THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GEORGE F. CLUTTER III,

Grievant,

v.

Docket No. 2009-1372-AGR

WEST VIRGINIA DEPARTMENT OF AGRICULTURE,

Respondent.

DISMISSAL ORDER

George F. Clutter III filed a level three grievance form with the Public Employees Grievance Board on March 20, 2009, contesting the termination of his employment with the Department of Agriculture ("Department").[1] Until the date of his dismissal, Mr. Clutter was employed with the Department as the State Apiarist.[2] Mr. Clutter alleges that his discharge was improper and seeks reinstatement to his position with back pay and restoration of all benefits. He also seeks changes in the administration of the Apiary Program as well as protection from any hostility or retaliation.

The Department filed a Motion to Dismiss the grievance on March 24, 2009. It claims that Mr. Clutter does not meet the definition of "employee" as that term is defined in the Public Employees Grievance Procedure and therefore "the Public Employees Grievance Board does not have jurisdiction to hear" Mr. Clutter's claim. Respondent's Motion to Dismiss at page 2.

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[1] W. VA. CODE § 6C-2-4(a)(4) provides that an employee may file a grievance contesting his discharge from employment directly at level three.

[2] An apiarist is a beekeeper. The State Apiarist promotes and assists bee-keeping endeavors throughout West Virginia.

On May 8, 2009, a telephonic hearing was held regarding the Motion to Dismiss at the Charleston Office of the Grievance Board. George Clutter appeared by telephone and represented himself. The Department also appeared by telephone through its attorney, Arden J. Curry II. The parties did not seek to submit fact/law proposals and this matter became mature for decision on the Motion at the conclusion of the May 8 hearing.

Synopsis

George F. Clutter III filed a grievance contesting his discharge from his position as State Apiary with the Department of Agriculture. A Motion to Dismiss the grievance was filed by the Department claiming that Mr. Clutter did not meet the definition of "employee" as set out in the Public Employees Grievance Procedure. The Department avers that employees of the Department of Agriculture are not covered under the grievance statute and therefore the Grievance Board has no jurisdiction to hear Mr. Clutter's complaint.

The Public Employees Grievance Board is a statutory creation with jurisdiction defined by law to resolve disputes between specific public employees and their public employers. Mr. Clutter's position did not meet the statutory definition of an employee set out in the grievance procedure and the Grievance Board does not have jurisdiction to hear his grievance. The grievance must be dismissed.

Findings of Fact

1. For a period of time prior to March 13, 2009, George F. Clutter III was employed by the Department of Agriculture as the State Apiarist.

2. On March 13, 2009, Mr. Clutter was discharged from employment with the Department.

3. The Department of Agriculture is under the supervision and control of the Commissioner of Agriculture. W. VA. CODE § 19-1-1.

4. The Commissioner of Agriculture is a constitutional officer of the State of West Virginia elected by popular vote of its citizens. W. VA. CONST. ART. VII, § 1; W. VA. CODE § 19-1-2.

5. The Commissioner of Agriculture is authorized by statute to employ such employees as are necessary in the performance of the duties of his office through the Department of Agriculture. W. VA. CODE § 19-1-3.

Discussion

The issue raised by the Respondent's Motion is whether the Public Employees Grievance Board has jurisdiction to resolve the complaint of George Clutter regarding his discharge from employment as the State Apiarist. The Department argues that Mr. Clutter is not an "employee" as that term is defined by W. VA. CODE § 6C-2-2 and therefore is not covered under the Grievance Board's statutory authority. The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002), (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public

Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*.

WEST VIRGINIA CODE § 6C-2-2(e)(1) defines "employee" for the purposes of the grievance procedure, as follows:

> (1) "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position.
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> (2) A substitute education employee is considered an "employee" only on matters related to days worked or when there is a violation, misapplication or misinterpretation of a statute, policy, rule or written agreement relating to the substitute.
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> (3) "Employee" does not mean a member of the West Virginia State Police employed pursuant to article two, chapter fifteen of this code, but does include civilian employees hired by the Superintendent of the State Police. **"Employee" does not mean an employee of a constitutional officer unless he or she is covered under the civil service system,** an employee of the Legislature or a patient or inmate employed by a state institution.

(Emphasis added). Mr. Clutter was employed by the Department of Agriculture which is under the supervision and control of the Commissioner of Agriculture. W. VA. CODE § 19-1-1. The Commissioner of Agriculture is a constitutional officer[3] and employees of the Department are his employees, hired to carry out the duties of his office. W. VA. CODE § 19-1-3. Based upon the unambiguous wording of the statute, since Mr. Clutter was employed by the Commissioner of Agriculture, his former position is specifically excluded

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[3] "The executive department shall consist of a governor, secretary of state, auditor, treasurer, **commissioner of agriculture** and attorney general, who shall be, ex officio, reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law." (Emphasis added) W. VA. CONST. ART. VII, § 1.

as an employee who may bring a grievance unless his position "is covered under the civil service system." W. VA. CODE § 6C-2-2(e)(3).

WEST VIRGINIA CODE § 29-6-4 lists a number of positions that are "classified-exempt". "Classified-exempt" employees are employees whose positions are not covered under the civil service system. W. VA. CODE § 29-6-2(g). The following provision of WEST VIRGINIA CODE § 29-6-4 is pertinent to this issue:

> (c) The following offices and positions are exempt from coverage under the classified service:
>
> (3) All officers elected by popular vote and employees of the officer.

Because the position is employed by the Commissioner of Agriculture who is elected by popular vote, the State Apiarist is not covered by the civil service system. Consequently, any employee in that position is not an "employee" as defined under the grievance statute and the Public Employees Grievance Board has no jurisdiction to hear his complaint against his employer. *See Kisamore v. W. Va. Dep't of Agriculture*, Docket No. 89-AGR-237 (July 26, 1989) (reaching the same result under the previous grievance statute).

Accordingly, Mr. Clutter's grievance must be dismissed.

Conclusions of Law

1. The Public Employees Grievance Board is an administrative agency established by the Legislature to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

2. "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002), (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority under WEST VIRGINIA CODE §§ 6C-2-1 *et seq*.

3. The position of State Apiarist is employed by the Commissioner of Agriculture to serve in the Department of Agriculture. The person employed in that position is not an employee as defined by W. VA. CODE § 6C-2-2(e). Therefore, the Public Employees Grievance Board does not have jurisdiction to resolve a dispute between him and his employer.

Accordingly, the 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* 156 C.S.R. 1 § 6.20 (2008).

DATE: MAY 28, 2009.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE