STEPHEN SMITH,

Grievant,

v. Docket No. 01-PEDTA-626

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

DECISION

Grievant, Stephen Smith, filed this grievance against the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about September 3, 2000. The Statement of Grievance reads:

> **Superviosr's (sic) position that was supposedly eliminated has a supervisor in the position.**
>
> **Relief Sought: make whole and complete.**

This grievance was denied at Level I by letter dated September 12, 2000, and denied at Level II by letter dated September 27, 2000. Grievant submitted the grievance to Level III, with a thirty-day waiver for the scheduling of the Level III hearing. On October 23, 2000, a Level III hearing was scheduled for November 3, 2000. Grievant requested a continuance, and this request was granted. No hearing was scheduled, and a Motion for Default was sent to this Grievance Board on January 2, 2002. A default hearing was held in the Grievance Board's Beckley office on February 4, 2002. Default was granted by order dated March 28, 2002. A hearing on whether the relief requested should be granted was held on May 10,

2002. This issue became mature for decision on June 3, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1) **After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

Findings of Fact

1. In 1999, Les Ball, who was the supervisor at the North Beckley Toll Plaza decided to retire. Grievant works as a Toll Foreman at Parkways' North Beckley Toll Plaza.

2. In December 1999, when this retirement was announced and before Mr. Ball had actually retired, Larry Cousins, General Manager, examined the work force at the North Beckley Toll Plaza, and decided there was no need for a separate supervisor for this Plaza. He decided Wesley Roles, the supervisor from Barrier B, could assume Mr. Ball's duties.

3. By memo dated December 20, 1999, Mr. Cousins announced the position of Supervisor at North Beckley would be eliminated when the Supervisor of North Beckley retired, and these duties would be assumed by Mr. Roles.

4. On or about January 1, 2000, the Supervisor of North Beckley retired, and Mr. Roles began supervising both facilities. Mr. Roles agreed to assume these duties. He did not receive a pay increase at that time.

5. Mr. Roles is allowed to use the North Beckley Toll Plaza vehicle to drive from that toll plaza to the Barrier B toll plaza.

6. On January 7, 2000, Grievant filed a grievance on this issue. His Statement of Grievance read: "Failing to post existing position." The relief sought was to "Make whole and complete."

7. By Level IV decision dated July 7, 2000, Administrative Law Judge Andrew Maier denied this grievance, Docket No. 00-PEDTA-133 (Smith I), and held

the positionin question, "supervisor at North Beckley Toll Plaza had been eliminated," "no longer existed," and there was "no position to post." **(See footnote 2)**

8. Additionally, Judge Maier held the decision not post the position was a management decision, and if PEDTA wanted to combine the duties of these position is it was not arbitrary and capricious to do so.

9. This instant grievance was filed on or about September 3, 2000. The Statement of Grievance stated, "Superviosr's (sic) position that was supposedly eliminated has a supervisor in the position." The Relief Sought was "make whole and complete."

10. This second grievance was "sparked" by a phone list that identified Mr. Roles as the supervisor at the North Beckley Toll Plaza.

11. As clarified by Grievant at hearing, the relief sought is the posting of the North Beckley Toll Plaza supervisor position.

12. No employees were laid off when the position was eliminated.

13. Parkways Personnel Policy I - 1, entitled Employment Procedures, states "[s]election [b]oards will be established to select for employment opportunities that occur as a result of vacancies in existing positions."

Discussion

In this grievance, Grievant has already proven that Respondent had defaulted. W. Va. Code § 29-6A-3(a)(2) states in pertinent part:

> **Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.**

Once a grievant has proven a default, the hearing examiner must presume the grievant prevailed upon the merits of the case. The Grievance Board has determined the standard of proof for a respondent, in these type of default claims, is by clear and convincing evidence, as the purpose of the default provision in W. Va. Code § 29-6A-3 was to encourage employers to rule upon pending grievances in a timely manner. Lohr v. Div. of Corrections/ Div. of Personnel, Docket No. 99-CORR-157D (Nov. 15, 1999). (See footnote 3)

Respondent requested a Level IV hearing to "determine whether the remedy is contrary to law or clearly wrong in light of that presumption." At the Level IV hearing on the clearly wrong default issue, the prior Level IV Decision on the elimination of the position was submitted into evidence, and Respondent asserted the defense of res judicata. Grievant argued this grievance was different from the previous one because Mr. Roles was the supervisor; thus, the position had not been eliminated. The relitigation of this issue is barred by the doctrine of res judicata. "The doctrine of res judicata may be applied by an administrative law judge to prevent the 'relitigation of 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). See Ellis v. Mingo County Bd. of Educ., Docket No. 96-29-366 (Apr. 16, 2000). The doctrine of res judicata requires the following four conditions to be the same:

(1) identity in the thing sued for;

(2) identity of the cause of action;

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

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

Syl. Pt. 2, Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). Further, "[t]he indenticality of issues litigated is the key component to application of administrative res judicata. . . . " Liller at 646. The prior administrative hearing in Smith I met the above- stated conditions. The grievance, relief sought, parties, and setting are the same as in Smith I.

Thus, this issue may not be relitigated under the maxim of res judicata, a well-established legal doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes "an absolute bar to a subsequent action involving the same claim, demand or cause of action." Black's Law Dictionary 678 (Abridged 5th Ed. 1983). See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095, (Feb. 28, 1997); Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dep't of Health & Human Serv., Docket No. 90-H-478 (July 31, 1991). It would be clearly wrong and contrary to law for this administrative law judge to reverse the prior decision. This action is barred.

Grievant also presented a new legal argument for granting this second grievance. He argued there had been a layoff of employees when Mr. Ball left, and the policy pertaining to layoffs was not followed. A layoff is "a termination of employment at the will of the employer." Black's Law Dictionary 460 (Abridged 5th Ed. 1983). No layoff occurred here as no employees were terminated. PEDTA decided not to fill one position based on a lack of need. Management believed the

employees at North Beckley Toll Plaza did not need a separate supervisor, and the supervisory duties could be handled by Mr. Roles.

Inherent in Grievant's argument is the idea that when duties are transferred from one position to another, the original position still remains and must be posted. See Butcher v. Logan County Bd. of Educ., Docket No. 95-23-015 (July 27, 1995). To accept this argument would severely limit the ability of an agency to reorganize and manage its personnel. An agency may reorganize the duties of its staff. Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995). Accord Hall v. Pizzino, 164 W. Va. 331, 263 S.E.2d 886, 888 (1980).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. W. Va. Code § 29-6A-3(a)(2) identifies the burden of proof of the employer once a default had been found:

> **Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.**

2. The Grievance Board has determined a respondent's standard of proof that the relief sought is clearly wrong or contrary to law, once a default claim is proven, is by clear and convincing evidence. Lohr v. Div. of Corrections/Div. of Personnel, Docket No. 99-CORR-157D (Nov. 15, 1999). See W. Va. Code § 29-6A-3 .

3. "The doctrine of res judicata may be applied by an administrative law judge to prevent the 'relitigation of 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). See Ellis v. Mingo County Bd. of Educ., Docket No. 96-29-366 (Apr. 16, 2000). The doctrine of res judicata requires the following four conditions to be the same:

(1) identity in the thing sued for;

(2) identity of the cause of action;

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

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

Syl. Pt. 2, Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). 4. "The indenticality of issues litigated is the key component to application of administrative res judicata. . . ." Liller at 646. The prior administrative hearing in Smith I met the above-stated requirements.

5. This grievance issue may not be relitigated under the maxim of res judicata, a well-established legal doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes "an absolute bar to a subsequent action involving the same claim, demand or cause of action." Black's Law Dictionary 678 (Abridged 5th Ed. 1983). See Meeks v. Kanawha County

Bd. of Educ., Docket No. 96-20- 095, (Feb. 28, 1997); Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dep't of Health & Human Serv., Docket No. 90-H-478 (July 31, 1991).

6. The relitigation of this issue is barred by the doctrine of res judicata. The grievance, relief sought, parties, and setting are the same as in Smith I. It would be clearly wrong and contrary to law for this administrative law judge to reverse the prior decision. This action is barred.

Accordingly, this grievance is DENIED.

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. 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 § 29A5-4(b) to serve a copy ofthe 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.

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Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: July 5, 2002

Footnote: 1

Grievant represented himself and was assisted by former fellow employee, Boyd Lilly. Respondent was represented by its General Counsel, David Abrams.

Footnote: 2

As stated by Judge Maier in his Level IV Decision, "[p]arkways established that there are six Toll Foremen supervising seven Toll Collectors at North Beckley, and that the Foremen there are capable of administering the daily operations of North Beckley, rendering a full-time Supervisor there unnecessary; that North Beckley is located close to Toll Barrier B, making supervision of North Beckley by Roles feasible, even in emergencies; (See footnote 4) that the position of Supervisor at North Beckley was eliminated for those reasons; and that Parkways has no policy forbidding a vacant position from being eliminated." Smith I.

Footnote: 3

Clear and convincing evidence requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt.

Footnote: 4

The undersigned Administrative Law Judge takes administrative notice that the official highway map of West Virginia places these two facilities approximately eight miles apart.