THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHERRIE GILL,

Grievant,

v. **Docket Nos. 2009-1598-CONS**

**WEST VIRGINIA DIVISION
OF NATURAL RESOURCES,**

Respondents.

DISMISSAL ORDER

Cherrie Gill has been employed seasonally by the Parks and Recreation Section of the Division of Natural Resources ("DNR") each year for the past nine years. She works as a Housekeeper at the Pipestem Resort Park ("Park") during the tourist season. On January 26, 2009, Ms. Gill filed a level one grievance form because she did not receive a permanent, full-time Custodian position at the Park.[1] As relief Ms. Gill seeks to be placed into the Custodian position. On February 23, 2009, Cherrie Gill filed a second level one grievance form because she was not selected for a permanent, full-time House Keeper position at the Park.[2] In this grievance, Ms. Gill seeks to be placed in the House Keeper position.

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[1] This grievance form was received at the Grievance Board on January 29, 2009, and assigned docket number 2009-0914-DOC.

[2] This grievance form was received at the grievance Board on February 23, 2009 and assigned docket number 2009-1071-DOC.

On February 13, 2009, DNR filed a Motion to Dismiss[3] the first grievance alleging that Ms. Gill did not meet the definition of "employee" in the grievance statute[4] and therefore she has no standing to contest her non-selection in that forum. On March 27, 2009, Respondent DNR filed a Second Motion to Dismiss alleging that the second grievance should be dismissed for the same reasons raised in its original Motion.

A telephonic hearing was held regarding the Motions to Dismiss the two grievances in the Charleston Office of the Public Employees Grievance Board on April 17, 2009, at 3:00 pm. Cherrie Gill participated by telephone and represented herself. DNR participated by telephone and was represented by William R. Valentino, Assistant Attorney General. During the hearing, Ms. Gill provided the only testimony. Additionally, DNR was ordered to provide Ms. Gill and the undersigned with a copy of the DNR policy related to seasonal employees. Neither party provided written fact/law proposals.

On April 23, 2009, Respondent supplemented the record with a copy of the DNR policy section related to season employees and a copy of the Temporary Appointment Form signed by Ms. Gill on December 16, 2008. This matter became mature for decision on the Motion to Dismiss at that time.

Synopsis

Cherrie Gill challenges the selection of less experienced workers to fill two full-time permanent positions at the Park. She claims that since she has more experience as a temporary worker she should have been selected for the permanent positions. DNR notes

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[3] Respondent alleges that it did not receive a copy of the grievance form until it was supplied a copy by the Grievance Board on February 12, 2009.

[4] W. VA. CODE § 6C-2-2(e)(1).

that temporary, seasonal workers like Ms. Gill, are exempt from coverage under the state classified service by W. VA. CODE § 29-6-4, and they are not included in the definition of "employee" set out in W. VA. CODE § 6C-2-2. Consequently, Respondent argues that Ms. Gill has no standing to file a grievance with the Public Employees Grievance Board. Because Cherrie Gill is not a permanent employee of the DNR, she has no standing under the grievance statute and the grievances must be dismissed.

Findings of Fact

1. Cherrie Gill has worked as a temporary employee for the DNR for nine years. She works each year as a Housekeeper at the Pipestem Resort and Park.

2. Each of the past nine years, Ms. Gill's employment started on or about January 1, and ended on or about October 31, of the same year.

3. For the first few years, Ms. Gill was required to apply for a House Keeping Position each year. Then, for about three years, the DNR allowed the temporary employees to be reemployed in the same position they left the previous year without application. For the last few years the DNR has required each temporary worker to reapply for the seasonal positions each year.

4. Ms. Gill and the other seasonal employees at the Park do not accrue sick or annual leave, nor do they receive insurance coverage or retirement benefits.

5. Temporary seasonal workers such as Ms. Gill are not covered under the state employee classification system.

6. The DNR policy related to seasonal employees states that their employment is terminated each year and specifically states that such termination is not a lay off.

7. To be reemployed, the seasonal employees from the previous year must reapply. Each seasonal employee is given a "Temporary Appointment" form that must be initialed and signed, advising them of the restrictions of seasonal employment which include the following:

1. IT IS **TEMPORARY** EMPLOYMENT;
2. YOU WILL **NOT** EARN SICK LEAVE;
3. YOU WILL **NOT** EARN ANNUAL LEAVE;
4. THIS TIME **CANNOT** BE COUNTED TOWARD EXTENDED LEAVE BENEFITS;
5. YOU WILL **NOT** BE ELIGIBLE TO PARTICIPATE IN THE RETIREMENT PROGRAM;
6. YOU **CANNOT** PARTICIPATE IN THE INSURANCE PROGRAM;
7. YOU **CANNOT** BE GRANTED A HEARING BEFORE THE EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD [SIC];
8. THE TIME SERVED IN THIS EMPLOYMENT **CANNOT** BE COUNTED AS PART OF THE PROBATIONARY PERIOD;
9. **TO BE CONSIDERED FOR A PERMANENT POSITION IN THE CLASSIFIED SERVICE, YOUR NAME MUST BE CERTIFIED TO DIVISION OF NATURAL RESOURCES ON A DIVISION OF PERSONNEL REGISTER.**

(Emphasis in original).

8. On December 16, 2008, Cherrie Gill filled out a Temporary Appointment form. She placed her initials by each of the conditions listed above and signed a statement certifying that she had read and understood those restrictions. Respondent's Supplement of the Record.

Discussion

Respondent asserts that Cherrie Gill is not an "employee" within the meaning of WEST VIRGINIA CODE § 6C-2-2, and therefore has no standing to file a grievance. A claim that the grievant lacks standing is an affirmative defense. When the employer asserts an affirmative defense, the defense must be proven by a preponderance of the evidence.

Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998).

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY 1442 (Eighth Edition 2004). The Public Employees Grievance Procedure was established to allow public employees and their employer 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).

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

> "Employee" means any person hired for **permanent employment** by an employer for a probationary, full- or part-time position.

(Emphasis added). To qualify as an employee within the meaning of the grievance statute the employee must have permanent employment status. BLACK'S LAW DICTIONARY 566 (Eighth Edition 2004) defines "permanent employment" as "[w]ork that, under a contract, is to continue indefinitely until either party wishes to terminate it for some legitimate reason." The Division of Personnel Legislative Rule defines a "permanent employee" as follows:

> Permanent Employee: Any classified employee who was hired from a register and who has completed the probationary period prescribed by the State Personnel Board for the job class, or **any classified exempt employee who was hired to fill a position for an unlimited period of time**, notwithstanding the appointing authority's right to terminate the employee for cause or at his or her will.

(Emphasis added) W. VA. CODE R. § 143 C.S.R. 1.3.66 (2007). Permanent employment clearly contemplates a continuing relationship much like the concept of tenure. The employment relationship does not end by a set period of time that defines the term of employment. Rather it continues indefinitely until one of the parties takes specific steps to terminate it.

It is undisputed that Cherrie Gill works for DNR for a period of time each year. However, DNR argues that the seasonal work performed by Ms. Gill each year is temporary and is not permanent employment as contemplated by the Grievance statute. DNR points out that seasonal employees are classified exempt. W. VA. CODE § 29-6-4 provides the following:

> (c) The following offices and positions are exempt from coverage under the classified service:
>
> (14) Seasonal employees in the state forests, parks, and recreational areas working less than 1,733 hours per calendar year: Provided, That notwithstanding any provision of law to the contrary, seasonal employees shall not be considered full-time employees.

Seasonal employees have no expectation of continued employment. They are employees for a specific ten-month period each year. By DNR's policy, their employment is terminated at the end of each season and they must apply to be reemployed for the next season. Ms. Gill verified that it has been Respondent's practice for the last few years. Because they are classified exempt, they are not protected by the "good cause" termination provisions of the Division of Personnel policies. Ms. Gill's position as a seasonal worker is classified exempt under W. VA. CODE § 29-4-6(c). Her position would have to continue for an "unlimited period of time" to meet the definition of a permanent employee. W. VA. CODE R. § 143 C.S.R.-1.3.66 (2007). That simply is not the nature of her employment. The

Grievance Board has held that temporary employees, even if employed on a full-time basis, are not hired for "permanent employment" and, accordingly, are not eligible to file grievances. *Lilly v. Division of Natural Res.*, Docket No. 98- DNR-011 Mar. 26, 1998); *Edmond et al. V. Div. of Juvenile Servs.*, Docket No. 99-DJS-293 (Feb. 22, 2000).

Respondent has proven by a preponderance of the evidence that Ms. Gill does not fall under the definition of "employee" contained in WEST VIRGINIA CODE §§ 6C-2-1 *et seq.* Consequently, she has no standing to pursue her claim through the grievance procedure.

Accordingly, this grievance must be dismissed.

Conclusions of Law

1. A claim that the grievant lacks standing is an affirmative defense. When the employer asserts an affirmative defense, the defense must be proven by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998).

2. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY (Eighth Edition 2004). The Public Employees Grievance Procedure was established to allow public employees and their employer 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).

3. For purposes of the Public Employees Grievance Procedure, an employee must be a person hired for "permanent employment" with a covered employer to have standing to file a grievance. W. VA. CODE § 6C-2-2(e)(1).

4. Temporary employees, even if employed on a full-time basis, are not "hired for permanent" employment and, accordingly, are not eligible to file grievances. *Lilly v. Division of Natural Res.*, Docket No. 98- DNR-011 Mar. 26, 1998); *Edmond et al. V. Div. of Juvenile Servs.*, Docket No. 99-DJS-293 (Feb. 22, 2000).

5. Because Cherrie Gill's employment with the DNR is seasonal and not permanent, she does not have standing to file a grievance under the Public Employees Grievance Procedure set out in W. VA. CODE §§ 6C-2-1 *et seq.*

Accordingly, the two grievances are 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 22,2009

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE