GEORGE SPIROFF and PAUL NEALIS,

Grievants,

v. **Docket No. 99-DOE-314D**

WEST VIRGINIA SCHOOLS for the DEAF
and BLIND/WEST VIRGINIA STATE
DEPARTMENT OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, George Spiroff and Paul Nealis, filed this grievance on June 25, 1999, with the West Virginia State Department of Education ("SDOE"), alleging they had worked several years with 261 day contracts and had only been paid for 240 days of work. They sought compensation for the days they believed they worked and were not paid.

Sometime after filing this grievance, they were informed by Kitty Dooley, the attorney for SDOE, that they had not followed the right procedure for filing their grievance, but the issue would be addressed by the State Superintendent of Schools, Henry Marockie in about one week. Grievant Spiroff again spoke with Ms. Dooley on July 14, 1999, and was informed he would receive a response by July 22, 1999. When no response was received by July 22, 1999, Grievant Spiroff again called SDOE and spoke to Barbara Jones who informed him a letter response was forthcoming. On July 30, 1999, after no response, Grievants filed this grievance at Level IV seeking default.

On August 3, 1999, Grievants received a letter from Dr. Marockie noting he had received Grievants' correspondence, and informing them that as they were retired employees and they were no longer employed by SDOE, they were not entitled to utilize

the grievance procedure. However, he went on in this letter to address the merits of the complaint. Dr. Marockie stated Grievants were in administrative positions, paid a salarythey had negotiated not based on any scale, and were not entitled to any additional payment.

Grievants disagreed with all of Dr. Marockie's contentions and requested this Grievance Board to reconsider his decision. On August 17, 1999, a phone conference was conducted between Grievant Spiroff and Ms. Dooley. Grievant confirmed he and Grievant Nealis were retired. Ms. Dooley moved to have the grievance dismissed arguing Grievants, as retirees, were unable to avail themselves of the grievance process, and also averring Grievants were not underpaid during their tenure with SDOE.

Grievant Spiroff reported he had completed some research on the issue, and nowhere in the statute did it say the employee, must be a "current" employee to maintain a grievance. He also reported he and Grievant Nealis had just discovered the error shortly before filing this grievance. He requested the opportunity for additional time to research the issue and to submit this information and findings in writing. This request was granted, and this case became mature for decision on August 31, 1999, after receipt of Grievants' proposed findings of fact and conclusions of law. (See footnote 1)

Discussion

The first issue to address is whether retired employees can file a grievance, as this issue could be dispositive of the grievance. This is a case of first impression for education employees, although similar issues have been addressed with state employees. ThisGrievance Board was created by the Legislature and given limited jurisdiction in certain matters which constitute grievances, and which can be filed by employees in accordance with W. Va. Code §§ 18-29-1, et. seq. See W. Va. Dep't of Admin. v. W. Va. Dep't 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).

W. Va. Code § 18-29-2 defines the following words appropriate to resolving this grievance:

> (a) "Grievance" means any claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers 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 the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.
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> (c) "Employee" means any person hired as a temporary, probationary or permanent employee by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.
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> (d) "Grievant" means any named employee or group of named employees filing a grievance as defined in subsection (a) of this section.
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> (e) "Institution" means any state institution of higher education, the governing boards of higher education, any institution whose employees are hired by the state board of education including the department of education, and any public school, regional educational service agency or multi-county vocational center.
>
> (f) "Employer" means that institution contracting the services of the employee.

Grievants, according to the statutory definition, were at one time employees of SDOE, as they were "hired as a . . . permanent employee[s]", and SDOE, according to the statutory definition, was their employer as it "contracted for the services of the[se] employee" until the time they retired from their positions.

Grievants' allegation that they were underpaid would certainly be a grievable event under the statutory definition of grievance. However, it is also clear Grievants had terminated their employment with SDOE at the time they sought to file this grievance. Grievant Spiroff retired in 1994, and Grievant Nealis retired in 1995. Hence, no employee/employer relationship has existed between Grievants and SDOE for several years.

Although not cited by the parties, the grievance of a state employee, Jackson v. West Virginia Division of Corrections, Docket No. 97-CORR-345 (January 30, 1998), is applicable to the issue presented here. In Jackson, the grievant had quit her employment with Corrections, and then had filed a grievance against her former employer alleging she had been misclassified.

In Jackson, the undersigned Administrative Law Judge cited 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 (December 18, 1997), to support the dismissal of the grievance. In Stroop, former employees sought compensation for hours they had worked during certain state holidays. The Administrative Law Judge held that "personswho 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. Respondent-care, Inc., 197 W. Va.

684, 478 S.E.2d 357 (1996); Adkins v. Civil Serv. Comm'n, 171 W. Va. 132, 298 S.E.2d 105 (1982). It is undisputed Grievants are no longer employed by SDOE, and that they were not employees at the time they filed their grievance. Thus, this Grievance Board is without authority to rule on the merits of this grievance. See Pridemore v. Office of Adjutant General, Docket No. 91-ADJ-358, aff'd Kanawha County Circuit Court, rev'd, in part, sub nom, Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997); 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 Spiroff retired from employment with SDOE in 1994, and Grievant Nealis retired from employment with SDOE in 1995.

2. In the Summer of 1999, Grievants discovered evidence to support their belief they were incorrectly paid for the amount of time they worked.

3. On June 25, 1999, Grievants filed a grievance with SDOE, seekingcompensation for this alleged error.

4. When SDOE did not respond within the time frames Grievants believed were appropriate, they filed a Level IV appeal requesting relief by default if the "rules governing response time" applied.

Conclusions of Law

1. This Grievance Board was created by the Legislature and given limited jurisdiction in certain matters which constitute grievances, and which can be filed by employees in accordance with W. Va. Code §§ 18-29-1, et. seq. See W. Va. Dep't of Admin. v. W. Va. Dep't 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). 2. Because Grievants were no longer employees of SDOE at the time they filed this grievance, they are not entitled to utilize the grievance process. Jackson v. W. Va. Div. of Corrections, Docket No. 97-CORR-345 (Jan. 30, 1998). See also, Stroop v. W. Va. Dep't of Military Affairs and Public Safety, Adjutant General, Docket No. 97-ADJ-476 (Dec. 18, 1997)(order denying grievants the right to file a grievance as they were no longer employees of the former employer.).

3. Because the employment relationship has been terminated, and this termination was not the subject of this grievance, any other subject matter between Grievants and SDOE was rendered moot by their retirement, and cannot be adjudicated through the grievance process. Jackson, supra; Stroop, supra.

4. Additionally, because Grievants are no longer employees, they are also not entitled to avail themselves of the default sections of the grievance process.

Accordingly, Respondent's Motion to Dismiss is **GRANTED**, and this case is dismissed from the docket of this Grievance Board.

Any party may appeal this decision to the Circuit Court of Kanawha County or the county in which the grievance occurred. Any 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 30, 1999

Footnote: 1

Although Ms. Dooley had indicated she might also wish to file something by this date, she did not.