KAREN K. VANCE,

Grievant,

v. **DOCKET NO. 03-19-018**

JEFFERSON COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Karen K. Vance, Grievant filed this grievance against Jefferson County Board of Education, Respondent on September 20,2002, stating:

> Grievant was employed as a regular teacher's aide. Grievant contends that Respondent erred in failing to reinstate her to the position of Aide/Switchboard Operator. Grievant had been assigned to that position in the absence of Diane Franks. Ms. Franks has not returned to her position. Grievant alleges a violation of West Virginia Code §§ 18A-4-8b(c) and 18A-4- 15.

Grievant stated the relief sought as:

> Grievant seeks: (a) compensation for lost wages; (b) interest for any sums to which [she] is entitled; (c) compensation for all lost benefits, pecuniary and nonpecuniary, including but not limited to seniority; and (d) reinstatement to the Aide/Switchboard Operator position, and (e) continuance in that position until the return of Ms. Franks.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Morgantown office on April 11, 2003. Grievant was represented by John E. Roush, Esq. of WVSSPA, and Respondent was represented by David Camiletti,Esq. This matter became mature for decision on May 21, 2003, the deadline for filing of the parties' replies to proposed findings of fact and conclusions of law.

At the level three and level four hearings, Respondent filed a Motion to Dismiss for *Res Judicata,* asserting that this grievance is essentially identical to a previously decided grievance filed by Grievant and denied at level four. The undersigned Administrative Law Judge deferred ruling on

Respondent's motion until after the hearing on the merits of the instant grievance.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is a regularly-employed service employee of Respondent. At the time this grievance arose, she was employed as an itinerant aide.

2. On or about June 24, 2002, Grievant filed a grievance which stated: “Violation of WV Code 18A-4-15/filling leave of absence position; Jefferson Co. B.O.E. Vacation policy; / WV 18A-2-7, transfer rights; WV 18A-2-5/contract rights; WV 18A-4-8h/summer employment.” A more complete description of the circumstances of the grievance was attached. As relief, she sought “To be reinstated to D. Franks' position for duration, accorded all rights/privileges/benefits for past days & forthcoming, including past vacation days accrued. Contract for duration of position; all expenses incurred from this grievance, including professional leave and reimbursed all days I was not allowed to work.”

3. That grievance was denied at all levels, and appealed to the Grievance Board, where it was heard on October 4, 2002. 4. A level four decision was rendered by Senior Administrative Law Judge Sue Keller on October 31, 2002, denying the grievance. Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-272.

5. Judge Keller found “Grievant failed to prove a violation of W. Va. Code §§ 18A-2-5, 18A-2-7, 18A-4-8h, 18A-4-15 or the JCBE Vacation Policy.”

DISCUSSION

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 ofthe 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).

A final adjudication of Grievance 02-19-272 was made on the merits of that grievance at the highest level of the grievance process. The parties to that grievance were identical to parties to the present grievance. Grievant argues that the present grievance “does not share the same 'thing sued for' and the 'quality' of the Grievant has changed.” She argues that in the previous grievance, she sought to be placed in Ms. Franks' position for the summer of 2002, and sought vacation and other benefits, while in the present grievance she seeks to be placed in Ms. Franks' position for the time period covered by her own employment term rather than the 261-day term of Ms. Franks. She claims her “quality” has changed because her employment term had commenced for the 2002-2003 school year in the prior grievance, while in the present grievance she was between school terms. (See

footnote 1) Grievant's argument is not convincing. Had grievant prevailed on her cause of action in her previous grievance, she would not have had cause to file the present grievance. Grievant did not seek, as she asserts, only to be placed in Ms. Franks' position for the summer, but “for [the] duration.” The mere passage of time, does not give rise to a new grievance on the same issues.

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, 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).

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 Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-272 (Oct. 31, 2002) and is precluded by the prior final judgment in that action.

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 Jefferson 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 27, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant also claims the prior judgment was in error on several points, but there is no record of that decision having been appealed to Circuit Court. If, so, the proper remedy would have been an appeal to Circuit Court, not the filing of an identical grievance. Because no appeal was filed, the decision is now final.