GRAHAM H. ARCHER, .

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Grievant, .

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v. . Docket No. 94-BOT-138

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WEST VIRGINIA BOARD OF TRUSTEES .

at MARSHALL UNIVERSITY, .

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Employer. .

D E C I S I O N

Graham Archer filed this complaint with the Grievance Board at level four against the West Virginia Board of Trustees and Marshall University (hereinafter Marshall) by appeal form dated April 6, 1994. Attached with Mr. Archer's appeal form was a letter which contained alleged facts in support of his claim that agents of Marshall had violated W.Va. Code §18B-7-1. (See footnote 1) Because Mr. Archer currently resides in Athens, Tennessee, the undersigned spoke with both he and Ms. Mary Roberta Brandt, Assistant Attorney General,via telephone, in order to clarify the issues in the case and to make arrangements for developing a record upon which a Decision could be based.

Marshall filed a Motion to Dismiss on May 16, 1994, contending that the instant complaint should be dismissed based upon the following grounds:

1) Mr. Archer had previously entered into a settlement agreement with Marshall in which he had agreed to forego any claims against Marshall;

2) Mr. Archer's grievance was untimely filed;

3) Mr. Archer's claim does not give rise to a cognizable claim under W.Va. Code §18-29-1, et seq.;

4) Mr. Archer was not an employee at the time the challenged actions took place; and finally,

5) Mr. Archer is not entitled to evoke the benefits established by Code §18B-7-1, as he was never a classified employee at Marshall.

By letter dated May 19, 1994, Mr. Archer responded to Marshall's Motion to Dismiss. A telephone conference was held on May 25, 1994, in order to establish an evidentiary record so that a ruling on Marshall's Motion to Dismiss could be rendered. From the onset, this case has presented the undersigned with the unenviable task of sorting through a myriad of facts, inferences and allegations from both parties, based upon actions which occurred a considerable time ago, in order to ensure that both parties' procedural due process rights and procedural rights under the Grievance Procedure for Education Employees, Code §18-29-1 et seq., have been adequately protected.

The following findings of fact have been properly deduced from the limited evidentiary record developed in the case.

Findings of Fact

1. Mr. Archer was hired into the full-time, classified-exempt position of Program Manager for Technology at Marshall effective October 1, 1990. This position was specifically funded from monies obtained from the State lottery.

2. By letter dated July 1, 1991, Mr. Archer was notified by Marshall President Alan Gould, that his appointment to the position of Program Manager was to continue for the period of July 1, 1991 through June, 30, 1992, unless otherwise notified. Mr. Archer executed a contract with Marshall accepting said appointment.

3. On March 9, 1992, Mr. Archer was notified in writing that his appointment was indeed going

to end on June 30, 1992.

4. On June 5, 1992, Mr. Archer was assigned an interim position of Manufacturing Engineer at Marshall's Robert C. Byrd Institute for Advanced Flexible Manufacturing. Mr. Archer's future placement in any other position at that time was undetermined.

5. On or about the time Mr. Archer was assigned to the position of Manufacturing Engineer, Marshall was recruiting for the position of Director of the Robert C. Byrd Institute. David M. Porreca was ultimately chosen for this position.

6. By letter dated November 3, 1992, Mr. Porreca notified Mr. Archer that he was to be removed from his interim position effective November 30, 1992. The stated reason for this action was to allow for a restructuring of the Institute which included the filling of various permanent positions.

7. Mr. Archer entered into an agreement with Marshall, through Mr. Porreca, which was reduced to writing and signed by Mr. Archer sometime in late November or early December 1992. Under this agreement, Marshall agreed to pay Mr. Archer his salary until the end of 1992 in exchange for Mr. Archer's agreement not to file any claims against Marshall based upon subjects raised in any conversation between Mr. Archer and agents of Marshall held after his notification of November 3, 1992 that he was not to be retained.

8. In late November and early December 1992, Mr. Archer, by memoranda, indicated his desire to apply for various positions at Marshall University.

9. With regard to one of these positions Mr. Archer makes reference to, he learned that said position had been filled in August, 1993.

Discussion

W.Va. Code §18-29-1, et seq., provides for the grievance procedure for employees of the governing boards of higher education. The grievance process is intended to be a "simple, expeditious and fair process" for resolving problems which arise between employees and employers within the scope of their relationship. Code §18-29-1. W.Va. Code §18-29-2(a) defines the term "grievance," in pertinent part, as

> any claim by one or more affected employees of the governing boards of higher education. . .alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violations, misapplication or misinterpretation regardingcompensation, hours, terms and conditions of employment, employment status or discrimination; any

> discriminatory or otherwise aggrieved application of unwritten policies or practices of the board;. . .

"Employee" is defined by subsection (c) as "any person hired as a temporary, probationary or permanent employee by an institution either full or part time. . .." "Employer" is defined in subsection (f) as "that institution contracting the services of the employee."

W.Va. Code §18-29-4 establishes the procedural levels and procedure to be followed in prosecuting a grievance. At level one, subsection (a)(1) requires that before a formal grievance may be filed, the grievant or his representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action,

> within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date the event became known to the grievant (See footnote 2) or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance.

In essence, Code §18-29-4 establishes the "statute of limitations" for bringing a grievance claim against one's employer. W.Va. Code §18-29-3(c) gives an employee the right to file his/her grievance at the level vested with the authority to grant the requested relief. . .." In the instant case, Mr. Archer's claim has been received and docketed at level four for purposes of administrative economy, consistent with the spirit of Code §§18-29-1, 3(c).

Mr. Archer has made reference to various substantive claims to support his grievance. He has alleged the agents of Marshall violated Code §18B-7-1 at the time his employment was terminated. He has alleged that he has been "black balled" by various administrators at the Byrd Institute, and that agents of Marshall have made slanderous statements about him to possible employers. Finally, he avers that positions have been filled at Marshall with individuals less qualified for those positions than he; therefore, he should have been placed into those positions. Mr. Archer's letter requesting a hearing at level four indicates that he has been aware of wrongdoing with regard to the filling of several positions at Marshall since August, 1993. Marshall has raised several theories to support its Motion to Dismiss, all of which need not be addressed at length in this Decision.

To the extent Mr. Archer has filed a grievance based upon a cause of action for defamation, this Grievance Board is not empowered to hear and/or decide such a claim. A charge of slander is a defamation claim that must be brought within the parameters of a civil suit and under the jurisdiction

of a court within the judicial branch of government. To the extent Mr. Archer has raised such a claim herein, said claim may not be entertained as constituting a "grievance" under Code §18-29-2(a). This ruling would also appear to apply to any allegation of "black balling."

Secondly, upon considering the evidence presented in this limited record in a light most favorable to Mr. Archer, he has failed to establish that he was ever entitled to the protectionsafforded classified employees of the Board of Trustees pursuant to Code §18B-7-1. Therefore, any allegation made by Mr. Archer concerning a violation of said statutory provision must be denied.

With regard to Mr. Archer's contention that he is more qualified for various positions filled after his termination of employment, he has not established sufficient facts upon which to support a finding that this grievance was timely filed. It is obvious that Mr. Archer was not an "employee" of Marshall, consistent with how that term is defined within the grievance procedure, at the time he filed the instant complaint. A cause of action may survive one's length of employment if the grievant does not discover the facts giving rise to the claim until after his/her employment has ceased. In this case, the only date Mr. Archer referred to as to when he became aware that a position he had applied for was allegedly improperly filled was August, 1993. He has presented no evidence to justify or explain this lengthy delay of eight months between the time he learned that this position was filled and the date on which he filed his complaint. Therefore, it must be determined that at the time Mr. Archer filed the instant grievance, he was not an eligible "employee" who could file a grievance against a past employer and his claim must be viewed as untimely.

In reference to the settlement agreement entered into between the parties, there has been no evidence presented by Marshall to allow the undersigned to conclude that Mr. Archer has attempted to violate said agreement. No evidence was presented that Mr. Archerhas attempted to pursue a claim based upon "any subjects raised in any of the conversation or written correspondence you [Mr. Archer] had with any Marshall University, M.U.R.C., or Byrd Institute employee since being informed of your termination on November 3, 1992." This language has been reproduced from the fifth paragraph or term of said agreement which makes reference to Mr. Archer's promise to forego any right to sue Marshall for valuable consideration.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Mr. Archer has failed to raise a substantive claim giving rise to a "grievance" as defined by W.Va. Code §18-29-2(a).

2. To the extent that Mr. Archer's grievance sets forth a cognizable claim under W.Va. Code §18-29-1, et seq., said claim or claims is/are untimely pursuant to the procedural mandates of W.Va. Code §18-29-4.

3. This Grievance Board does not have subject matter jurisdiction over claims based upon actions of defamation.

Therefore, it is hereby determined that this Grievance Board lacks jurisdiction to hear the claims filed by Graham Archer on April 12, 1994. This case is to be **DISMISSED** and **STRICKEN** from the docket of the Grievance Board of the undersigned and Marshall's Motion to Dismiss is hereby **GRANTED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and suchappeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

September 7, 1994

Footnote: 1This statutory provision is titled: ***SENIORITY FOR FULL-TIME CLASSIFIED PERSONNEL, SENIORITY TO BE OBSERVED IN REDUCING WORK FORCE; PREFERRED RECALL LIST; RENEWAL OF LISTING; NOTICE OF VACANCIES***

Footnote: 2This language has given rise to a "discovery rule exception" to the normal fifteen day filing requirements. See Spahr v. Preston County Board of Education, 391 S.E.2d 739 (W.Va. 1990).