THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

FRANKLIN WOLFE,
Grievant,

v. **Docket No. 2013-0713-SCA**

SUPREME COURT OF APPEALS OF WEST VIRGINIA,
Respondent.

DISMISSAL ORDER

Franklin Wolfe, Grievant, was dismissed from his position as a probation officer for the 17th Judicial Circuit on October 2, 2012. Grievant was employed by Respondent, Supreme Court of Appeals of West Virginia. On October 22, 2012, Grievant filed this challenge to his termination directly to level three, pursuant to W. VA. CODE § 6C-2-4(a)(4).

Respondent filed a request that the acknowledged and docketed grievance be dismissed. This communication was addressed to Robin Perdue, Director, by J. Kirk Brandfass, Respondent's General Counsel, by e-mail dated November 1, 2012. On November 9, 2012, Grievant filed a Motion to Hear Grievance, by his Representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. The matter is now mature for consideration.

Synopsis

The Supreme Court of Appeals of West Virginia is responsible for personnel matters regarding it own staff, and Grievant is not an "employee" under the definition found in W. VA. CODE § 6C-2-2(e)(3). Respondent's request is granted and the grievance is dismissed due to lack of jurisdiction.

Findings of Fact

1. Grievant was employed as a probation officer for the 17th Judicial Circuit. He was terminated from this position on October 2, 2012.

2. Probation Officers are employees of Respondent, Supreme Court of Appeals of West Virginia, and are not covered under the State's Merit System, i.e., Civil Service.

Discussion

Mr. Wolfe was terminated by Respondent on October 2, 2012. Mr. Wolfe filed a complaint with the Grievance Board on October 22, 2012, alleging he was terminated without good cause. By letter dated October 25, 2012, Respondent's Administrative Director, Steven D. Canterbury, pointed out to Mr. Wolfe that had he desired a post-dismissal appeal hearing, such a request had to be made in writing to his office within two weeks of dismissal. Since this request was not made within two weeks of his dismissal date, Mr. Canterbury advised Mr. Wolfe that his termination was final and no further administrative action could be taken. Upon receipt of the Grievance Board's Level Three Acknowledgment letter, Respondent's General Counsel, J. Kirk Brandfass, contacted the Grievance Board's Director, Robin Perdue, concerning the letter's request for hearing dates and the issue of jurisdiction. Director Perdue referred the matter to Deputy Chief Administrative Law Judge Brenda L. Gould. On November 7, 2012, the Grievance Board sent Grievant's Representative a letter requesting that he "respond, in writing, by no later than November 15, 2102, stating clearly why this grievance should not be dismissed for lack of jurisdiction." On November 9, 2012, Grievant responded with a Motion To Hear Grievance.

The Grievance Board has historically found it does not have jurisdiction to hear grievances filed by employees of the judicial branch based on the definition of employee in the grievance statute, the fact that the Supreme Court of Appeals of West Virginia is responsible for personnel matters regarding its staff, and that an intrusion by the Grievance Board into judiciary personnel matters would be a violation of the separation of powers mandated by the State Constitution.[1]

The statutory definition of employee found in the Grievance Board statute at W. VA. CODE § 6C-2-2(e)(3) provides, in pertinent part, as follows:

> "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.

In addition, Art. V, § 1 *W. Va. Const.* is titled "Division of Powers" and provides, in pertinent part, as follows:

> The legislature, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.

Art. VIII, § 3, *W. Va. Const.*, provides, in pertinent part, as follows:

> The officers and employees of the supreme court of appeals . . . shall be appointed and may be removed by the court.

For the foregoing reasons, this matter is dismissed. The following conclusions of law support the dismissal of this grievance.

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[1]*Harvey-Stevens v. Supreme Court of Appeals of West Virginia*, Docket No. SCA-88-021 (Dec 12, 1988).

Conclusions of Law

1. The Supreme Court of Appeals of West Virginia, which is within the judicial branch of State government, is responsible for personnel matters regarding its own staff. *Mayle v. Ferguson*, 327 S.E.2d 409, 411-412 (W. Va. 1985). Accordingly, intrusion by the West Virginia Public Employees Grievance Board, an agency of the executive branch of State government, would be a violation of the separation of powers mandated by the *W. Va. Const.*, Art. V, § 1.

2. The Supreme Court of Appeals of West Virginia is a "constitutional officer" for the purpose of W. VA. CODE § 6C-2-2(e)(3).

3. Grievant is not an "employee" for the purpose of W. VA. CODE § 6C-2-2(e)(3).

Accordingly, this matter is **DISMISSED** and **STRICKEN** from the docket of the West Virginia Public Employees Grievance Board. This dismissal should in no way be construed to prevent Grievant from pursuing his complaint in other forums.

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 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 (eff. July 7, 2008).

Date: November 30, 2012

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Ronald L. Reece
Administrative Law Judge