

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**LINDSEY PLYMALE,
Grievant,**

v.

Docket No. 2019-0169-DHHR

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.**

DISMISSAL ORDER

Grievant, Lindsey Plymale, filed a level three grievance against Respondent, Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital, dated August 1, 2018, protesting the termination of her employment and requesting reinstatement.

On August 9, 2018, Respondent, by counsel, filed *Department's Motion to Dismiss*. On the same date, Grievance Board staff forwarded a copy of Respondent's motion to Grievant by email, stating that any response to the motion must be made in writing by August 23, 2018, and that a decision on the motion would be made based on the submissions of the parties without further hearing. Grievant did not file a response to the motion. Grievant appears *pro se*¹. Respondent appears by counsel, Brandolyn Felton-Ernest, Assistant Attorney General.

Synopsis

Grievant was employed by Respondent as a temporary exempt employee in a Health Service Worker position. Respondent moved to dismiss the grievance for lack of

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

jurisdiction. Temporary employees are not afforded the statutory right to file a grievance. Accordingly, this grievance is DISMISSED.

Findings of Fact

1. Grievant was employed by Respondent as a temporary exempt employee in a Health Service Worker position.

2. At the commencement of her employment with Respondent, Grievant signed a document entitled, "West Virginia Department of Health & Human Resources 1000 Hour Temporary Exempt Appointment Form." This document explained that Grievant's employment would be temporary, not to exceed 1000 hours in a twelve-month period, that Grievant would not have right of appeal to the Grievance Board, and that "[y]our temporary employment may be ended at any time with or without cause."²

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq." W. VA. CODE ST. R. § 156-1-6.2 (2008). "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19. "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not

² Respondent attached this document as an exhibit to the motion to dismiss. The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

Respondent asserts the grievance must be dismissed for lack of jurisdiction as Grievant, a temporary employee, does not meet the definition of “employee” for purposes of the grievance procedure. Grievant was allowed an opportunity to respond to the motion and failed to do so.

“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “‘Grievance’ means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . .” W. VA. CODE § 6C-2-2(i)(1). “‘Employee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). “Temporary employees do not have permanent employment, and therefore, do not meet the statutory definition of

‘employee’ for grievance purposes.” *McGinnis v. Dep’t of Health and Human Res./Lakin Hospital*, Docket No. 2014-1661-DHHR (Sept. 3, 2014) (citing *Lilly v. Div. of Natural Res.*, Docket No. 98-DNR-011 (Mar. 26, 1998); *Edmond, et al. v. Div. of Juvenile Serv.*, Docket No. 99-DJS-293 (Feb. 22, 2000); *Gill v. Div. of Natural Res.*, Docket No. 2009-1598-CONS (May 22, 2009); *Waybright v. Dep’t of Health and Human Res.*, Docket No. 2012-1317-DHHR (June 15, 2012)).

Grievant does not dispute that she was a temporary employee. As a temporary employee, she has no statutory right to file a grievance and the Grievance Board lacks jurisdiction to hear her grievance. Accordingly, this grievance must be DISMISSED.

The following conclusions of law support the dismissal of this grievance:

Conclusions of Law

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq.” W. VA. CODE ST. R. § 156-1-6.2 (2008).

2. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in

the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

3. “Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

4. “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “‘Grievance’ means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . .” W. VA. CODE § 6C-2-2(i)(1). “‘Employee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1).

5. “Temporary employees do not have permanent employment, and therefore, do not meet the statutory definition of ‘employee’ for grievance purposes.” *McGinnis v. Dep’t of Health and Human Res./Lakin Hospital*, Docket No. 2014-1661-DHHR (Sept. 3, 2014) (citing *Lilly v. Div. of Natural Res.*, Docket No. 98-DNR-011 (Mar. 26, 1998); *Edmond, et al. v. Div. of Juvenile Serv.*, Docket No. 99-DJS-293 (Feb. 22, 2000); *Gill v.*

Div. of Natural Res., Docket No. 2009-1598-CONS (May 22, 2009); *Waybright v. Dep't of Health and Human Res.*, Docket No. 2012-1317-DHHR (June 15, 2012)).

6. As a temporary employee, Grievant has no statutory right to file a grievance and the Grievance Board lacks jurisdiction to hear her grievance.

Accordingly, this 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: October 4, 2018

Billie Thacker Catlett
Chief Administrative Law Judge