DAVID YOUNG, et al.,
Grievants,

v. **Docket No. 03-CORR-196**

DIVISION OF CORRECTIONS/
NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,
Respondent.

D E C I S I O N

Grievants, thirty-three individuals employed by the Division of Corrections (DOC) as Correctional Officers, filed a level one grievance on April 18, 2003, in which they stated:

> The distribution rate of pay for all state employees is based on 2080 hours. Due to 'public interest,' on-line security officers are required to work 2112 hours (32 hours more) per year than the community service crew officers, transportation officers, and industries officers who receive four (4) more days off than on-line security officers within the same facility.
>
> Relief sought: To have the base salary rate amended from 2080 hours to 2112 hours for on-line security staff to reflect actual hours worked OR be compensated the additional 32 hours worked by way of straight time pay or days off, with two years back-pay and/or made whole.

Grievants' immediate supervisor lacked authority to grant the matter at level one. The grievance was denied at levels two and three, and appeal to level four was made on July 7, 2003. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on September 4, 2003, to supplement the lower-level record. Grievants were represented by Grievant Young, and DOC was represented by Charles Houdyschell, Jr., Assistant Attorney General. The grievance became mature for decision on September 15, 2003, the due date for filing proposed findings of fact and conclusions of law.

The following facts are derived from a preponderance of the evidence.

Findings of Fact

1. Grievants are employed by the DOC as Correctional Officers, and were assigned to the Northern Regional Jail and Correctional Facility (NRJCF) at all times pertinent to this grievance.

2. Because the NRJCF requires Correctional Officers assigned to Security to be on duty twenty-four hours, seven days a week, administrators adopted a schedule, known as the ABC schedule, in an effort to insure employees were given holiday time. This schedule required the Security Officers to work 2112 hours per year. State employees, including those at NRJCF who do not work Security, are required to work 2080 hours per year.

3. On April 2, 2003, a level four decision was issued in the matter of Knight, et al. v. Northern Regional Jail and Corr. Facility, Docket No. 02-CORR-301 (Apr. 2, 2003), in which forty-one employees alleged they were working more hours than other employees. The requested relief, compensation for the total days of lost pay, with back pay for two years, was denied based upon a finding that they were paid for all hours worked, and that DOC had not violated any law, rule, regulation, or policy, by requiring grievants to work the additional hours.

4. DOC has adopted a new work schedule, effective July 1, 2003, which eliminates the disparity between Correctional Officers assigned to Security, and other employees.

Discussion

Respondent asserts that this grievance is essentially identical to a previously decided grievance filed by Grievants and denied at level four. If this claim is dispositive of the grievance, a discussion of the merits will be unnecessary. An assertion that a

grievance is precluded by res judicata is an affirmative defense that must be proven by Respondent by a preponderance of the evidence. The preclusion 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, 440, 376 S.E.2d 639, 646 (1988); Hunting v. Lincoln County Brd. of Educ., Docket No. 01-22-629 (Apr. 16, 2002). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995).

"The identicality of issues litigated is the key component to the application of administrative res judicata." Liller, supra. 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 West Virginia Supreme Court of Appeals has refined this test, holding, before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could

have been resolved, had it been presented, in the prior action. Syl. pt. 4, Blake v. Charleston Area Medical Center, Inc. 201 W. Va. 469; 498 S.E.2d 41 (1997); Harmon v. Fayette County Bd. of Educ., Docket No. 03-10-035 (May 6, 2003).

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).

Had the employees prevailed in their previous grievance, Grievants would not have had cause to file the present grievance . A level four decision issued in Knight was made on the merits of that grievance at the highest level of the grievance process. Approximately twenty-seven parties to that grievance were identical to parties to the present grievance. The issue addressed in Knight is identical to that presented herein, i.e., the number of hours worked, and payment for those hours. Therefore, the prior administrative hearing in Knight met the above-stated conditions, and serves as an absolute bar to consideration of the present grievance.

Conclusions of Law

1. An assertion that a grievance is precluded by res judicata is an affirmative defense that must be proven by Respondent by a preponderance of the evidence.

2. The preclusion 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, 440, 376 S.E.2d 639, 646 (W. Va. 1988); Hunting v. Lincoln County Bd. of Educ., Docket No. 01-22-629 (Apr. 16, 2002).

3. "Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. pt. 4, Blake v. Charleston Area Medical Center, Inc. 201 W. Va. 469; 498 S.E.2d 41 (1997); Harmon v. Fayette County Bd. of Educ., Docket No. 03-10-035 (May 6, 2003).

4. This grievance is identical in every material aspect to Knight, et al. v. Northern Regional Jail and Corr. Facility, Docket No. 02-CORR-301 (Apr. 2, 2003), and is precluded by the prior final judgment in that action.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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 § 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: SEPTEMBER 29, 2003

_____

SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE