DENNIS BRACKMAN, et al.,

Grievants,

v. Docket No. 01-CORR-034

DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER
and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Dennis Brackman, Calvin Cox, and Twylia Dorsey, filed this grievance against their employer, Respondent, Division of Corrections/Anthony Correctional Center ("Corrections"), because they believed their original appointment date of June 1, 1999, should have been adjusted to February 1, 1999, after they prevailed by default in a previous grievance. As relief they requested that their original appointment date be changed to February 1, 1999, their permanent appointment date be changed from December 1, 1999, to August 1, 1999, that they be credited with state retirement back to February 1, 1999, and that Corrections' seniority lists be amended to reflect these dates. Grievants later dropped their request that they be credited with state retirement back to February 1, 1999. (See footnote 1)

On July 18, 1999, these Grievants, along with three other Corrections employees, filed a grievance. Shortly thereafter, they claimed a default had occurred at Level I of the grievance procedure. On April 27, 2000, an Order was entered at Level IV of the grievance procedure in Brackman, et al., v. West Virginia Division of Corrections, Docket No. 99-CORR-374D2, finding that the grievants had prevailed by default, were therefore presumed to have prevailed on the merits, and that they should be credited with annual and sick leave from February 2, 1999, through May 31, 1999. This Order was entered after Corrections had been found to be in default, and failed to request a hearing within five days on the issue of whether the remedy requested was clearly wrong or contrary to law, even though a “default hearing” was held on December 2, 1999, according to the

Order. Personnel was not a party to the default proceeding. No evidence was taken on the merits of the grievance at Level IV, nor were the merits considered or even described in any way when the Order was entered. The Order does state that the grievants were"requesting that they be credited with annual and sick leave for the period of February 2, 1999, through May 31, 1999."

Grievants argued they are entitled to the relief sought here, because the default Order already decided the issue of their employment status on February 1, 1999. Grievants argued that Order precluded the relitigation of this issue under the legal doctrines of res judicata and collateral estoppel. Respondents did not find these legal doctrines to be applicable, and argued Grievants were not entitled to seniority with Corrections back to February 1, 1999, because they were not hired for permanent employment at that time, and they were not hired off a register.

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

FINDINGS OF FACT

1. Grievants were placed on Corrections' payroll as 160-day temporary employees on February 1, 1999, and began working for Corrections at that time. Grievants believed they were being hired as temporary employees. They were hired for permanent employment as probationary employees effective June 1, 1999, and began a six month probationary period. They became permanent employees on December 1, 1999.

2. Grievants filed a grievance in 1999 seeking annual and sick leave from February 2, 1999, through May 31, 1999. Grievants prevailed by default and were granted annual and sick leave for that period. The merits of the grievance were not litigated or addressed.

DISCUSSION

The first issue is Grievants' argument that Respondents cannot contest Grievants' employment status on February 1, 1999, as that issue was already decided in the default proceeding, and they are therefore entitled to the additional relief requested. The doctrineof 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.

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, 391 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).

“Collateral estoppel is a narrower legal doctrine than res judicata which prevents a party to a contested matter from relitigating an issue that was determined against him in an earlier proceeding, even though there is a significant difference between the present action and the previous grievance. See Black's Law Dictionary 256 (7th ed. 1999); Jordache Enterprises v. National [Union] Fire Ins. Co., 204 W. Va. 465, 513 S.E.2d 692 (1998). See also State ex rel. Leach v. Schlaegel, 191 W. Va. 538, 447 S.E.2d 1 (1994).” Rule v. W. Va. Dep't of Health and Human Resources, Docket No. 00-HHR-080 (May 24, 2000). Neither of these legal doctrines is applicable here to Grievants' claim that the issue of their employment status on February 1, 1999, has already been adjudicated. Were those doctrines applicable, they would likewise preclude Grievants from pursuing this grievance, although Corrections did not contest Grievants' pursuit of this grievance on these grounds. The issue of Grievants' employment status on February 1, 1999, has never been decided or even litigated. Grievants received leave back to February 2, 1999, because Corrections defaulted, and then did not contest the remedy requested. Grievants prevailed by default solely by operation of a statute, W. Va. Code § 29-6A-3, not upon the merits. No judgement was rendered on the merits. Christian v. Sizemore, 185 W. Va. 409, 407 S.E.2d 715 (1991).

As to the merits of this grievance, Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievants believe they are entitled to have their seniority at Corrections adjusted based upon the theory that their probationary period should have begun on February 1, 1999, the date they were hired on a temporary basis, not on June 1, 1999, the date they were hired for permanent employment. This would give Grievants preference over employees hired at a later date for promotions. They contend that they should not have been required to complete a six month probationary period after they were hired for permanent employment on June 1, 1999, but should have been credited for the period they worked on a temporary basis, so that their probationary period would have ended on August 1, 1999, not December 1, 1999.

The parties presented evidence in support of their differing positions as to whether Grievants were hired off a register, in an effort to address the issue presented by the relief Grievants sought of having their original appointment dates changed. The undersigned concludes that the question of whether Grievants were hired off a register is not useful indetermining the real issue at hand, which is, when Grievants' probationary period should have begun and ended.

The date on which employees attain seniority with Corrections is outlined in Corrections' Policy Directive 132.02, dealing with “Correctional Officer Promotion.” That Policy Directive states with regard to seniority:

> Within the context of this Policy Directive, seniority time shall be counted from the original permanent employment date with the West Virginia Division of Corrections. Permanent employee status with the West Virginia Division of Corrections will be the only employment time that will count toward Division of Corrections' seniority[.]

(Emphasis in original.)

The phrase “original permanent employment date” is not defined by Corrections' policies, or by Personnel's Rules. “Permanent employee” is defined by Personnel's Rule 3.68 as “[a]ny employee who was hired from a register and who has completed the probationary period prescribed by the State Personnel Board for the job class.”

Grievants argued they should not have been required to complete a six month probationary period starting June 1, 1999, after they had already worked for four months, and that those four months

should have been counted toward their probationary period. The only support Grievants presented for this proposition was Personnel's Rule 9.5, which provides that “[a]ppointing authorities shall make temporary appointments in the same manner as prescribed in this rule for probationary appointments.” Grievants believe this means the six month probationary period starts for temporary employees on the date they are hired as temporary employees.

James Wells, a Senior Personnel Specialist in Personnel's Employee Relations Section, explained that Rule 9.5 does not mean that any variety of temporary employees get to count their employment as temporaries toward the probationary period. He testified that the probationary period is for a designated period of time after an employee is hired for permanent employment, and it would be contrary to Personnel's Rules to creditemployees with probationary service for the period they served prior to being hired for permanent employment.

> It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally Blankenship, supra; Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

Jones v. W. Va. Dep't of Educ., Docket No. 00-DOE-108 (May 23, 2000). In this case, the statement in Rule 9.5 referred to by Grievants is unclear in its meaning, and subject to interpretation. The statement refers to making temporary appointments “in the same manner as prescribed in this rule for probationary appointment.” The phrase “probationary appointment” is not used elsewhere in these Rules. Probationary period is defined in Rule 10, and that Rule also sets forth the length of the probationary period. That Rule also states that “[a]ppointing authorities shall make all original appointments to permanent positions from officially promulgated registers for a probationary period of not more than one year.” This statement appears to be the manner in which a probationary appointment is made. Whether this means temporary employees are also subject to a probationary period is not clear, particularly since temporary employees, by definition (Rules 3.91 and 9.5) are

only hired for limited duration. It would seem unnecessary to impose a probationary period on someone who is only intended to work for a short period of time. In addition, neither the provision relied upon by Grievants, or any other provision in these Rules, suggests that if temporary employees were in fact subject to a probationary period,this would count toward the probationary period if they were hired for permanent employment at a later date. Thus, Personnel's interpretation of this Rule is entitled to deference, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. Dyer, supra.

Mr. Wells' explanation that Rule 9.5 does not mean that the probationary period begins when the temporary employment period begins is a reasonable interpretation. That same Rule states that a temporary appointment is made when “an employee is needed for a temporary period.” Mr. Wells testified that the register used for temporary appointments consists of individuals who have stated they only want to work for a short-term period. Thus, as noted above, there would be no need for a probationary period. The language quoted above from Rule 10 regarding the duration of the probationary period further supports the proposition that the probationary period does not begin until the employee is hired for permanent employment. Rule 10 provides an exception which agencies may choose to take advantage of for persons who were hired in a provisional status, allowing agencies to credit time worked in a provisional status toward the probationary period. Those in provisional status are hired to fill a position when there are urgent reasons for doing so, and there is no appropriate register, thus indicating the desire to hire for permanent appointment, but the inability to do so due to the lack of a register. While it appears to the undersigned from the evidence presented that this may well be the correct category for Grievants, inasmuch as they received letters referring to interviews for vacancies, and Personnel provided Corrections with a list of persons, not a register, which it could use to quickly fill vacancies until a register could be provided, there is no requirement that an agency credit employees with the time they worked in a provisional capacity when setting the probationary period. Certainly, if an agency is not required to credit provisional employees with time toward the probationary period, when these individuals were intended to be hired for permanent employment, it should not have tocredit temporary employees with such time. Grievants have not demonstrated they were entitled to receive four months' credit toward their probationary period when they were hired for permanent employment on June 1, 1999.

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, 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:

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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). "The identicality of issues litigated is the key component to the application of administrative res judicata." Liller, supra.

2. This Grievance Board has applied the doctrine of res judicata 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, 391 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).

3. “Collateral estoppel is a narrower legal doctrine than res judicata which prevents a party to a contested matter from relitigating an issue that was determined against him in an earlier proceeding, even though there is a significant difference betweenthe present action and the previous grievance. See Black's Law Dictionary 256 (7th ed. 1999); Jordache Enterprises v. National [Union] Fire Ins. Co., 204 W. Va. 465, 513 S.E.2d 692 (1998). See also State ex rel. Leach v. Schlaegel, 191 W. Va. 538, 447 S.E.2d 1 (1994).” Rule v. W. Va. Dep't of Health and Human Resources, Docket No. 00-HHR-080 (May 24, 2000).

4. Grievants prevailed in a prior grievance by default, solely by operation of a statute, W. Va. Code § 29-6A-3, not upon the merits. No judgement was rendered on the merits. Accordingly, the

legal doctrines of res judicata and collateral estoppel do not apply to this proceeding to preclude the adjudication of the issue of Grievants' employment status on February 1, 1999. Christian v. Sizemore, 185 W. Va. 409, 407 S.E.2d 715 (1991).

5. Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

6. The date on which Grievants attained seniority with Corrections is stated in Corrections' Policy Directive 132.02, dealing with "Correctional Officer Promotion." That Policy Directive states with regard to seniority:

> Within the context of this Policy Directive, seniority time shall be counted from the original permanent employment date with the West Virginia Division of Corrections. Permanent employee status with the West Virginia Division of Corrections will be the only employment time that will count toward Division of Corrections' seniority[.]

(Emphasis in original.)

7. Personnel's Rule 10 provides that "[a]ppointing authorities shall make all original appointments to permanent positions from officially promulgated registers for a probationary period of not more than one year."

8.

> It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally Blankenship, supra; Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

Jones v. W. Va. Dep't of Educ., Docket No. 00-DOE-108 (May 23, 2000). Thus, Personnel's interpretation of its Rules is provided substantial deference.

9. Persons who are hired on a temporary basis, or otherwise not for permanent employment,

are not entitled to count their time worked in this capacity toward their probationary period if they are later hired for permanent employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 26, 2001

Footnote: 1

This grievance was filed on December 5, 2000. Grievants' supervisor responded on December 7, 2000, that he was without authority to grant the relief sought. Grievants appealed to Level II on December 18, 2000. The grievance was denied at Level II on January 9, 2001, on the merits, and on the grounds that it was not timely filed. Grievants appealed to Level III, where a hearing was held on January 24, 2001. A Level III decision denying the grievance was issued on January 26, 2001. This grievance was docketed at Level IV on February 8, 2001, although it is not clear that the documents received by the Grievance Board were forwarded by the Grievants, and no grievance form accompanied the documents received. A Level IV hearing was convened on May 9, 2001, before Administrative Law Judge Andrew Maier, at which time a determination was made that the Division of Personnel ("Personnel") should be joined as a party, and no evidence was taken. This matter was transferred to the undersigned, and the parties met again for the Level IV hearing on June 15, 2001; however, the hearing was not properly recorded, and the hearing was repeated on September 5, 2001, to create a record of the proceedings. Grievants were represented by Grievant Brackman, Corrections was represented by Leslie Kiser Tyree, Esquire, and Personnel was represented by Robert Williams, Esquire, although Mr. Williams did not appear for the September 5 hearing. This matter became mature for decision at the conclusion of the Level IV hearing on September 5, 2001. Respondents did not pursue a timeliness argument at Level IV.