WILLIAM HARMON,

Grievant,

v. **DOCKET NO. 03-10-035**

FAYETTE COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

In a grievance filed October 8, 2002, Grievant stated: "Job Title - WV 18-8-3, 18- 8-4; SB Policy 4110-5.3.1 SB Policy 2510-6.6.6; SB Policy 2320 5.7.2. Uniformity of pay and days of employment, WV 18A-4-5A, Discrimination, WV 18-29-2(M); Favoritism WV 18-29-2(O), WV 18A-1-1(4)." Grievant's stated relief requested is: "Change of title from Coordinator to Director of Attendance. Uniform pay and days of employment as other directors, effective October 8, 2002."

After being denied at the lower levels, a level four hearing was held March 19, 2003, at the Grievance Board's Beckley Office. Grievant appeared *pro se*, and Respondent was represented by its counsel, Erwin Conrad, Esq. The parties agreed to submit their proposed findings of fact and conclusions of law by April 22, 2003, whereupon the matter became mature for decision.

Grievant's claim is that his position should be classified as Director of Attendance rather than Coordinator of Attendance, and that he should be given like pay and days of employment as other Directors. He contends that he should not be considered aprofessional service personnel, but rather as a professional central office administrator. He alleges that Respondent's failure to classify his position as a Director's position is a result of discrimination and favoritism. Respondent argues Grievant's position was classified as a coordinator when he applied for it, and that he does not perform the duties of a Director-level position.

Respondent also asserts this issue has already been litigated in a prior grievance filed by Grievant, and is barred by *res judicata.* (See footnote 1) Grievant's position is that the present grievance is different than his prior grievance, and also that facts have changed since then, causing a

new grievable event.

Based on the record of the foregoing proceedings, and on the testimony and evidence adduced at the level four hearing, I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. On June 15, 1989, Respondent posted a job vacancy for a position in its central office titled, "Coordinator of Attendance." Grievant applied for and was awarded the position, and has held it since then.

2. In 1996, Grievant was assigned the additional duty of coordinating the county's home schooling program.

3. On June 9, 1999, Grievant filed a grievance alleging "days of employment and daily supplement are not uniform with other Directors, 18A-4-5A, 18A-29-2(m) discrimination, 18-29-2(o) favoritism to other Directors/Central Office Administrators." As relief, he sought, "uniformity and equity with other Directors, 261 days employment,$12.50 a day supplement and any and all benefits to which other Directors/Central Office Administrators are entitled."

4. That grievance, referred to as Grievance 99-4, was denied at level one by Grievant's immediate supervisor on June 24, 1999, on the basis that his supervisor had no authority to grant the relief requested, and without consideration of its merits. Grievant did not appeal to level two.

5. Directors in Fayette County are employed for 261-day terms and receive a $12.50 per day salary supplement.

6. Grievant, as a Coordinator, has a 210-day employment term and receives a salary supplement of $7.50 per day.

7. The county salary supplements received by directors and coordinators have been in effect since 1999.

8. Grievant's immediate supervisor is Chris Perkins, Director of Secondary Schools and Vocational Education. Mr. Perkins reports to an Associate Superintendent, who in turn reports to the Superintendent.

9. Respondent posted Grievant's position in order to comply with W. Va. Code § 18-8-3, which requires it to "employ the equivalent of a full-time county director of school attendance."

10. The job posting under which Grievant applied had attached a job description for the position. The job description requires a professional service certificate in social services and attendance, and defines the position by reference to W. Va. Code §§ 18A-1-1(b), 18-8-3 and 18-8-4. It also lists the salary as a teacher's salary based on degree and years of experience, and an employment term of ten and one-half school months (210 days.) 11. Grievant requested of the State Superintendent of Schools an interpretation of W. Va. Code § 18A-1-1 as it applies to county attendance directors. On March 9, 2001, State Superintendent David Stewart opined that "an attendance director, who is employed by a county board of education and is a certified professional educator, is to be considered a central office administrator pursuant to the definitions set for in [W. Va. Code] § 18A-1-1." Level three Grievant's Exhibit No. 7. Dr. Stewart relied on a West Virginia Supreme Court of Appeals decision in an earlier grievance filed by Grievant, Harmon v. Fayette County Brd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999), in which Grievant had sought to have his position classified as a "classroom teacher."

12. The “Coordinator of Attendance” job description under which Grievant was hired lists the following “Performance Responsibilities:”

A. Assist in directing the taking of the school census to see that it is taken at the time and in the manner provided by law.

B. Confer with principals and teachers on the comparison of school census and enrollment for the detection of possible nonenrollees.

C. Cooperate with existing State and Federal agencies charged with enforcement of child labor laws.

D. Provide documentation of enrollment status on a form approved by the Department of Education to any student sixteen years of age or older upon request who is properly enrolled in a school under the jurisdiction of said official for presentation to the Department of Motor Vehicles on application for or reinstatement of an instruction permit or license to operate a motor vehicle.

E. Prepare reports for submission by the county superintendent to the state superintendent of schools on school attendance, at such times and in such detail as may be required; file also with the county superintendent and county board of education at the close of each month a report showing the activities of the school attendance office and the status of attendance in the county at the time.

F. Promote attendance in the county by the compilation fo data for

schools and by furnishing suggestions and recommendations for publication through school bulletins and the press, or in such manner as the county superintendent may direct.

G. Participate in school teacher's conferences with parents and students.

H. Assist in such other ways as the county superintendent may direct for the improvement of school attendance.

I. Demonstrate a working knowledge of the School Laws of West Virginia and coordinate the preventive aspects of school attendance, especially in reference to the drop-out prevention program.

J. Perform other duties as assigned by the Superintendent of Schools or by his/her designee.

K. Maintains good professional work habits.

L. Maintains and upgrades his/her professional skills.

M. Evaluates personnel under his/her supervision.

13. One of the “other duties . . . assigned by the Superintendent of Schools of by his/her designee” has been the assignment to Grievant of coordinating the county's home-schooling program, a former duty of retired Director of Elementary Education John Cavalier.

DISCUSSION

Respondent's *res judicata* claim, if proven, would be dispositive of the grievance, and so that issue will be addressed first. Respondent asserts that the present grievance is identical to Grievance 99-4, and that grievance was filed, heard and denied, and that Grievant made no appeal. 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." Hunting v. Lincoln County Bd. of Educ., Docket No. 01-22-629 (Apr. 16, 2002). 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 refined the test further a few years later, 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). "The identicality of issues litigated is the key component to the application of administrative res judicata." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988).

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). However, the doctrine is applicable to decisions issued at the lower levels of the grievance procedure which have not been appealed within the statutory time periods to the next level of the grievance procedure. Ashley v. W. Va. Bureau of Senior Services, Docket No. 00-BSS-506 (Aug. 1, 2000). The present grievance meets all four conditions in the Woodall test for *res judicata* when compared to Grievance 99-4. Although Grievant asserts that the hiring of additional directors since 1999 gave rise to a new cause of action, the basis for his claim remains one of discrimination and favoritism between classes of persons, not specific persons, and his misclassification issue is a continuing practice that has not changed since his original grievance was filed. Although Grievant seeks to be retitled as a Director in the present grievance and he did not ask for the same thing in Grievance 99- 4, the previous grievance implicitly requested the reclassification when it asked for "uniformity with other Directors."

However, in order for *res judicata* to be applicable, the parties must have already had a full and fair opportunity to litigate and must have, in fact, litigated. In this case, there has been no prior litigation, despite the filing of Grievance 99-4.

West Virginia Code 18A-29-4 dictates the procedure for filing and disposing of a grievance at level one. It states, in pertinent part:

(a) Level one.

(1) 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.

(4) The immediate supervisor shall state the decision to such filed grievance within ten days after the grievance is filed.

Grievance 99-4 never proceeded beyond level one. That level consists of an informal "conference to discuss the nature of the grievance" before a formal grievance is ever filed, and if the grievant does not agree with his supervisor's response to the discussion, he may then file a written grievance, to which the supervisor must respond in writing. No level one hearing was ever held, thus there was no "litigation" of the grievance issue at that level.

In the case of Grievance 99-4, Grievant's immediate supervisor in effect denied the grievance on jurisdictional grounds, and did not give the merits of the claim any consideration. Grievant's supervisor made no findings of fact, made no conclusions of law, and afforded Grievant none of the due process rights generally associated with grievance hearings and required by W. Va. Code 18A-29-6. (See footnote 2) Thus, the prior action fails to satisfy the first part of the Blake test, which

requires "a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings." These facts are substantially different from Ashley, *supra*, in which the grievant failed to appeal a levelthree hearing decision on the merits of his claim, and was barred from relitigating the same issue in a later grievance. Here, Grievant was given an opportunity to litigate his claim, but he did not, in fact, litigate it, and the present action is not barred by *res judicata*. (See footnote 3)

The merits of the grievance must now be addressed. Grievant asserts infractions of a number of statutes and policies that if properly followed, he claims, would require his position to be considered a professional, central office administrator's position. Respondent currently employs Directors for 261 days and supplements their salaries by $12.50 per day, while it employs Coordinators for 210 days with a $7.50 per day supplement. Grievant argues he should be paid uniformly with directors. This is a non- disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

W. Va. Code § 18A-4-5b provides that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county[.]" This provision has been interpreted to mean that boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Airhart v. Wood County Bd. of Educ., 569 S.E.2d 422 (W. Va. 2002); Covert v. Putnam County Bd.of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

The distinction between a “Director” and a “Coordinator” is not specified in Respondent's salary supplement policy, but "Director or coordinator of services" is defined in W. Va. Code § 18A-4-8(i)(34) as:

> [P]ersonnel who are assigned to direct a department or division. Nothing in this subdivision may prohibit professional personnel or professional educators as defined in section one, article one of this chapter, from holding this class title, but professional personnel may not be defined or classified as service personnel unless the professional personnel held a service personnel title under this section prior to holding class title of "director or coordinator of services." Directors or coordinators of service positions shall be classified as either a professional personnel or service personnel position for state aid formula funding purposes and funding for directors or coordinators of service positions shall be based upon the employment status of the director or coordinator either as a professional personnel or service personnel;

Since the definition of the labels for the different positions provides little clarity, it is the actual duties of the positions that should be compared. Grievant's position is defined in the job description attached to the announcement of the vacancy for which he applied in terms of the definitions contained in W. Va. Code §§ 18A-1-1(b), (See footnote 4) 18-8-3 and 18-8-4. (See footnote 5) Although Grievant correctly contends W. Va. Code § 18-8-3 does not explicitly mention a coordinator, his argument ignores the language “or equivalent” in the samesection. That the classifications of Director and Coordinator are equivalent is evidenced by W. Va. Code § 18A-4-8(i)(34). Thus, nothing in the Code prohibits a county board of education from assigning the duties of an Attendance Director to a coordinator-level administrator rather than to a director-level administrator. Grievant is therefore properly classified as a Coordinator. Grievant presented no evidence that his pay and days of employment were not uniform with other Coordinators.

The following conclusions of law support this discussion.

CONCLUSIONS OF LAW

1. 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, 376 S.E.2d 639, 646 (W. Va. 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).

2. "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, inthe prior action." Syl. pt. 4, Blake v. Charleston Area Medical Center, Inc. 201 W. Va. 469; 498 S.E.2d 41 (1997).

3. A level one conference held under W. Va. Code § 18A-29-4(a) is not "litigation" for purposes

of applying the doctrine of *res judicata*. A decision rendered on jurisdictional grounds rather than based on consideration of the merits and application of the law to the facts has not been "litigated" for purposes of applying the doctrine of *res judicata*.

4. This grievance is not barred by the doctrine of *res judicata*.

5. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

6. The duties of the “Attendance Director or Equivalent” position mandated by W. Va. Code § 18-8-3 may be assigned by a county board of education to a position classified as Director or Coordinator.

7. Grievant has not met his burden of proving the allegations of this grievance.

For the foregoing reasons, this grievance is hereby **DENIED.** Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County. Any 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. 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.

Date: May 6, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Latin for "the thing has been judged."

Footnote: 2

These considerations are not required at a level one informal conference.

Footnote: 3

An issue that was not argued is whether Grievant abandoned Grievance 99-4. Had he done so, he would have been required to obtain the level one evaluator's permission to reinstate it. Absent this permission, it may be that his only option was to refile the grievance.

Footnote: 4

"'Professional personnel' means persons who meet the certification and/or licensing requirements of the state and includes the professional educator and other professional employees."

Footnote: 5

"The county attendance director and the assistants shall diligently promote regular school attendance. They shall ascertain reasons for inexcusable absences from school of pupils of compulsory school age and students who remain enrolled beyond the sixteenth birthday as defined under this article and shall take such steps as are, in their discretion, best calculated to correct attitudes of parents and pupils which results in absences from school even though not clearly in violation of law. . . ."