THOMAS ROBERTS,

Grievant,

v. Docket No. 95-C&H-302

WEST VIRGINIA DIVISION OF

CULTURE AND HISTORY,

Respondent.

D E C I S I O N

Grievant, Thomas Roberts, grieves his termination from the Division of Culture and History ("C&H"). His original statement of grievance was "wrongfull [sic] discharge", and his requested relief was "reinstatement, backpay." (See footnote 1) C&H filed a Motion to Dismiss on August 3, 1995, and a prehearing conference was scheduled on September 11, 1995, for the purpose of taking evidence and hearing argument on Respondent's Motion. No evidence was taken on that date, as Grievant did not appear, but he was represented by counsel. The conference of that date ended with the parties agreeing to discuss the possibility of settlement. (See footnote 2) No settlement followed these discussions, and on October 20, 1995, a Level IVhearing was scheduled, with the first order of business being C&H's Motion to Dismiss.

C&H presented three reasons why this grievance should be dismissed. First, the grievance was not timely filed as the Grievant received notice of his termination on June 15, 1995, and did not file his grievance with the Grievance Board until July 10, 1995. Second, Grievant is not an employee as defined by the grievance statute, and was therefore unable to avail himself of the grievance process. Third, Grievant, as an at-will employee of C&H, did not allege his discharge had contravened a substantial public policy as required in the Grievance Board's prior decision of Wilhelm v. West Virginia Tax and Revenue and Lottery Commission, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom Wilhelm v. West Virginia Lottery Commission, et al., 479 S.E.2d 602 (W. Va. 1996).

At the October 20, 1995 hearing, the parties presented evidence on the above-stated issues. At the close of the hearing on the Motion to Dismiss, the proceedings were continued to allow Grievant

to redraft his Statement of Grievance, utilizing the discussion in Wilhelm for guidance. Since Grievant no longer wished to be reinstated to the position, the parties agreed to hold this case in abeyance until the West Virginia Supreme Court of Appeals had made a final ruling on the Wilhelm case.

The final ruling in Wilhelm was filed November 14, 1996, and the parties were directed to file briefs on this case as it pertained to Grievant's situation. The submissions were due onJanuary 21, 1997, at which time Respondent's Motion became mature for action by the undersigned.

Timeliness

As stated above, Grievant received his notice of termination on June 15, 1995, but did not file his grievance until July 10, 1995. During this interim period, Grievant's representative, who was not an attorney, attempted to contact Mr. William Drennen, Director of the Division, to arrange a Level IV hearing. There was some difficulty with Mr. Drennen and the representative contacting each other. There was also some difficulty with Grievant's representative understanding Mr. Drennen's statement that he could not conduct a Level IV hearing, but that he would meet with Grievant and his representative. This meeting took place on June 29, 1995.

The undersigned finds that although Grievant did not strictly abide by the timelines for filing with this Grievance Board, he did contact Mr. Drennen within the timelines in a mistaken attempt to arrange a Level IV hearing. The grievance procedure should not be such "a procedural quagmire that the merits of cases are forgotten." Spahr v. Preston County Bd. of Educ., 182 W.Va. 726, 391 S.E.2d 739 (1990). Thus, although all the rules for filing a grievance were not strictly followed, the undersigned finds Grievant substantially complied through his attempts to file his grievance within the timelines, and this grievance is timely filed. Duruttya v. Bd. of Educ., 181 W.Va. 203, 382 S.E.2d 40 (1989). See Hale v. Mingo County Bd. of Educ., No. 23748 (Mar. 21, 1997).

Employee Status

At hearing, Respondent presented evidence to demonstrate Grievant was a tour guide who gave tours of the State Capitol building, and who worked as a part-time, temporary employee on an as needed basis. Before 1993, Grievant was employed by Parks and Recreation as a ninety-day employee. After that time, he was an employee of C&H. On July 8, 1993, shortly after Grievant became an employee of C&H, he signed a ninety-day appointment letter which stated the following

information:

> The purpose of this form is to advise you that the employment you are accepting is in a position not under the West Virginia Civil Service System.
>
> This appointment has the following restrictions:
>
> 1. It is temporary employment. The maximum period of time is 90 days.
> 2. You will not earn sick leave.
> 3. You will not earn annual leave.
> 4. This time cannot be counted towards extended leave benefits.
> 5. You will not be eligible to participate in the retirement program.
> 6. You cannot participate in the insurance program.
> 7. You cannot be granted a hearing before the Civil Service Commission.
> 8. It will be necessary for you to take the Civil Service System examination in order to be employed in a permanent position. Your name will have to be among the top five available names as certified by the Civil Service office to receive a probationary appointment.
> 9. The time served in this temporary employment cannot be counted as part of the probationary period.

Grievant's Exh. 3. (emphasis in original).

For the first portion of Grievant's employment with C&H, he was on ninety-day, temporary appointments. Later, because of a change in the regulations, C&H was able to hire Grievant as a 1,560hour, temporary employee. This change meant Grievant was still not a classified or permanent employee, but he could now work 1,560 hours a year, as needed, instead of ninety days.

Grievant testified he was not an at-will employee, but upon questioning, it became clear he did not understand this term. He did remember signing the above-cited letter, and he knew he was classified-exempt. He knew he was not covered by Civil Service, worked a varied, 1,560 hour schedule, and did not receive any benefits. He also stated no one ever told him he was covered by Civil Service, and he knew he was considered a part-time employee. The grievance procedure is open to all permanent employees. Taylor v. W. Va. Div. of Natural Resources/Pipestem State Park,

Docket No. 95-PEDTA-023 (Apr. 11, 1995); See Cook v. W. Va. Parkways Auth., 96-PEDTA-295 (Aug. 26, 1996). W. Va. Code §29-6A- 2(e) defines an employee, for purposes of access to the grievance procedure as:

> any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by the board of regents or by any state institution of higher learning, members of the department of public safety, any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature.

Clearly, Grievant was a temporary, part-time, at-will employee. He was not covered by the Civil Service system, and was not a permanent employee of any type. His employment was on an as needed basis. The fact that he typically worked all the hours he wasallowed, is of no moment. As he was not a permanent employee, he cannot be covered by the grievance procedure. Taylor, supra.

Because the issue of Grievant's status is dispositive of his right to file a grievance, it is not necessary to examine the issue of his at-will status, and whether he alleged a substantial public policy interest which would allow an at-will employee to file a grievance over his discharge.

The above-discussion will be supplemented by the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. When Grievant was hired as an employee with C&H, it was as a temporary, part-time employee.
2. Grievant's representative attempted to file this grievance within the timelines stated in the W. Va. Code § 29-6A-4.
2. Although Grievant's hours were increased, this change did not alter the fact that Grievant was a temporary, part-time, classified employee.

Conclusions of Law

1. As Grievant substantially complied with the timelines set forth in W. Va. Code §29-6A-4, his grievance was timely filed. Duruttya v. Bd. of Educ., 181 W.Va. 203, 382 S.E.2d 40 (1989).
2. Because Grievant was a temporary employee, he is not covered by the grievance statute

and cannot file a grievance over his termination. Taylor v. W. Va. Div. of Natural Resources/ Pipestem State Park, Docket No. 95-PEDTA-023 (Apr. 11, 1995). See Cook v. W. Va. Parkways Auth., 96-PEDTA-295 (Aug. 26, 1996).

Accordingly, this grievance is **DISMISSED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, 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 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 1997

Footnote: 1

At the hearing on October 20, 1995, Grievant stated he no longer wanted to be reinstated.

Footnote: 2

Because this scheduled hearing actually became an opportunity for initial discussion and no evidence was taken, this conference was not taped.