DESIREE JACKSON,

Grievant,

v v.

Docket No. 97-CORR-345

WEST VIRGINIA DIVISION OF CORRECTIONS/

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Desiree Jackson, filed this action on January 23, 1997, alleging she had been misclassified while she worked at the West Virginia Division of Corrections ("Corrections"). She sought back pay from July 1, 1996, to January 9, 1997, the day she terminated her employment.[1] (See footnote 1) Grievant began employment with the Department of Transportation ("DOT") on January 10, 1997. This grievance was waived at Levels I and II, and at Level III, the Grievance Evaluator dismissed the grievance because Grievant was no longer an employee of Corrections at the time of the filing of the grievance. This grievance was appealed to Level IV, and on September 3, 1997, a Level IV hearing on the issues of timeliness and the prior Motion to Dismiss was held. The parties agreed a ruling on this issue should be rendered before any further action was taken on the merits of the case, as this issue could be dispositive of the grievance.

Discussion - Timeliness

The timeliness issue is governed by the time lines set out in W.Va. Code § 29-6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

A claim of misclassification is seen as an ongoing grievance. As such, this claim can be filed any time during the period of alleged misclassification. As noted in the above-cited statute, an employee has ten days to file a grievance. Grievant filed her grievance on January 23, 1997, or nine days since the last occurrence of the alleged misclassification. Thus, her grievance was timely filed.[2] (See footnote 2)

Discussion - Right to File

This Grievance Board was created by the Legislature and given limited jurisdiction in certain matters which constitute grievances, and which can be filed by classified and unclassified employees in accordance in W. Va. Code §§ 29-6A-1 et. seq. See W. Va. Dept. of Admin. v. W.Va. Dept. of Health and Human Resources, 192 W.Va. 202, 451 S.E.2d 768 (1994); Mills v. W.Va. Soil Conservation Agency. Docket No. 96-AGR-153 (July 30, 1996). In this grievance, the Division of Personnel ("DOP") filed a Motion to Dismiss stating Grievant had no right to file a grievance against Corrections as it was no longer her employer. As support for this argument, DOP cited W. Va. Code§§ 29-6A-29(e), (g), & (i), and several orders written by this Grievance Board. W. Va. Code § 29- 6A-29(e) defines employee as:

> (e) "Employee" means 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 education, members of the department of public safety [West Virginia state police], any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature. The definition of "employee" shall not include any patient or inmate employed in a state institution.

W. Va. Code §29-6A-2(g) defines employer as:

> (g) "Employer" means that state department, board, commission or agency utilizing the services of the employee covered under this article.

W. Va. Code §29-6A-2 (i) defines a grievance as:

> (i) "Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules,

> regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees. Any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§ 5-16-1 et seq.], chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

Grievant, according to the statutory definition, was an employee of Corrections, as she was “hired for permanent employment”, and Corrections, according to the statutory definition, was her employer as it “utiliz[ed] the services” of Grievant until the time she resigned her position to take the position with DOT. Grievant is alleging she was misclassified by Corrections which is certainly a grievable event under the statutory definition of grievance. However, it is also clear Grievant hadterminated her employment with Corrections at the time she filed this grievance because she resigned from employment on January 9, 1997, and did not file this grievance until January 23, 1997.

The Orders cited by DOP deal with a grievance filed by a West Virginia Department of Transportation employee against the West Virginia Bureau of Employment Programs for failure to select her for a position. In those Orders, the administrative law judge held the grievant's employer, the Department of Transportation, was not vested with the authority to act as required by the statute, as it had not committed the alleged wrong. Dooley v. W.Va. Dept. of Admin./Div. of Personnel, W.Va. Bureau of Employment Programs/Workers' Compensation, Office of Judges and W.Va. Dept. of Transp., Docket Nos. 95-DOA-436, 437 (Oct. 2, 1995). The administrative law judge did not find an employee/employer relationship between the grievant and the Bureau of Employment Programs.

Although not cited by DOP, the Order entered in the case of Stroop v. West Virginia Department of Military Affairs and Public Safety, Adjutant General, Docket No. 97-ADJ- 476 (Dec. 18, 1997), is very similar to the instant case. In Stroop, former employees sought compensation for hours they had worked during certain state holidays. The Administrative Law Judge held that "persons who no longer hold employment status [were] generally not eligible to use the grievance procedure once the employment relationship was terminated, unless such termination is the subject of their grievance, or their grievance was initiated before their employment relationship was severed, and the subject matter of such grievance was not rendered moot by termination of their employment status." See

Archer v. W.Va. Bd. of Trustees, Docket No. 94-BOT-138 (Sept. 7, 1994); Karr v. Jackson County Bd. of Educ., Docket No. 18-86-297-1 (Feb. 2, 1987). See also Asaad v. Res-Care, Inc., 197 W.Va. 684, 478 S.E.2d 357 (1996); Adkins v. Civil Service Comm'n, 171 W.Va. 132, 298 S.E.2d 105 (1982).

It is undisputed that Grievant is no longer employed by Corrections and that she was not an employee at the time she filed her grievance. Thus, this Grievance Board is without authority to rule on the merits of this grievance. See Vest v. Bd. of Educ., 193 W.Va. 222, 455 S.E.2d 781 (1995).

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

Findings of Fact

1. Grievant became a permanent employee with Corrections on July 1, 1996.
2. On January 9, 1997, Grievant resigned this position and took a position with DOT on January 10, 1997.
3. After Grievant began work with DOT, she discovered data that led her to believe she had been misclassified during her employment with Corrections. She filed a misclassification grievance with Corrections on January 23, 1997.

Conclusions of Law

1. Grievant's misclassification grievance was timely filed as it was within ten days of the most recent occurrence.
2. Because Grievant is no longer employed by Corrections she has no right to file a grievance against Corrections as the employment relationship has been terminated and this grievance was not filed before her termination nor was her termination the subject of the grievance. Stroop v. W.Va. Dept. of Military Affairs and Public Safety, Adjutant General, Docket No. 97-ADJ- 476 (Dec. 18, 1997).

Accordingly, Respondents' Motion to Dismiss is **GRANTED**, and this case is dismissed from the dockets of this Board.

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: January 30, 1998

Footnote: 1

[1]*Grievant stated she did not find out she had been misclassified at Corrections until she had worked for a while in her position at DOT.*

Footnote: 2

[2]*The undersigned Administrative Law Judge informed the parties that this Grievance Board had ruled in Gaskins v. Dept. of Health/Div. of Personnel, Docket No. 90-H-032 (Apr. 12, 1990), that while misclassification was seen as an ongoing grievance, a party's relief was limited to ten days prior to filing a grievance. Thus, the maximum amount of relief Grievant would be entitled to, if she were found to be misclassified, would be one day. Grievant's representative indicated he believed Corrections had granted more relief in similar cases.*