THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DANIEL FROST,

Grievant,

v. **Docket No. 06-HE-295**

BLUEFIELD STATE COLLEGE,

Respondent.

DISMISSAL ORDER

Grievant, Daniel Frost, filed a grievance against his employer, Bluefield State College ("BSC"), on August 15, 2006. His statement of grievance reads:

The event causing this grievance was the West Virginia Legislature enacting Increment Pay for faculty members within the Higher Education System of West Virginia. Prior to and after this legislation, Classified Employees within the same system were/are required to serve three contractual years to be eligible for increment pay and the increment pay was/is paid on the fourth year and continues thereafter. Once faculty members were granted Increment pay the Legislature deemed that nine months of service is all that is required to be eligible for Increment Pay. In other words, a Classified Employee can have eleven Mercer years of service and only be eligible for ten years of Increment pay. Therefore, it is my contention Classified Employees have been discriminated against.

The relief sought in this grievance is for Classified Employees who have nine or more months of service within a contractual year be paid for that year of service when the Increment pay is disbursed.

The grievance was filed directly to Level III. A Level III hearing was held on August 21, 2006, and both parties agreed to waive the need for a written transcript and/or a taped copy of the hearing. That same day, a Level III decision was issued denying the grievance because Respondent does not have the authority to grant the relief requested and because the grievance may not have been timely filed. On October 4, 2006, Respondent filed a Motion to Dismiss because the grievance deals with a legislative act and does not allege Respondent is violating, misinterpreting or misapplying the statute. In addition, Respondent asserts the Grievance Board does not have authority to overturn an act of the Legislature. A phone conference was held on October 4, 2006, with Grievant appearing *pro se* and Respondent being represented by Elaine L. Skorich, Assistant Attorney General. During that phone conference, Grievant agreed with Respondent that the undersigned lacked the authority to grant the relief sought. Because of that, Grievant did not want a Level IV hearing, and Respondent agreed.

Since the undersigned was not supplied with a transcript from the Level III hearing and because there is an agreement between the parties that this is purely a legal issue, no Findings of Fact will be addressed in this Order. Instead, the undersigned will focus on the arguments relating to whether the relief sought can be provided by the Grievance Board.

Discussion

Grievant is grieving a legislative change to W. Va. Code § 5-5-1(a)(3) which, for the first time in the state's history, includes faculty as eligible employees for the purpose of receiving increment pay.

The Procedural Rules of the West Virginia Education and State Employees Grievance Board permit an administrative law judge to dismiss a grievance if no claim upon which relief can be granted is stated. 156 C.S.R. 1 § 4.11 (1995); Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996). Although the Rules of Civil Procedure do not apply to proceedings before this Grievance Board, this motion will be treated as if it were filed under Rule 12(b)(6).
Shriver v. Reg'l Jail & Corr. Facility Auth., Southwestern Reg'l Jail, Docket No. 98- RJA-359 (Mar. 29, 1999).

Pursuant to W. Va. Code § 29-6A-2(I), a grievance is a

> claim by one ore 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 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.

Grievant has failed to state a claim upon which relief can be granted. In his statement of grievance, there is no allegation BSC has violated, misapplied, or misinterpreted a statute, policy, rule, regulation or written agreement. Instead, Grievant alleges that the Legislature changed a statute, and Grievant does not like the change in the statute. In fact, Grievant is unhappy because BSC is actually following the statute as written. Clearly, Respondent's adherence to a statute cannot meet the definition of a grievance; therefore, this matter must be dismissed.

"Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant is not grievable. W. Va. Code §§ 29-6A-2(g) and (I); See Smith v. Dep't of Health and Human Res., , Docket No. 05-HHR- 218 (Aug. 5, 2005.)" Brining v. Div. of Corr./Parole Serv. and Div. of Personnel, Docket No. 05-CORR-284 (Dec. 7, 2005.) W. Va. Code § 29-6A-2(I) states the Grievance Board lacks jurisdiction over statutory claims. Section 2(i) provides that "any. . . matter in which the authority to act is not vested with the employer shall not be the subject of any grievance." This Grievance deals with a Legislative matter, and Respondent does not have the authority to act on the subject of this grievance. Because the Grievance Board does not have jurisdiction over this claim, it must be dismissed.

Conclusions of Law

1. The Procedural Rules of the West Virginia Education and State Employees Grievance Board permit an administrative law judge to dismiss a grievance if no claim upon which relief can be granted is stated. 156 C.S.R. 1 § 4.11 (1995); Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996) (hereinafter "Lottery"). Although the Rules of Civil Procedure do not apply to proceedings before this Grievance Board, this motion will be treated as if it were filed under Rule 12(b)(6).

Shriver v. Regional Jail and Correctional Facility Authority, Southwestern Regional Jail, Docket No. 98-RJA-359 (Mar. 29, 1999).

2. Pursuant to W. Va. Code § 29-6A-2(I), a grievance is a

claim by one ore 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 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.

3. "Any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant is not grievable. W. Va. Code §§ 29-6A-2(g) and (I); See Smith v. Dep't of Health and Human Res., Docket No. 05- HHR-218 (Aug. 5, 2005.)" Brining v. Div. of Corr./Parole Services and Div. of Personnel, Docket No. 05-CORR-284 (Dec. 7, 2005.) 4. W. Va. Code § 29-6A-2(I) the Grievance Board lacks jurisdiction over statutory claims. Section 2(I) provides that "any. . . matter in which the authority to act is not vested with the employer shall not be the subject of any grievance."

5. Grievant has failed to state a claim upon which relief can be granted because the Grievance Board lacks jurisdiction over statutory claims.

Accordingly, this grievance must be **DISMISSED**.

Any party 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: October 25, 2006

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Wendy A. Campbell

Administrative Law Judge