



REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

LARRY KISAMORE

v.

DOCKET NO. 89-AGR-237

WEST VIRGINIA DEPARTMENT OF AGRICULTURE

DECISION

Grievant, Larry Kisamore, had been employed as a livestock inspector with the Animal Health Division of the West Virginia Department of Agriculture (Department) for approximately thirteen years until his termination on May 1, 1989. A level four grievance was filed on May 30 after Commissioner Cleve Benedict advised Mr. Kisamore that he was not subject to a grievance procedure.

The Department has submitted a motion to dismiss the grievance for lack of jurisdiction. The Department's counsel argues that Mr. Kisamore was employed by a constitutional officer and was not classified by the West Virginia Civil Service Act and is therefore not eligible to utilize the grievance procedure set forth in W. Va. Code §§29-6A-1 et seq.

The grievant argues that he should not be excluded from pursuing a remedy through the Education and State Employees Grievance Board as the intended exceptions to its

applicability were political appointees whose employment coincides with the term of office of the elected official. He asserts that he was employed by the Department prior to the election of the present Commissioner and is not a political appointee who would be excluded from the grievance procedure. The grievant further argues that he held permanent employment with the Department thereby meeting the definition of employee as stated in Code §29-6a-2(e) and that to deny him accessibility to the grievance procedure would violate his due process rights guaranteed by the United States Constitution and the Constitution of West Virginia.

W.Va. Code §29-6A-1 states the purpose of the Education and State Employees Grievance Board is to provide a procedure for the resolution of employment grievances raised by nonelected state employees who are classified under the State Civil Service System, or employed by any department, agency, board or commission created by the Legislature. Exceptions are employees of the Board of Regents, state institutions of higher education, the Legislature, any employees of any constitutional officer unless they are classified under the Civil Service System, and members of the Department of Public Safety. The definition of "employee" set forth in Code §29-6A-2(e) restates the criteria of §29-6A-1. Statutes which are clear and unambiguous will

be applied and not interpreted. Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984).

Since Mr. Kisamore was employed by a constitutional officer and was not governed by the Civil Service System, he may not seek a remedy under this grievance procedure. This holding does not preclude Mr. Kisamore from seeking any due process to which he may be entitled in an appropriate forum.

Findings of Fact

1. The grievant was employed as a livestock inspector with the Animal Health Division of the West Virginia Department of Agriculture until his termination on May 1, 1989.

2. The Commissioner of Agriculture is a constitutionally created officer and employees of that department are excluded from participation in the statutory grievance procedure unless they are regulated by the Civil Service Commission.

3. Neither the grievant nor his position were classified by the Civil Service Commission.

Conclusions of Law

1. W.Va. Code §§29-6A-1, et seq. provides a grievance procedure for nonelected state employees who are classified under the state Civil Service System, or employed by any department, agency, board or commission created by the legislature, with the exception of employees of the board of

regents, state institutions of higher education, the Legislature, employees of any constitutional office unless they are covered under the Civil Service System and members of the Department of Public Safety.

2. The grievant is employed by a constitutional officer and is not covered by the Civil Service System; he is therefore unable to seek a remedy under W.Va. Code §§29-6A-1 et seq.

Accordingly, the Motion to Dismiss is **GRANTED** and the matter is Ordered stricken from the docket of the Education and State Employees Grievance Board.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Pendleton County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §29-6A-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED

July 26, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER