

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PRISCILLA ANN THOMAS,
Grievant,**

v.

Docket No. 2017-2268-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DISMISSAL ORDER

On May 25, 2017, Grievant filed this grievance against Respondent using the required form and attaching an additional typed document. Grievant's form and attached document are somewhat unclear, but it appears Grievant protests her non-selection for a position with "West Virginia University (WVU) – Energy Express program." On the grievance form, Grievant listed her employing agency as "Energy Express – WVU President's Office." On May 26, 2017, Grievance Board staff received an e-mail from Sue Keller, who is the designee of West Virginia University's chief administrator for purposes of the grievance procedure. Ms. Keller asserted Grievant was not an employee of West Virginia University, and was only a temporary employee of the Energy Express Program, although Ms. Keller did not identify the nature of the Energy Express Program. By e-mail dated June 1, 2017, Grievant attached emails regarding her non-selection in which she was corresponding with John Lyonett, who identified himself as the "AmeriCorps Coordinator" and in which Grievant referred to the AmeriCorps' handbook.

By letter dated July 26, 2017, the undersigned notified the parties that it did not appear the Grievance Board had jurisdiction to hear the grievance as Grievant did not appear to be employed as a permanent employee of a qualifying agency. The letter instructed that, if Grievant disagreed, she must "respond in writing to clearly state why

this grievance should not be dismissed for lack of jurisdiction, including an explanation of why you believe you were a permanent employee and who you assert was your actual employer for the Energy Express Program.” By email dated July 31, 2017, Grievant responded with a copy of a paystub and a document entitled “Using 4-H Leader Accounts for Energy Express.” Although the pay stub Grievant provided demonstrated she was paid by the state treasury from the account of West Virginia University, nothing in the information she provided demonstrated whether she was a permanent or temporary employee.

By letter dated August 29, 2017, the undersigned informed Grievant that her response did not address whether she was a permanent or temporary employee as she had been instructed to do. Grievant was instructed to respond, in writing, to either admit or deny that she was a temporary employee. By email dated August 30, 2017, Grievant requested to “add Logan County Schools Board of Education” and to consolidate the grievance with Docket Number 2017-1082-CONS. By email dated September 11, 2017, Grievant asserted she was not a temporary employee.

Based on the procedural rule definitions and the information provided by Grievant, it was not possible to determine whether or not Grievant was a temporary employee without further factual development, so, by *Order* entered September 26, 2017, the undersigned denied the motions and ordered that the matter proceed at level one of the grievance process.

The February 12, 2018 *Level One Grievance Decision* denied the grievance stating, “Grievant’s acknowledgement that her employment was limited to three hundred hours during an eight week period of time establishes that she was a temporary

employee.” The level one grievance administrator cited no law or policy to support the conclusion Grievant was a temporary employee based solely on those facts.

On May 1, 2018, Respondent, by counsel, filed *Respondent’s Motion to Dismiss* asserting Grievant was a temporary employee and, therefore, not an employee covered by the grievance procedure. On May 18, 2018, Grievant filed *Grievant’s Motion Not to Dismiss* asserting she was a permanent part-time employee. By *Order Denying Motion to Dismiss* entered July 2, 2018, the undersigned denied the motion stating,

Grievant’s employment for three hundred hours during an eight-week period of time meets the definition of both a temporary employee and a part-time regular employee per the procedural rules of the Higher Education Policy Commission. Although Respondent states in its motion that Grievant was “clearly” a temporary employee, Respondent provided no explanation of law or fact to support this assertion. Without other facts or legal argument, it remains impossible to determine w[h]ether Grievant was a temporary employee.

On August 18, 2018, Respondent, by new counsel, filed *Respondent’s Motion to Dismiss Grievance for Lack of Jurisdiction* asserting Grievant was never a permanent employee of Respondent and that Grievant was not an employee of Respondent in any capacity when she filed her grievance. In support of its motion, Respondent attached numerous exhibits. On August 20, 2018, Grievant filed *Grievant’s Motion Not to Dismiss for Lack of Jurisdiction and Not to Dismiss Exhibits 4 – 8* along with several exhibits asserting that she was a permanent employee. A telephone conference was held on August 22, 2018, to allow the parties to argue the motions and present any additional relevant testimony. Grievant appeared *pro se*. Respondent appeared by counsel, Kristi McWhirter.

Synopsis

Grievant was employed in the Energy Express Program and grieved her non-selection for a position within that program. Respondent asserts that Grievant's employment was temporary and that she was not an employee at the time the grievance was filed. Grievant asserts she was a permanent employee. Grievant does not meet the definition of employee and this grievance must be dismissed. Accordingly, the grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed in the Energy Express Program and grieved her non-selection for a position within that program.
2. Members of the program provide three hundred hours of service during a defined, approximately eight-week period, for which they are not paid a wage, but are paid a living allowance and an educational award.
3. In 2016, Grievant served from June 16, 2016 to August 5, 2016 and in 2017, Grievant served from June 9, 2017 to July 28, 2017.
4. Grievant was required to complete a new application for the program each year.

Discussion

"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 (2018). "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. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2008).

Respondent asserts that Grievant’s employment was temporary and that she was not an employee at the time the grievance was filed. Grievant asserts she was a permanent employee.

“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). “‘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).

The Higher Education Policy Commission does not define “permanent employee,” but defines the relevant employee types as follows:

Part-Time Regular Employee (PTR). An employee in a position created to last less than 1,040 hours during a twelve-month period. An employee in a PTR position is not eligible for benefits, but is covered under the classification program as set out in Series 8.

W.VA. CODE ST. R. § 133-39-2.1.

Temporary Employee. An employee hired into a position expected to last fewer than nine months of a twelve month period regardless of hours worked per week. A temporary employee is not eligible for benefits, but is covered by the classification program as set out in Series 8.

W.VA. CODE ST. R. § 133-39-2.2.

The undisputed documents attached as exhibits to the motion to dismiss prove Grievant’s relevant status with the Energy Express Program. On June 9, 2017, Grievant signed a *Member Contract for Participation Energy Express Americorps Program*, in which she agreed to perform three hundred hours of service through a stated date range, from June 9, 2017 to July 28, 2017, in exchange for a living allowance, workers’ compensation coverage, and an educational award upon successful completion of the program. While a similar contract for the 2016 program was attached, with similar terms, it was not signed by Grievant. However, Grievant did not dispute that her term of service in 2016 was from June 16, 2016 to August 5, 2016. Further, the exhibits show Grievant completed a new application each year for the program.

Despite the lack of clarity in the rules of the Higher Education Policy Commission, a position that is called a “term of service”, that is for only three hundred hours of service during a defined, approximately eight-week period, for which Grievant was not paid a wage, but was paid a living allowance and an educational award, cannot be considered permanent employment. Further, Grievant clearly was not an employee when she filed her grievance on May 25, 2017, as her previous term of service ended August 5, 2016, and her next term of service did not begin until June 9, 2017. Therefore, Grievant does not meet the definition of employee and this grievance must be dismissed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. “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 (2018). “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.

2. “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)).

3. "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).

4. The Higher Education Policy Commission does not define "permanent employee," but defines the relevant employee types as follows:

Part-Time Regular Employee (PTR). An employee in a position created to last less than 1,040 hours during a twelve-month period. An employee in a PTR position is not eligible for benefits, but is covered under the classification program as set out in Series 8.

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Temporary Employee. An employee hired into a position expected to last fewer than nine months of a twelve month period regardless of hours worked per week. A temporary employee is not eligible for benefits, but is covered by the classification program as set out in Series 8.

W.VA. CODE ST. R. § 133-39-2.2.

5. Grievant does not meet the definition of employee and this grievance must be dismissed.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal 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 2, 2018

Billie Thacker Catlett
Chief Administrative Law Judge