THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DAVID REED,
Grievant,

v. **Docket No. 2011-0440-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DISMISSAL ORDER

_____Grievant David Reed had previously been employed at the Department of Health and Human Resources/William R. Sharpe, Jr. Hospital as a temporary exempt employee. After being terminated from that position, Grievant filed the instant grievance on September 27, 2010, asserting the termination was without just/good cause and Grievant sought to have his position reinstated with back pay and interest. Respondent filed a Motion to Dismiss this grievance on October 6, 2010. Grievant was given an opportunity to respond to this motion, and did so on November 3, 2010. Grievant appears by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appears by Heather Laick, Assistant Attorney General. Having received written arguments from both parties this grievance is presented to the undersigned Administrative Law Judge in a posture to rule on the motion.

The following material facts are undisputed.

Findings of Fact

1. Grievant was hired by Respondent to work at Sharpe Hospital on May 17, 2010, as a 1000 Hour Temporary Exempt Employee.

2. Grievant accepted a temporary employee position and signed a "1000 Hour

Temporary Exempt Appointment Form" on May 5, 2010. The Division of Personnel ("DOP") maintains a Register of qualified candidates from which all positions in state government must be filled. 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 he was certified for the DOP Registry.

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

4. Grievant was terminated from his temporary position at Sharpe Hospital on September 22, 2010.

5. On September 27, 2010, Grievant filed this grievance asserting the termination was without just or good cause.

6. Grievant points out that he was hired as a temporary employee for a set length of employment, which Respondent terminated short of the completion of that set time frame of 1000 hours. Grievant was terminated for unsatisfactory work performance.

7. Grievant asserts that he has a liberty interest, and asserts that he should be afforded due process with respect to the reason given for his termination.

Discussion

Respondent asserts that Grievant is not an "employee" within the meaning of WEST VIRGINIA CODE § 6C-2-2, and therefore has no standing to file a grievance. As noted above, Grievant argues that he has a liberty interest at stake, and should be given due process with respect to the reason given for termination. When the employer asserts an affirmative

defense, it must be established by a preponderance of the evidence. *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996). In addition, 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). 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 "work 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.

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.[1] He was hired under a temporary exempt employment contract that was specifically limited to 1000 hours. While employed in this temporary status Grievant was exempt from the DOP rules. The form Grievant signed specifically notified him of these limitations, including the fact that he 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 does not fall under the definition of "employee" as contained in WEST VIRGINIA CODE § 6C-2-1, *et seq*. He has no standing to pursue his claim through the grievance procedure. This grievance must be dismissed.

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[1]This same fact pattern was recently presented to the Honorable William B. McGinley, the undersigned cites to his sound rationale and outcome in *Walker v. Dep't of Health and Human Res./Jackie Withrow Hosp.*, Docket No. 2010-1557-DHHR (Sept. 2, 2010) as authority.

Before moving to the conclusions of law in support of this ruling, the undersigned would like to briefly address Grievant's argument against the dismissal of this grievance. Grievant asserts that he will not be afforded procedural due process if this grievance is dismissed. The West Virginia Supreme Court in the case of *Waite v. Civil Rights Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1978) is instructive regarding Grievant's due process claims, as *Waite* defines liberty and property interests and discusses how to decide if a violation has occurred.

"A 'property interest' . . . extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." *Id*. at Syl. Pt. 3, in part. Non-classified, at-will employees do not have a property interest in continued employment because they do not have a legitimate claim of entitlement to the position. *Deputy Sheriff's Ass'n v. County Comm'n*, 376 S.E.2d 626, 627-29 (W. Va. 1988). Thus, Grievant has no property interest in his continued employment. "A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities." *Waite*, at Syl. Pt. 2, in part. "[A]n accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside his work world, infringes one's liberty interest." *Id*. at 167- 168. Simply discharging Grievant for cause does not deprive him of any liberty interest.

The following conclusions of law support this ruling.

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 the 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 Respondent was as an exempt temporary employee and not permanent, he 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 Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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: January 19, 2011

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Ronald L. Reece
Administrative Law Judge