THERESA HOSTETTER,

Grievant,

v.

DOCKET NO. 97-BOT-371

BOARD OF TRUSTEES/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Theresa Hostetter, filed the following grievance on or about May 21, 1997:

> Grievant employed by Marshall University 2/12/96. Grievant worked 37-1/2 hours per week until 1/31/97. Fired without cause. University refused to classify Grievant as “full time” in spite of rules requiring this action.

A level two hearing was conducted on July 25, 1997, and a decision denying the grievance was issued on July 30, 1997, by Marshall University President J. Wade Gilley. The grievance was waived at level three, and Grievant appealed to level four on August 13, 1997. Following several continuances for good cause, hearing was held on October 22, 1997, and this matter became mature for decision on November 18, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Level Two Grievant's Exhibits

Ex. 1 -

January 16, 1997 memorandum from Barry A. Beckett to Herbert J. Karlet

Ex. 2 -

September 18, 1996 memorandum from Cathy Rideout to Barry Beckett

Ex. 3 -

May 28, 1997 letter from Cathy Rideout to James St. Clair

Ex. 4 -

Marshall University Personnel Action Form, dated January 31, 1997

Ex. 5 -

Time Records for Theresa Hostetter

Marshall's Exhibits

Ex. 1 -

Marshall University Personnel Action Form, dated February 9, 1996

Ex. 2 -

Marshall University Personnel Action Form, dated March 25, 1996

Ex. 3 -

Marshall University Personnel Action Form, dated July 1, 1996

Ex. 4 -

October 24, 1996 memorandum from Barry Beckett to William P. Burdette

Ex. 5 -

Marshall University Personnel Action Form, dated January 31, 1997

Testimony

Grievant testified in her own behalf. Marshall presented the testimony of Barry Beckett and William Burdette.

ISSUE

The issue is whether Grievant has proven by a preponderance of the evidence that she is entitled to the relief sought: instatement as a full-time permanent employee of Marshall University.

FINDINGS OF FACT

The material facts of this grievance are not in dispute and are set forth in the following findings.

1. Grievant was hired as temporary help with a salary of $5.66 per hour by the Bursar's Office of Marshall University ("Marshall") on February 9, 1996. R. Ex. 1.

2. On March 25, 1996, after completing her first temporary assignment, Grievant was placed in another, better paying temporary position within the Bursar's Office. R. Ex. 2.

3. On July 1, 1996, the Bursar's Office received permission to continue Grievant's temporary position into the next fiscal year. R. Ex. 3; LII Tr., p. 44. 4. On or about October 1, 1996, Barry Beckett, Director of Student Financial Systems/Bursar, sought to obtain further temporary work for Grievant, for her benefit as well as to complete a project in the department. He further recommended that he and Grievant meet with the Director of Human Resources to see if there were any available permanent positions for which she would be qualified. He consistently advised Grievant that her position in the Bursar's office was temporary. He also advised her that he would see if there was enough money to keep her on until the busy time was over in January or February. LII Tr., pp. 45-46.

5. In October 1996, Barry Beckett requested permission to continue Grievant's temporary position, which was scheduled to expire on October 31, 1996, which request was approved by William P. Burdette, Acting Director, Human Resources. R. Ex. 4.

6. Grievant's temporary position with Marshall expired on January 31, 1997. G. Ex. 4; R. Ex. 5.

7. Grievant worked at Marshall for 37-1/2 hours a week from February 12, 1996 until January 31, 1997, for a total of 1,967.25 hours.

DISCUSSION

Grievant alleges Marshall violated its own Classified Staff Handbook ("Handbook") when it continued her temporary employment beyond the hours and time frame designated in the Handbook for temporary positions. Grievant asserts she is entitled to be instated into a full-time, permanent position as a result of this violation. Grievant has presented no authority to support this assertion, and her grievance must fail.

The July 1991 Handbook which was in effect at all times relevant to this grievance, states that it is "to be used in an advisory capacity only . . . is not intended to be a legalcontract and is not expected to alter the nature of employment for either the employee or the institution." Handbook, inside cover.

The Handbook defines "temporary help" as:

> Appointments for short-term, emergency, temporary, project and/or grant, or transitory positions. The duration of such appointments may be extended in duration due to a grant's extension. If the temporary position is in a budgeted-line position and is at least twenty (20) hours per week, the appointment will carry benefits.

Handbook, pp. 27-28.

The Handbook defines "extra help" as:

> An extra help appointment may be made for any position on a "as needed basis" which is considered emergency in nature and which has the following stipulations:

1.

> A maximum of 675 hours may be worked from the initial date of hire per 12-month period. An individual may work 37-1/2 hours per work week or less; once an individual has reached 675 total hours, his/her employment must be terminated. The person is eligible to work for Marshall University again only after the 12-month period has expired.

2.

> No benefits accrue.

3.

> Payment for work is on an hourly basis; time cards must be completed twice per month.

4.

> The first paycheck is delayed a month.

Handbook, p. 28.

Finally, personnel administration in West Virginia Public Higher Education for the University System of West Virginia employee is covered by legislative rule 128 C.S.R. 62, under the authority of W. Va. Code §§ 18B-1-6, 18B-1-8 and 18B-9-4. The legislative rule clearly defines a temporary

employee as:

> 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 temporaryemployee is not eligible for benefits, but is covered by the classification program.

128 C.S.R. 62 § 2.1.3.

Grievant alleges that since Marshall violated the provision cited above with respect to temporary employees, by employing her for 37-1/2 hours per week for approximately 11 months, it is required to instate her into a permanent full-time position. There simply is nothing in any of the above-cited authorities governing temporary employees which would mandate such a result. In fact, had Marshall strictly complied with the provisions in the Handbook or Series 62, the legislative rule, Grievant would have been terminated after nine months if she were “temporary”, or after accumulating 675 hours, if she were “extra help”, and would not have been eligible to be rehired at Marshall until after the 12-month period had expired. As it turned out, Grievant was afforded the opportunity to work for approximately 11 months, at 37-1/2 hours per week. If Grievant wishes to be employed on a full-time, permanent basis at Marshall, then she should apply for vacant positions for which she is qualified.

CONCLUSIONS OF LAW

1. In all non-disciplinary matters, the employee has the burden of proving all allegations against the employer by a preponderance of the evidence. Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. 128 C.S.R. 62 (Series 62) is a legislative rule that governs personnel employed by the University System of West Virginia Board of Trustees.

3. Both the Marshall Handbook and Series 62 define temporary employees as those hired for a temporary and transitory time. Series 62 specifically states that theposition is expected to last fewer than nine months of a twelve-month period. There is no mandated time limit nor is a requirement placed on the number of hours than can be worked during this period.

4. Neither Series 62 nor the Handbook mandates placement of any employee into a full-time regular position when the employer extends the temporary status for a short period of time, particularly when the employer clearly indicates to the employee that the position is of a temporary

nature only.

5. Grievant's temporary employment status precluded her receiving a property interest in continued public employment. “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it.” State ex rel. Tuck v. Cole, 182 W. Va. 178, 180, 386 S.E.2d 835, 837 (1989), citing, Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

6. Grievant has failed to prove by a preponderance of the evidence that she is entitled to full-time, permanent employment with Marshall by virtue of its extending her temporary help position to 11 months and a total of 1,967.25 hours.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal 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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MARY JO SWARTZ

Administrative Law Judge

Dated: January 20, 1998