THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARILYN WALKER,

Grievant,

v. **Docket No. 2010-1557-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ JACKIE WITHROW HOSPITAL,

Respondent.

DISMISSAL ORDER

Grievant Marilyn Walker had previously been employed at the Department of Health and Human Resources/Jackie Withrow Hospital (hereinafter referred to as "DHHR" and "Hospital") as a nursing assistant. She was dismissed from employment on May 1, 2009, because her name was placed on the Office of Health Facility Licensure and Certification ("OHFLAC") registry for neglect of a patient. Nursing assistants who are listed on the OHFLAC registry may not be employed at the Hospital. Grievant's name came off the OHFLAC registry on June 1, 2010 and she sought reinstatement to her prior position at the Hospital. Respondent allowed Grievant to return to the Hospital as a temporary employee while she applied to be placed on the DOP employment Register for permanent employment.

Grievant's employment at the Hospital was once again terminated on June 10, 2010. Marilyn Walker filed a grievance contesting her dismissal on June 11, 2010. Respondent filed a Motion to Dismiss the grievance based upon the proposition that Grievant, as a temporary employee, had no standing to file a grievance under W. VA. CODE

§§ 6C-2-1 et seq. Grievant counters that she should have been reinstated as a regular full-time employee and is entitled to proceed with her grievance contesting her dismissal from employment.

A telephonic hearing was held concerning Respondent's Motion to Dismiss on July 19, 2010. Grievant was represented at the hearing by Gordon Simmons, of the UE Local 170, West Virginia Public Workers Union. Respondent DHHR was represented by Heather Laick, Assistant Attorney General. After hearing the arguments of the parties, the undersigned requested that the representatives provide written arguments regarding their respective positions to be mailed no later than August 20, 2010. Both parties provided written arguments the last of which was received by the West Virginia Public Employees Grievance Board on August 24, 2010.[1]

Findings of Fact

1. Grievant was employed at the DHHR Jackie Withrow Hospital [2] as a certified nursing assistant for approximately four years before she was dismissed on May 1, 2009. Grievant was dismissed because her name was placed on the OHFLAC registry for neglect of a patient. The Hospital is prohibited by law from employing a nursing assistant whose name appears on the OHFLAC registry.[3]

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[1] Respondent's initial response was received on August 20, 2010. However, the exhibits were inadvertently left out. An amended response was submitted shortly thereafter containing the exhibits.

[2] At that time, the Hospital was called Pinecrest Hospital.

[3] For a full discussion of these issues *see Walker v. Dep't of Health & Human Res.,* Docket No. 2009-1473-DHHR (Feb. 10, 2010).

2. After one year, Grievant's name was removed from the OHFLAC registry and she sought reinstatement to her prior position at the Hospital.

3. The Division of Personnel ("DOP") maintains a Register of qualified candidates from which all positions in state government must be filled. A person who has been dismissed from classified employment within state government may be disqualified from the Registry. 143 C.S.R. 1 § 6.4. Additionally, DOP rules prohibit an employee from being reinstated to the Register who has been disqualified pursuant to the foregoing rule. 143 C.S.R. 1 § 7.4 (b) (3).

4. Angela Booker, Chief Executive Officer ("CEO") of the Hospital wanted to re-employ Grievant when her name came off the registry. In anticipation of that event, CEO Booker sent a letter dated May 5, 2010, to DOP Director Sara Walker, [4] requesting an exception to the Register disqualification of Grievant for her prior dismissal. Respondent Exhibit A.

5. As a result of CEO Booker's letter, Director Walker sent a letter to Grievant dated May 18, 2010. In that letter, Director Walker indicated that the DOP was removing the letter that disqualified Grievant from being listed on the Registry of qualified candidates for a position. However, Grievant remained ineligible for direct reinstatement due to her prior dismissal. Therefore, Grievant would have to apply for placement on the Register and positions as they were posted. Respondent Exhibit B.

6. CEO Booker gave Grievant the option of waiting until she became certified on the DOP Register or accepting a position as a temporary employee. Grievant accepted

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[4] There was no indication that Director Sara Walker is related to Grievant Walker.

a temporary employee position and signed a "1000 Hour Temporary Exempt Appointment Form" ("Form") on April 29, 2010. Temporary employees are not covered by the DOP so Grievant was allowed to go to work at the Hospital for a maximum of 1000 hours before she was certified for the DOP Registry.

7. The purpose of the Form is to notify the temporary employee that her position is exempt from DOP rules and the employee does not have certain rights and benefits of a permanent employee. One restriction listed on the Form states, "You cannot be granted a hearing before the Public Employees Grievance Board."

8. Serving as a temporary employee allowed Grievant Walker to work at the Hospital while she completed the Civil Service Exam and qualified to be placed on the DOP Register so she could be considered for permanent employment.

9. On June 10, 2010, Grievant was dismissed from employment at the Hospital and she filed this grievance the next day.

Discussion

Respondent asserts that Marilyn Walker, as a temporary employee, does not meet the definition of an "employee" within the meaning of WEST VIRGINIA CODE § 6C-2-2, and therefore has no standing to file a grievance. 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:

> (1) "Employee" means any person hired for **permanent employment** by an employer for a probationary, full- or part-time position.

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. 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.

Grievant's employment did not fit that standard. She was hired under a temporary exempt employment contract that was specifically limited to 1000 hours. She was hired as a temporary employee to give her time to complete an examination to qualify for the DOP Register and be eligible for permanent employment. While employed in this temporary status Grievant was exempt from the DOP rules. The Form Grievant signed specifically notified her of these limitations, including the fact that she was not eligible to participate in the Public Employees Grievance Procedure. 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. Div.*

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); *Gill v. Div. of Natural Res.*, Docket No. 2009-1598-CONS (May 22, 2009).

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

Accordingly, this grievance must be dismissed.

Conclusions of Law

1. 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).

2. 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).

3. 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. Div. 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); *Gill v. Div. of Natural Res.*, Docket No. 2009-1598-CONS (May 22, 2009).

4. Because Grievant's employment with the DHHR was as an exempt temporary employee 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 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: SEPTEMBER 2, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE