

RHONDA EDMOND, et al.,

Grievants,

v. Docket No. 99-DJS-293

WEST VIRGINIA DIVISION OF JUVENILE SERVICES,

Respondent.

DECISION

Grievants [\(See footnote 1\)](#) initiated this grievance on May 9, 1999, seeking compensation as Correctional Officer Is from March 1, 1999, through June 15, 1999, while they were assigned to the West Virginia Industrial Home for Youth (WVIHY). Grievants' immediate supervisor was without authority to grant relief, and this matter was appealed to level two on June 1, 1999. The grievance was denied at that level on June 14, 1999. Upon appeal to level three, a hearing was held on July 1, 1999, followed by a written decision, denying the grievance, dated July 14, 1999. Grievants appealed to level four on July 20, 1999. After a continuance granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on December 15, 1999. [\(See footnote 2\)](#) This matter became mature for consideration on February 4, 2000, upon receipt of the parties' fact/law proposals. The following facts were stipulated by the parties at the level four hearing.

Findings of Fact

1. At of the end of February, 1999, the Upshur County Jail was closed, and it was the intention of the Division of Juvenile Services (DJS) to convert the former jail into a new juvenile detention center to be known as the Central Regional Detention Center (CRDC).
2. Due to the closure of the Upshur County Jail, the nine employees of that facility were to be employed as Juvenile Detention Officers at the CRJDC, once that facility opened.
3. On February 26, 1999, Governor Underwood issued an executive order, which stated that the nine positions from the Upshur County Jail would be incorporated into the CRDC, effective March

1, 1999, and added to DJS' list of classified positions. 4. Effective March 1, 1999, the nine jail employees, including Grievants, were issued "WV-11s", or Personnel Action Forms, which listed the personnel action as "request new position" and the justification as "affiliation per Governor Underwood's Executive Order." All were hired as Juvenile Detention Officer Is (JDOIs), with the exception of Grievant Fidler, who was hired as a Juvenile Detention Officer II (JDOII). Grievants were paid the minimum salary for JDOI or JDOII, respectively.

5. From March 1, 1999, through March 19, 1999, Grievants attended the DJS training academy, where they were trained as JDOs.

6. As of March 19, 1999, the legislature had not approved an operating budget for the CRJDC, so Grievants could not begin work at the facility. 7. In order to provide Grievants with employment until political differences were resolved, and in hopes that the CRJDC would still open, DJS authorized WVIHY to utilize Grievants to temporarily fill vacant Correctional Officer (CO) positions at that facility.

8. Grievants worked alongside and performed the duties of COs at WVIHY from March 25, 1999, through June 15, 1999. They continued to be compensated at the JDO salaries.

9. An operating budget was never authorized and CRJDC did not open.

10. Effective June 15, 1999, Grievants Edmond, Fidler, Hamrick, and Miller were hired as 90-day, temporary employees. Grievants Edmond, Miller, Iden, Hamrick and Farnsworth were hired as permanent employees by DJS on September 1, 1999. [\(See footnote 3\)](#)

Discussion

In a grievance which does not involve a disciplinary matter, the grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. Grievants contend that they are entitled to compensation at CO salary levels during the time they were assigned to WVIHY, because they were performing the duties of COs. Respondents argue that Grievants are not "employees" entitled to avail themselves of the grievance process, because they had not been hired for permanent employment during the time for which they seek additional compensation.

W. Va. Code § 29-6A-2(e) defines "employee" for purposes of access to the grievance procedure

for state employees as follows:

[A]ny 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, any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature.

This grievance board has held on prior occasions that temporary employees, even if employed on a full-time basis, are not “hired for permanent” employment and, accordingly, are not eligible to file grievances. Lilly v. Division of Natural Resources, Docket No. 98- DNR-011 Mar. 26, 1998); Roberts v. W. Va. Division of Culture and History, Docket No. 95-C&H-302 (Apr. 30, 1997); Cook v. W. Va. Parkways Authority, Docket No. 96-PEDTA- 295 (Aug. 26, 1996); Taylor v. W. Va. Division of Natural Resources, Docket No. 95- PEDTA-023 (Apr. 11, 1995).

Lowell Basford, Director of DOP's Classification and Compensation Unit, testified that, during the time period at issue in this grievance, Grievants' status was “affiliated,” as set forth in § 9.1 of the Division of Personnel's Administrative Rules, which provides as follows:

9.1 Appointees in Positions Added to the Classified Service.

(a)

When additional state agencies or parts of state agencies are added to the classified service by executive order of the Governor with the consent of the Board and the appointing authority concerned, and when additional county or municipal agencies are added to the classified service by agreement between the local government and the Director with the approval of the Board, a date for the addition shall be fixed by agreement.

(b)

All appointments made on and after that date to the positions added to the classified service shall be made in accordance with this rule.

(c)

A person employed in such a position continuously for six months immediately preceding that date may take a qualifying examination administered by the Director and may be given a probationary or permanent appointment in the position if he or she passes the examination. If recommended by the appointing authority, he or she may be admitted to an examination regardless of the minimum qualifications for the class to which the position is allocated. The qualifying examinations shall be held within six

months after the date of addition of the position to the classified service. The examinations shall include appropriate written and performance tests where these tests are included in open-competitive examinations for the class. The appointing authority shall, within thirty days after the examination, separate from employment any employee who fails to pass the qualifying examination unless there are no available eligibles on the register for the class, in which case his or her employment may be continued but he or she must be separated from employment within thirty days after certification of available eligibles.

(d)

The appointing authority shall, within thirty days of the date of affiliation, separate from employment any person employed in such a position for less than six months preceding that date of affiliation unless there are no available eligibles on the register for the class, in which case his or her employment may be continued but he or she must be separated from employment within thirty days after certification of available eligibles, provided, however, that he or she may be given a probationary appointment if he or she has passed an open-competitive examination for the class and is eligible for appointment within the provisions of Subsection 9.2 of this rule.

(e)

In making the appointments provided for in Subdivision 9.1(c) and (d) of this rule the appointing authority may count employment in the agency immediately prior to the appointments as part or all of the probationary period required under Section 10 of this rule. The appointing authority shall promptly report to the Director his or her decision for therecords.

As explained by Mr. Basford, until the process for adding the positions to the classified service is completed, employees serving in these positions are said to be in the affiliation process. However, they have not been "hired for permanent employment" prior to the completion of the affiliation process and appointment from a register. By the clear provisions of Section 9.1, even an individual who has served in one of these positions for six months prior to the completion of the affiliation process must take a qualifying examination and be appointed from a register to begin permanent employment.

Grievants were hired to fill positions which had not yet been formally added to the classified service. Accordingly, during the period from March 1, 1999, through June 15, 1999, they were not employees who had been "hired for permanent employment," and they were not entitled to file a grievance.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, the grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.
2. W. Va. Code § 29-6A-2(e) defines "employee" for purposes of access to the grievance procedure for state employees as "any person hired for permanent employment[.]"
3. Grievants were hired to fill positions which had not yet been added to the classified service, and were not permanent employees during the affiliation process. Therefore, they cannot file a grievance.

Accordingly, this grievance is **DISMISSED** from the docket of this Grievance Board.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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.

Date: February 22, 2000 _____

DENISE M. SPATAFORE

Administrative Law Judge

[Footnote: 1](#)

The named grievants are Rhonda Edmond, Richard Hamrick, Larry Fidler, Shawn Miller, Robert Farnsworth, John Iden, and Michael Pumphrey.

[Footnote: 2](#)

Grievants Edmond, Fidler, and Hamrick were represented by counsel, Timothy Miley; Grievant Shawn Miller appeared pro se; and Grievants Farnsworth, Iden, and Pumphrey did not appear at the level four hearing. The Division of Juvenile

Services was represented by counsel, C. Scott McKinney, and the Division of Personnel was represented by counsel, Stephanie Schultz.

[Footnote: 3](#)

The employment status of the remaining grievants is not contained in the record.