ALVIN WATTS,

Grievant,

v. **DOCKET NO. 98-22-375**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent, and

DALLAS BELL AND ELOISE ROBERTS,

Intervenors.

DECISION

Grievant Alvin Watts filed this grievance against Respondent Lincoln County Board of Education on or about August 28, 1998. The statement of grievance reads:

> Violation of WV Code 18A-4-8b by transferring grievant and alleging grievant's bus run would not exist for 1998-99 school year. Grievant's run does exist with minor changes and was given to another driver. Violation of WV Code 18-29-2(a)(n), interference with job performance and harassment.

Grievant requested as relief:

> reinstatement to previous run of 1997-98 and return of used sick days and expenses for doctor visits due to stress of situation and legal fees. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant Alvin Watts has been employed as a bus operator by the Lincoln County Board of Education ("LCBOE") for 34 years. He is the most senior bus operator in the county.

2. Intervenors Dallas Bell and Eloise Roberts are also employed as bus operators by LCBOE, and have been so employed for 13 and 19 years, respectively.

3. During the 1997-98 school year, Grievant and Intervenors were assigned to drive special education bus routes, that is, they drove buses specially equipped to handle the needs of special

needs children, and transported only special needs children, and their siblings in some circumstances as an accommodation to parents.

4. Grievant received a letter dated March 19, 1998, notifying him that he was being recommended for transfer. Grievant requested a hearing on the transfer.

5. At the transfer hearing, Grievant was told that the reason for the transfer was they were unsure of student enrollment and routes would need to be reconfigured. Superintendent Rick Powell also commented that he thought Grievant was planning to retire.

6. Grievant was the only bus operator placed on transfer by LCBOE. The least senior bus operator in the county was reduced in force. 7. Grievant filed a grievance when he was placed in a position for which he did not apply, which was not a special education run. In that grievance he challenged the legality of his transfer, and asked to be returned to the route he had run for the 1997-98 school year. The decision in that grievance, Alvin Watts v. Lincoln County Board of Education, Docket No. 98-22-348, was issued November 30, 1998, and decided the transfer was lawful, and Grievant's old route did not exist.

8. Grievant's run during the 1997-98 school year consisted of picking up five students, traveling from the bus garage up the Mud River, through Woodville, up Brushy, to Griffithsville, and on to Hamlin. In the evening Grievant transported two additional students. Grievant's bus capacity was 15.

9. During the 1997-98 school year, Intervenor Bell transported six special education students. Three of those students graduated.

10. During the 1997-98 school year Intervenor Roberts transported eight special education students in the afternoon. Only one of those students rides a special education bus this school year. Intervenor Roberts' morning run for the 1997-98 school year was not made a part of the record.

11. One of the five students transported by Grievant on his morning run graduated, and one no longer rides a special education bus. One of the students on Grievant's afternoon run graduated.

12. In March or April 1998, Transportation Director Johnnie Adkins asked the parent of a special education child on Grievant's 1997-98 bus route if she would be willing to transport her special needs child and her other child, who had been allowed to ride Grievant's bus as a courtesy to the parent, to school from the very remote area in whichshe lives, in exchange for payment for her mileage, and she agreed she would try to do so. If she had been able to do so, this would have left one student on Grievant's morning run, so Mr. Adkins recommended that Grievant's one student be

absorbed by the remaining special education drivers. In April 1998 the parent made a trial run, and immediately told Mr. Adkins her truck would not be able to make the trip each day, unless the state improved the road she had to travel. Mr. Adkins became aware sometime after July 1, 1998, that the road was not owned by the state, and would not be adopted and improved by the state, and this child would again need transportation.

13. Each year special education bus routes change somewhat, and Mr. Adkins is never sure what the routes will be until he receives revised information on the special education students right before school starts each fall.

14. During the 1997-98 school year there were six special education bus drivers. For the 1998-99 school year there are five special education bus drivers.

15. Intervenor Bell's run for the 1998-99 school year consists of going up Mud River to pick up two students, and then to Brushy to pick up one student, all of whom were on Grievant's run last year. Then he goes to Yawkey, then to Bear Fork to pick up one student, then to Griffithsville Elementary, then to Garrets Bend to pick up a student, and to Hamlin. He transports two students who were not transported by Grievant, and six students total. A part of his run this year is the same as his run last year, and his afternoon run is nearly identical to Grievant's run last year.

16. The four special education students Intervenor Roberts transports during the 1998-99 school year were all on Intervenor Bell's route during the 1997-98 school year.

17. On the first day of the current school year, Intervenor Bell told Grievant hisrun was similar to Grievant's from the previous school year. Additional areas and stops were added to his route after that discussion.

18. Intervenors asserted at the Level II hearing that this grievance was not timely filed.

19. Respondent raised the issue of the grievance being untimely filed at the Level IV hearing.

20. Grievant was told by the parent referred to above in Finding of Fact Number 12, before school was out for the 1997-98 school year, that she was not going to transport her children to school.

21. The stated justification for transferring Grievant did not cease to exist until after July 1, 1998.

Discussion

At the beginning of the Level IV hearing Respondent asked that this grievance be dismissed, arguing that the same issue raised in this grievance had already been addressed in a previous grievance, which precluded Grievant from raising the same issue again. The decision in that grievance, Alvin Watts v. Lincoln County Board of Education, Docket No. 98-22-348, was issued November 30, 1998. Respondent was represented by Erwin Conrad, Esquire, in that grievance. Respondent noted that the two grievances were filed within a few weeks of each other, and both stem from Grievant being transferred in the Spring and wanting to be returned to his old position.

Grievant responded that the issue in the prior grievance was whether Grievant could be placed in a position for which he did not apply. Grievant noted that grievance was filed on August 6, 1998, and the Level II hearing was held on August 21, 1998, before thisgrievance was filed.

The doctrine of res judicata may result in the dismissal of a grievance when a party seeks to relitigate "matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, ___, 376 S.E.2d 639, 646 (1988); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Four conditions must be met in order to apply the doctrine of res judicata:

(1) identity in the thing sued for;

(2) identity of the cause of action;

(3) identity of persons, and of parties to the action; and

(4) identity of the quality in the persons for or against whom the claim is made.

Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994), citing Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). "The identicality of issues litigated is the key component to the application of administrative res judicata." Liller, supra.

However, this Grievance Board has applied this doctrine sparingly, "as the grievance process is intended to be a fair, expeditious, and simple procedure, and not a `procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). "Generally, res judicata will be applied by the Grievance Board only when the grievance `involves the same parties, cause of action, relief requested, and factual situation as that of

a prior matter' which has actually been decided by the Board. Woodall v. W.Va. Dept. of Transportation, Docket No.93-DOH-393 (Feb. 2, 1994)." Farley/Stover v. Mason County Bd. of Educ., Docket No. 94- 26-639 (Feb. 28, 1995), footnote 3 (emphasis in original).

The decision issued in Mr. Watts' earlier grievance states that the relief sought is that Mr. Watts be returned to the run he held during the 1997-98 school year. Grievant acknowledged that this was one of the remedies he sought. He asserted that return to the unassigned list was an alternate remedy sought, however, the decision does not reflect this. The decision states at page 7:

> Grievant also asserted his transfer was the result of age discrimination. This issue was not argued or discussed, nor was there any evidence presented to support this belief. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Vickers v. Bd. of Directors/W. Va. State College, [Docket No.] 97-BOD-112A (June 26, 1998); Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT- 359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

> Additionally, it must be noted that the relief requested by Grievant could not be granted in any event. No evidence was presented to demonstrate Grievant's former run is still needed, and thus LCBOE's decision to eliminate the run must stand.

Conclusion of Law Number 2 further notes:

> Grievant has failed to demonstrate LCBOE violated any statute, rule, or regulation in his transfer and subsequent placement. (Emphasis added.)

The earlier grievance was appealed to Level IV on September 9, 1998. Although the parties had the opportunity to present evidence at a Level IV hearing, they chose not to do so, and submitted the grievance to be decided on the record developed at Level II.

While it is certainly true that one of the issues in the earlier grievance was whether Mr. Watts could be placed in a position for which he did not apply, it is also clear that Mr. Watts challenged his transfer in that grievance, and whether his old run still existed, andthese issues were decided. Grievant has raised the very same issues in this grievance.

Grievant's argument that he did not know his route still existed when he filed his previous grievance is not persuasive. While he may not have known at the time that grievance was filed, the record in this case demonstrates that he knew this when he appealed his previous grievance to Level IV, and he would have known this had he inquired at the Level II hearing. Nonetheless, he chose not to proceed with a Level IV hearing in that grievance, where he could have presented this evidence in

support of the claims he raised, and in support of the requested relief.

Respondent has proven that the issues raised in this grievance were already decided in Alvin Watts v. Lincoln County Board of Education, Docket Number 98-22-348 (November 30, 1998), the parties are the same, and the requested relief is the same. The legal doctrine of res judicata precludes the undersigned from addressing the very same issues again.

Respondent also raised for the first time at Level IV a timeliness defense. Intervenors, however, had raised this defense at Level II, and asserted it again at Level IV.

The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96- DOH-445 (July 29, 1997). W. Va. Code § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. . . . Provided, That the specified time limits may be extended by mutual written agreement andshall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.

W. Va. Code § 18-29-4(a) requires that:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
>
> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.
>
> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.

> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

Only working days are counted in determining when the time period runs for filing a grievance. Holidays, weekends and other school closings are not counted. W. Va. Code § 18-29-2(b). No evidence was presented regarding any holidays or other school closings.

Respondent is precluded by statute from raising the timeliness defense for the first time at Level IV. The statute does not address an intervenor raising a timeliness defense, but it does not specifically preclude it. Grievant did not argue that Intervenors could not assert a timeliness defense. An intervenor has the right to raise all defenses and makeaffirmative claims on his own behalf. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997). The undersigned concludes that Intervenors may argue that a grievance was not timely filed, and the burden is upon the Intervenors to prove this affirmative defense, as it would be upon a respondent. As Intervenors raised this defense at Level II, the undersigned need not address whether an intervenor is required to raise this defense by Level II.

Intervenors argued Grievant knew of the event in April 1998, at the latest, when he was placed on transfer. They noted this Grievance Board has ruled that if the reason for the transfer of an employee ceases to exist prior to July 1, the transfer must be rescinded; but if the reason for the transfer ceases to exist after July 1, the school board is not required to rescind the transfer. Brown v. Logan County Bd. of Educ., Docket No. 90-23- 177 (Oct. 31, 1990). They further noted that the grievable event is when the Grievant is notified of the transfer, not when it becomes effective, and cited Rose v. Raleigh County Board of Education, 199 W. Va. 220, 483 S.E.2d 566 (1997), in support of this proposition.

Grievant argued the reasons given for his transfer were false, and the grievable event was when Grievant discovered in August that Intervenor Bell was driving what he believed to be his old route.

What Grievant discovered in August was additional evidence which he believes supports a finding that the reason given for his transfer was false. The grievable event was the transfer, and Grievant challenged the transfer in his other grievance. Under these circumstances, this grievance was not timely filed.

"When the stated justification [for transfer] is lost after the close of the . . . school year, the county board's decision to not offer automatic reinstatement will not, again absentextremely compelling cause, be deemed an abuse of discretion." Youngblood v. Morgan County Bd. of Educ., Docket No. 91-32-488 (Apr. 30, 1992), citing Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990). Even if the undersigned were to evaluate the evidence presented in support of Grievant's claims anew, based upon the Findings of Fact made, Grievant did not establish that the reasons given at the transfer hearing for his transfer were not made in good faith or were not otherwise valid at that time, nor did he establish that those justifications were lost prior to the end of the 1997-98 school year. Hambrick and Weis v. Mercer County Bd. of Educ., Docket No. 94-27-293 (Sept. 20, 1994); Youngblood, supra. The reasons for the transfer ceased to exist when Mr. Adkins determined sometime after July 1, 1998, that the road along which two of the students on Grievant's 1997-98 run lived would not be improved by the beginning of the new school year, and those students would need special transportation. As the parent clearly testified, had the road been improved, she would have transported her children to school, and this is what she told Mr. Adkins.

Further, although Grievant argued that Intervenor Roberts should have been placed on transfer rather than him based upon the fact that most of the students from her 1997-98 route are no longer being transported on a special education bus, the undersigned could not draw a conclusion simply from this single fact that Grievant was not properly placed on transfer based upon the information available to LCBOE at the time the transfer decision was made. Even if Grievant had proven Intervenor Roberts should have been placed on transfer, this does not negate the need to place Grievant on transfer as well.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The doctrine of res judicata may result in the dismissal of a grievance when a party seeks to relitigate "matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (1988); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Four conditions must be met in order to apply the doctrine of res judicata:

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Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994), citing Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975).

2. The issues raised in this grievance were already raised by the Grievant and decided in Alvin Watts v. Lincoln County Board of Education, Docket Number 98-22-348 (November 30, 1998), the parties are the same, and the requested relief is the same. The legal doctrine of res judicata precludes the undersigned from addressing the very same issues again.

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

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Lincoln County and 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. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 12, 1999

Footnote: 1

Grievant's immediate supervisor denied the grievance on September 2, 1998, and Grievant appealed to Level II on September 3, 1998. A Level II hearing was held on September 15, 1998, and the grievance was denied at Level II on September 21, 1998. Level III was waived by Grievant, who appealed to Level IV on September 28, 1998. A Level IV hearing was held on December 3, 1998. Grievant was represented by Anita Mitter and Edward Hall, Esquire, Respondent was represented by James Gabehart, Esquire, and Intervenors were represented by John Roush, Esquire. This matter became mature fordecision on December 28, 1998, upon receipt of the last of the parties' post-hearing written arguments.