THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DEWEY ROGERS,

Grievants,

v. **DOCKET NO. 06-DOH-399**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DISMISSAL ORDER

Grievant filed this grievance on October 4, 2006, and after it was denied and dismissed at the lower levels, appealed to Level IV on October 31, 2006. Grievant challenges the decision of the Fairmont State University (FSU) Transportation Engineering Technician/Technologist Certification Program to deny him certification as a Transportation Engineering Technician (TET). Respondent asserts it has no control over the certification process, and Grievant has therefore failed to state a claim upon which relief may be granted in this forum.

The Division of Personnel classification specification for the TET position states as a minimum qualification and employee must have “Certification as a Transportation Engineering Technician by Fairmont State College [now University].” Once an employee receives the certification, he is eligible to be placed in a TET position. Thus, TET is both a title for a certification level and a title for a position.

West Virginia Code § 29-6A-2(i) defines “Grievance,” and excludes from the definition certain retirement and insurance disputes, but also provides that “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.” Respondent contendsthat FSU and the Transportation Engineering Technician/Technologist Certification Program Board have sole control over the certification process, and it has none. Although the Board that runs the program is controlled by FSU, two of its seven members is also an employee of Respondent, so Grievant argues that makes the Board an agent of

Respondent. However, “Employer” as used in the grievance code is also narrowly defined, and in section 29-6A-2(g) the term “means that state department, board, commission or agency utilizing the services of the employee covered under this article.” Under the facts presented at the Motion Hearing, the Board and FSU do not fall within this definition, but are merely contractors providing a certification service for the employer.

Grievant also contends that, if he cannot dispute the lack of certification through the grievance process, he is left without recourse if he is actually entitled to certification. However, he admits the program does have an appeal procedure, through which he has already filed two appeals. Further, the grievance process has never been an exclusiveremedy for most employment disputes, as other judicial forums exist with the power to compel a required action.

The grievance, as presented, is against an entity that does not fall within the definition of “employer” as contemplated by the grievance procedure, and the relief requested does not fall within the ambit of the Respondent to act. For the foregoing reasons, the undersigned finds the West Virginia Education and State Employees Grievance Board lacks jurisdiction to hear the claim presented, and this grievance is therefore **DISMISSED** from the docket of the Grievance Board.

Any party or the West Virginia Division of Personnel may appeal this Order 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 days of receipt of this Order. 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.

December 11, 2006

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M. Paul Marteney

Administrative Law Judge