeding which is in process on the effective date of the enactment of this article will be completed as expeditiously as possible, and all outstanding orders for hearings must be completed by the first day of July, two thousand seven. Parties to grievances for which a hearing has not been held may, by agreement, proceed to either level two or level three.

The July 1 deadline in this provision only applies to grievances pending which had not completed the hearing process. A grievance in any other phase "will be completed as expeditiously as possible." This grievance had already completed the hearing process as of July 1, 2007.

Even if this July 1 deadline applied to this situation, it should not be read in a way which would result in the situation suggested by Respondent, where a respondent may, by its refusal to agree, make a grievance disappear, and eliminate an employee's grievance rights, on July 1, 2007. "It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice.It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would

lead to injustice and absurdity." Syl. Pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E.2d 194 (1925). "In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety." Syl. Pt. 3, *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990)(citing Syl. Pt. 3, *Parkins v. Londree*, 146 W. Va. 419, 127 S.E. 194 (1925)). *Bever v. Nicholas County Bd. of Educ.*, Docket No. 03- 33-064 (Aug. 29, 2003). Respondent's reading of the statute would produce an absurd result, and would certainly be inconsistent with *Code* § 6C-2-1(b), which states that "[r]esolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia." A more reasonable reading of the language relied upon by Respondent is that, if a hearing has not been held by July 1, 2007, the grievance may proceed at that time either to the new level two for mediation, or the new level three for hearing, depending upon which level the parties choose if they decide to proceed under the new procedure. Otherwise, the grievance will be processed as expeditiously as possible under the old grievance procedure, which consists of four levels.

Since the enactment of Senate Bill 442, this Board has consistently taken the position that the former statutes and rules continue to control proceedings in cases pending when the statute took effect, and which are being processed under the old four level grievance procedure. The new statutory provisions make clear that the West VirginiaPublic Employees Grievance Board is the successor to the West Virginia Education and State Employees Grievance Board. *West Virginia Code §* 6C-2-1, which immediately precedes the *Code Section* relied upon by Respondent in its Motion, provides that any references to the old statutory provisions governing the grievance procedure "shall be considered to refer to the appropriate grievance procedure pursuant to this article." *W. Va. Code §* 6C-2-1(d). The grievance procedure continued without interruption after July 1, 2007. Grievances pending at the West Virginia Education and State Employees Grievance Board on June 30, 2007, became grievances pending at the West Virginia Public Employees Grievance Board on July 1, 2007. Governor Joe Manchin III, by Executive Order 2-07, on May 8, 2007, confirmed this, stating,

> 6. The abolition of the Education and State Employees Grievance Board and the creation of the West Virginia Public Employees Grievance Board shall in no way hinder any ongoing programs, benefits, litigation, or grievance procedures.

Respondent's Motion does not address this Executive Order.

Respondent's Motion is DENIED.

Synopsis

This grievance arose when Grievants were informed that if they wished to remain in their current positions, they would need to apply for employment with the West Virginia State College Research and Development Corporation. Although Grievants contend they did not resign their employment with West Virginia State University, they did apply for and accept employment with the West Virginia State College Research and Development Corporation effective July 1, 2006. Grievants argued Respondent did not comply with statutory mandates in eliminating their positions, noting they should have received twoweeks' notice before they were laid off, and they should have been notified of the positions available for them to bump into. They questioned whether the West Virginia State College Research and Development Corporation and West Virginia State University were truly separate, and suggested that the actions taken by both entities were intended to circumvent the applicable hiring and bumping policies.

Respondent argued first, that the grievances were not timely filed, noting that Grievants were informed in writing on June 22, 2006, that their positions at West Virginia State University would be eliminated June 30, 2006. By statute, the grievances had to be filed by July 7, 2006. These grievances were not filed until July 17, 2006. Respondent further argued that on the date the grievances were filed, Grievants were not employed by West Virginia State University, and by statute, could not avail themselves of the grievance procedure. Respondent argued that, to the extent Grievants were seeking information on positions into which they could bump, the grievances were moot, as this information had been provided at the level three hearing, and Grievants' request for bumping rights was moot because Grievants were not interested in accepting any of the positions available to them, all of which were in a lower pay grade.

Finally, Respondent argued that there is no authority to grant the relief requested relating to Grievants' request for their accumulated sick leave and increment to follow them to their new position with the West Virginia State College Research and Development Corporation, as that entity is a private corporation, not a state agency or institute of higher education.

Grievants were not employees of West Virginia State University at the time they filed this grievance, having previously accepted employment with the West Virginia StateCollege Research and Development Corporation. Only employees may file a grievance. This Grievance Board has no jurisdiction to hear and decide this grievance.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Prior to July 1, 2006, Grievants were employed by West Virginia State University ("WVSU") in the Educational Network area.

2. Sometime early in 2006, the employees in the Educational Network area at WVSU were told their department would be transferred to the West Virginia State College Research and Development Corporation (See footnote 4) ("the Research Corporation") on July 1, 2006. 3. The Research Corporation is a non-profit corporation affiliated with West Virginia State University, formerly West Virginia State College.

4. By separate letters dated June 5, 2006, Grievants asked Dr. Cassandra Whyte, Vice President of Administration at WVSU, for "information on employees' rights and possible positions available to me under the WVSU 'Bumping' policy. In addition, I request that Human Resources include any additional options that relate to employees' termination and or transfer from WVSU." The letters list the reason for the request as a verbal advisement that Grievants' positions would be transferred to the Research Corporation at the end of the fiscal year. No one responded to Grievants' request.

5. Grievants received a letter on June 21, 2006, advising them:

> Effective January 01, 2006, the Educational Network, an area of Academic Affairs, was transferred to Plan[n]ing & Advancement, Gus R. Douglas Institute. Due to funding, you were allowed to continue as state employees until June 30, 2006. Effective July 1, 2006, all positions will be held within the Gus R. Douglas Institute with the WVSU Research and Development serving as fiscal agent.
>
> If you desire to continue in your current position, you must resign as a State of West Virginia employee and become an employee of the Research and Development Corporation, working for the Educational Technology Center of the Gus R. Douglas Institute.

> Please attend a meeting on June 22, 2006, at 3:30 PM, East Hall conference room to discuss salaries and benefits, and to answers [sic] questions related to future employment. If you should have any questions, please feel free to call me.

This letter was signed by Brunetta Gamble Dillard, Business Manager. Grievants attended the meeting on June 22, 2006.

6. On June 26 and 27, 2006, Grievants applied for employment with the Research Corporation. They became employees of the Research Corporation on July 1, 2006. They were removed from the WVSU payroll effective June 30, 2006.

7. This grievance was filed on July 17, 2006. Grievants were not employees of WVSU at the time this grievance was filed.

Discussion

This Grievance Board was created by the Legislature and given limited jurisdiction in certain matters which constitute grievances that can be filed by classified and nonclassified employees in accordance in *W. Va. Code* §§ 29-6A-1, *et. seq*. *See W. Va. Dep't of Admin. v. W.Va. Dep't of Health and Human Resources*, 192 W.Va. 202, 451 S.E.2d 768 (1994); *Mills v. W.Va. Soil Conservation Agency*, Docket No. 96-AGR-153 (July 30, 1996). Under the grievance procedure, a person who no longer holds employmentstatus is generally not eligible to invoke the grievance procedure after the employment relationship is terminated. *Spiroff v. W. Va. Schools for the Deaf & Blind*, Docket No. 99-DOE-314D (Sept. 30, 1999); *Jackson v. W. Va. Div. of Corr.*, Docket No. 97-CORR-345 (Jan. 30, 1998). The burden of proof is on Grievants to establish they were employees of WVSU at the time this grievance was filed. *Chatfield v. W. Va. State Univ.,* Docket No. 06- HE-074 (Jan. 4, 2007).

"Of course, if the grievance was filed while the person was still employed (and the matter has not been rendered moot by the termination of employment), or the termination is the subject of the grievance, an individual may nonetheless have standing to grieve." *Rule v. W. Va. Dep't of Health and Human Resources*, Docket No. 00-HHR-080 (May 24, 2000). In particular, a former employee may through the grievance procedure challenge the termination of his employment that resulted from being laid off, provided the grievance challenging the lay off action is timely submitted. *Id.*

In this case Grievants' employment with WVSU was not terminated, nor were they laid off. Grievants were told they could apply with the Research Corporation if they wished to retain their

positions in the Educational Network area, and both chose to do so. Effective July 1, 2006, they were no longer employees of WVSU, and could not file a grievance challenging WVSU's alleged failure to follow proper procedure for notifying them that their positions were being eliminated, and notifying them of other positions available to them through the reduction in force provisions. The Research Corporation is a separate legal entity from WVSU, and is not a state agency or institution of higher education subject to the grievance procedure. *Chatfield, supra.* While Grievants suggested that WVSU and the Research Corporation were not truly separate entities, the sparse legal documentation introduced into the record shows the Research Corporation to be a legal entity, separate from WVSU. Grievants produced no documentation that any governing body has taken action to remove the Research Corporation's legal status as a separate entity. Further, this Grievance Board has previously addressed this issue, and found that the Research Corporation is indeed a legal entity separate and apart from WVSU, and that employees of the Research Corporation may not use the grievance procedure. *Chatfield, supra*.

While not directly on point with regard to whether there is jurisdiction in this matter, the case of *Freshwater v. Regional Jail and Correctional Facility Authority and West Virginia Division of Corrections*, Docket No. 95-RJA-371 (Dec. 12, 1995), is instructive. In that case the Grievance Board addressed whether a former employee of the Division of Corrections who had been employed at the West Virginia Penitentiary in Moundsville until shortly before its closure, and chose to resign his position and apply for and accept a position with a separate state agency, the Regional Jail and Correctional Facility Authority, could then complain that Corrections should have placed him on preferred recall. The administrative law judge noted that some employees had assumed the risk that another job might not be available to them and did not resign, and were placed on preferred recall when the Penitentiary closed, while the Grievant did not assume this risk, choosing instead to apply for a position with the Regional Jail Authority. The administrative law judge summarized the situation well, stating, “Grievant cannot have it both ways, that is, to avail himself of the benefit of secure employment at one point and then move ahead of other former Corrections workers who opted not to seek employment elsewhere.” *Id.* Grievants made a choice to retain their employment by applying for and accepting jobs with the Research Corporation, rather than risk that there would not be another acceptable position at WVSU into which they could bump. While the undersigned agrees that it would have been better if they had been given more information so that they could have better

evaluated their options, they nonetheless made their decisions and left the employment of WVSU voluntarily. Once they did so, they could no longer grieve the failure of their former employer to follow the required procedure.

As far as Grievants' complaint that they wanted their accumulated sick leave and increment pay to follow them to the Research Corporation, the undersigned would suggest that it would have been prudent for Grievants to have found out what the benefits would be before they accepted employment with the Research Corporation. The Research Corporation is not an employer covered by the grievance procedure. The undersigned has no authority to direct Grievants' current employer, the Research Corporation, to credit Grievants with any accrued sick leave they had when they were employed by West Virginia State University, or to continue to pay Grievants an annual increment.

The following Conclusions of Law support the Dismissal of this grievance.

Conclusions of Law

1. This Grievance Board was created by the Legislature and given limited jurisdiction in certain matters which constitute grievances that can be filed by classified and nonclassified employees in accordance in *W. Va. Code* §§ 29-6A-1, *et. seq*. *See W. Va. Dep't of Admin. v. W.Va. Dep't of Health and Human Resources*, 192 W.Va. 202, 451 S.E.2d 768 (1994); *Mills v. W.Va. Soil Conservation Agency*, Docket No. 96-AGR-153 (July30, 1996). *Jackson v. W. Va. Div. of Corr.*, Docket No. 97-CORR-345 (Jan. 30, 1998). Under the grievance procedure, a person who no longer holds employment status is generally not eligible to invoke the grievance procedure after the employment relationship is terminated. *Spiroff v. W. Va. Schools for the Deaf & Blind*, Docket No. 99-DOE-314D (Sept. 30, 1999); *Jackson, supra*.

2. A “Grievant has the burden of proving he is an employee of an agency covered by the grievance procedure. See Eggleton v. Div. of Culture & History, Docket No. 03-C&H-237 (Nov. 24, 2003); Roberts v. Div. of Culture & History, Docket No. 95- C&H-302 (May 12, 1997).” *Chatfield v. W. Va. State Univ.,* Docket No. 06-HE-074 (Jan. 4, 2007).

3. Grievants were not employees of West Virginia State University, or any other employer subject to the grievance procedure at the time their grievances were filed. This Grievance Board has no jurisdiction to render a decision on this grievance. *Id.*

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

Any party may appeal this dismissal order to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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 Grievance 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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BRENDA L. GOULD

Administrative Law Judge

Date: December 20, 2007

Footnote: 1

Grievants filed more than one grievance form at the lower levels of the grievance procedure, and requested different forms of relief, all of which was a topic of discussion at the level three hearing. The statement of grievance on the form filed at level four, and the stated relief sought on that form, will be considered to be the grievance and relief sought at this level. Neither the statement of grievance, nor the stated relief sought is an expansion of what was considered at level three.

Footnote: 2

2007 Acts ch. 207, now codified at W. Va. Code §§ 6C-2-1 through 6C-3- 6 (2007).

Footnote: 3

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References later in this decision are to the

former statutes and rules, which continue to control the proceedings in this case.

Footnote: 4

The Research Corporation was often referred to in the record as the West Virginia State University Research and Development Corporation, but the name on the Certificate of Incorporation introduced into the record as Respondent's Exhibit 3 is the West Virginia State College Research and Development Corporation.