PAMELA BLETHEN, et al.,

Grievants,

v. **DOCKET NO. 03-T&R-416**

DEPARTMENT OF REVENUE/STATE TAX DEPARTMENT and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants (See footnote 1) separately filed two different grievances against their employer, the Department of Revenue/State Tax Department ("Tax"). (See footnote 2) The Division of Personnel ("DOP") was joined as an indispensable party at level three. All of the grievances were consolidated by order of the undersigned at level four. The issues and inter-relatedness of these grievances and past grievances are more fully set out below in the Findings of Fact.

Having been denied at all lower levels, Grievants separately appealed to level four. A level four hearing was held in the Grievance Board's Charleston office on May 26, 2004. Grievants were represented by counsel John F. Dascoli, Frank J. Venezia and James P. McHugh. Respondent Tax was represented by Esther VanDall and A.M. "Fenway" Pollack,Assistant Attorneys General, and Respondent DOP was represented by Darlene Ratliff- Thomas and Karen Thornton, Assistant Attorneys General.

Prior to the level four hearing, Tax filed its Motion to Dismiss challenging the timeliness of appeals and on the bases of collateral estoppel and res judicata. Ruling on this motion was deferred until after the level four hearing, and the following Findings of Fact are made with respect to these issues as well as the merits of the case.

This matter became mature for decision on July 30, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

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. On August 30, 1999, the Grievance Board issued a level four decision in the matter of *Bonnett, et al. v. W. Va. Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118, finding that the grievants, all Revenue Agents 2, were not entitled to be placed in pay grade 14, which is the same paygrade as Credit Analysts II employed by the Workers' Compensation Commission ("WCC").

2. With the exceptions of Thomas Bryant, David Crowder, Mark Gaughenbaugh, Janie Higdon, Paula Junkins, Tammy Nutter, Darlene Rupe, Pearl Short, and Daniel Walters, all of the grievants herein were grievants in *Bonnett* as well. (See footnote 3)

3. The *Bonnett* decision was appealed by some of the grievants to the Circuit Court of Kanawha County in Civil Action 99-AA-151, where it was affirmed by order datedMarch 1, 2001. In the circuit court, the case was styled *Ferguson, et al. v. State of W. Va., Dep't of Tax and Revenue and Div. of Personnel* ("*Ferguson I*").

4. On June 18, 2001, the Grievance Board ruled in the matter of *Stanley, et al. v. Dep't of Tax and Revenue & Div. of Personnel*, Docket No. 99-T&R-490, that Tax Unit Supervisors 1 ("TUS1's") employed by Respondent were not equivalent positions to Credit Analysts III employed by WCC. The grievants in that matter appealed to the Circuit Court of Kanawha County, and the decision of the Grievance Board was reversed by Judge Zakaib in Civil Action No. 01-AA-93 on January 2, 2003. The grievants were awarded a change from pay grade 14 to pay grade 16 retroactive to October 17, 1997.

5. The grievance *sub judice* is a consolidation of two separate issues, raised in two separate grievance filings. The first ("*Blethen I*"), filed individually by each grievant in May, 2003, seeks to compare the position of Revenue Agent 2 ("RA2") with the position of Credit Analyst 2 ("CA2"), and seeks to have the RA2 paygrade increased from 12 to 14, consistent with the paygrade of CA2. The individual grievances were consolidated at level three and then individually appealed to level four.

6. The second issue in the present matter was raised in separate grievances filed in September, 2003, as a result of a ruling at level three that *Blethen I* could not be amended to include

the claim that more than a two-paygrade difference between RA2's and their supervisors (the TUS1's from *Stanley*) was unlawful. These grievances ("*Ferguson II")* were denied at level three and again appealed individually to level four, where *Blethen I* and *Ferguson II* were consolidated to form the grievance being decided here.

7. Grievant Kristin Liller did not file a *Ferguson II* claim until June 3, 2004. The parties waived the level one and two conferences and the level three hearing, and sheappealed to level four on July 7, 2004. Despite the waivers, written decisions were issued at levels two and three, each finding the grievance was untimely. Upon appeal to level four, this grievance was consolidated with the present matter.

8. Grievant Janie Higdon filed a grievance at level one on April 23, 2004, in which she raised both issues as stated in the *Blethen I* and *Ferguson II* grievances. Grievant Paula Junkin filed a similar grievance on April 22, 2004. Both have been appealed to level four and consolidated with the present action.

9. Grievants Michael Martin, Arville Sargent and Cynthia Miller were not employees of Respondent at the time they filed their grievances.

10. In the *Bonnett*, *supra* grievance, "Grievants assert[ed] that their job description is virtually identical to that of the Credit Analyst IIs, and therefore, they should be placed in the same pay grade."

DISCUSSION

While the underlying grievances deal with non-disciplinary issues, Respondent has raised a number of affirmative defenses that would be dispositive. On these defenses, Respondent bears the burden of proof, and they will be discussed preliminarily because, if Respondent prevails, the merits of the grievance need not be addressed.

I. Lack of jurisdiction over non-employees.

Grievants Michael Martin, Arville Sargent and Cynthia Miller were not employees of Respondent at the time they filed their grievances. "Grievance" is defined as "any claim by one or more affected state employees . . . ." W. Va. Code 29-6A-2(i). The Grievance Board has determined that

> persons who no longer hold employment status [were] generally not eligible to use the grievance procedure once the employment relationship was terminated, unless such termination is the subject of their grievance, or theirgrievance was initiated before their employment relationship was severed, and the subject matter of such grievance was

not rendered moot by termination of their employment status. [Citations omitted.]

Jackson v. Div. of Corrections, Docket No. 97-CORR-345 (Jan. 30, 1998). As non- employees, these Grievants may not avail themselves of the grievance procedure for state employees, and their claims must be and they are hereby dismissed.

II. Timeliness

Respondent asserts that the claims presented here are untimely. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997). Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). There singular grievable event giving rise to these grievances was the decision to place the RA2 classification in its current paygrade. Grievants identified two theories on why they think this decision was improper: A) Because CA2's are similar and working in a higher paygrade; and B) Because there is more than a two paygrade difference between the RA2 classification and the TUS1 classification that supervises it. Grievants argue the paygrade issue is a continuing practice, but Respondents contend it is the continuing effect of a one- time event.

A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days ofthe most recent occurrence of a continuing practice giving rise to a grievance. . . ." W. Va. Code § 29-6A-4(a). A grievance shall be filed within the times specified in [W. Va. Code § 29-6A-4] and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment. W. Va. Code § 29-6A-3(a)(1).

West Virginia Code § 29-6A-4 contains the same discovery rule found in the education grievance procedure, which has been interpreted to mean that, "the time in which to invoke the grievance

procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl Pt. 1, *Spahr v. Preston Co. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). Grievants knew unequivocally what the paygrade for the RAII classification is when they first accepted positions in that classification. There is no evidence their job duties or positions have changed in any way since they were hired or even since the previous grievances. That they found out that they had an arguable claim that the CA2 positions were similar is not an event, but the discovery of a legal theory. Likewise with the theory that there can be no more than a two-paygrade difference between a position and its supervisory classification. The date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within ten days of the event or occurrence of the practice. *Lynch, supra*.

The *Stanley* decision retroactively created a larger gap between the pay grades of CA2 and TUS1, triggering the filing of *Ferguson II*. However, it did not create a new grievable event. Grievants still complain that their paygrade has been improperly assigned, but its assignment existed exactly the same before and after the *Stanley* decision. The only thing that changed is that Grievants now have additional evidence to support their claim the paygrade is improper, in the form of a larger salary gap. Grievants simply now have a new legal theory on which to base their same allegation. Grievants' argument that they were not required to file until ten days after the appeal period had run in the *Stanley* case is misplaced, because that case was not a grievable event.

The only Grievants who were not part of the *Bonnett* case, and hence precluded from filing again by *res judicata* as discussed below, are Thomas Bryant, David Crowder, Mark Gaughenbaugh, Janie Higdon, Paula Junkins, Tammy Nutter, Darlene Rupe and Pearl Short. Each of their claims, however, are untimely, as they knew of the paygrade assignment of their classification more than ten days prior to the filing of their grievances.

Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). No grievant provided such an excuse.

III. Res Judicata

Respondent contends Grievants are precluded from prosecuting this grievance because they already have. An assertion that a grievance is precluded by *res judicata* is an affirmative defense that must be proven by Respondent by a preponderance of theevidence. *Vance v. Jefferson County Bd.*

of Educ., Docket No. 03-19-018 (May 27, 2003). 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." *Id*. "Before the prosecution of a [grievance] 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).

With respect to those grievants who participated in the *Bonnett* grievance, the current action is precluded by *res judicata. Bonnett* and *Ferguson I* are essentially and materially identical to the *Blethen* claim. Grievants have discovered a new legal theory on which to support the claim they first raised in *Bonnett*, but the parties and cause of action are identical. *Bonnett* was a final decision for those grievants who did not appeal it, and for the rest, the matter was finally concluded in *Ferguson I*. The current claim that Grievants deserve a higher pay grade because they are similarly situated to CAII's meets all three elements of the *res judicata* test, and must therefore be denied.

Because the claims of all grievants are either untimely or precluded by *res judicata*, the merits of those claims may not be addressed. The following conclusions of law support this decision.

CONCLUSIONS OF LAW

1. A grievance must be filed with the immediate supervisor of the grievant “[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .” W. Va. Code § 29-6A-4(a).

2. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH- 060 (July 16, 1997).

3. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler*

v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

4. A grievance shall be filed within the times specified in [W. Va. Code § 29-6A- 4] and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment. W. Va. Code § 29-6A-3(a)(1). 5. "Grievance" is defined as "any claim by one or more affected state employees . . . ." W. Va. Code 29-6A-2(i)

6. "Persons who no longer hold employment status [were] generally not eligible to use the grievance procedure once the employment relationship was terminated, unless such termination is the subject of their grievance, or their grievance was initiated before their employment relationship was severed, and the subject matter of such grievance was not rendered moot by termination of their employment status. *See Archer v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-138 (Sept. 7, 1994); *Karr v. Jackson County Bd. of Educ.*, Docket No. 18-86-297-1 (Feb. 2, 1987). *See also Asaad v. Res-Care, Inc.*, 197 W. Va. 684, 478 S.E.2d 357 (1996); *Adkins v. Civil Service Comm'n*, 171 W. Va.132, 298 S.E.2d 105 (1982)." *Jackson v. Div. of Corrections*, Docket No. 97-CORR-345 (Jan. 30, 1998).

7. Michael Martin, Arville Sargent and Cynthia Miller, as non-employees at the times they filed their grievances, were not eligible to avail themselves of the grievance procedure.

8. 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. *Vance v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003).

9. 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." *Vance, supra*; *Liller v. W. Va. Human Rights Comm'n,* 376 S.E.2d 639, 646 (W. Va. 1988); *Hunting v. LincolnCounty Brd. of Educ.*, Docket No. 01-22-629 (Apr. 16, 2002). *See 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).

10. "Before the prosecution of a [grievance] 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).

11. For each of the remaining grievants who were also *Bonnett* grievants, *Blethen I* is both untimely and precluded by *res judicata*; *Ferguson II* is untimely. For all other grievants, their filings are untimely.

For the foregoing reasons, the claims of Michael Martin, Arville Sargent and Cynthia Miller are **DISMISSED**. For the remaining grievants, this grievance is hereby **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, and 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 15, 2004 _____

M. Paul Marteney

Administrative Law Judge

Appendix A

***Blethen, et al.* Grievants**

Grievant	Docket No.	May Gvnc	Sep Gvnc	Attorney	Bonnett

Anderson, Marcia A.	03-T&R-401	.	.	Venezia/Dascoli	.
Bias, Don W.	03-T&R-384	.	.	Venezia/Dascoli	.
Blethen, Pamela D.	03-T&R-416	.	.	Venezia/Dascoli	.
Bonnett, Victor G.	03-T&R-383	.	.	Venezia/Dascoli	.
Bryant, Thomas	03-T&R-398	.	.	Venezia/Dascoli	
Crowder, David A.	03-T&R-406	.	.	Venezia/Dascoli	
Elmore, Kimela D.	03-T&R-399	.	.	Venezia/Dascoli	.
Ferguson, James H.	03-T&R-393	.	.	Venezia/Dascoli	.
Garrison, Donna	03-T&R-405	.	.	McHugh	.
Gaughenbaugh, R. Mark	03-T&R-400	.	.	Venezia/Dascoli	
Higdon, Janie T.	04-T&R-199	New - Raises both issues		Venezia/Dascoli	
Jennings, Darrell	03-T&R-403	.	.	Venezia/Dascoli	.
Jones, Philip G.	03-T&R-386	.		Venezia/Dascoli	.
Junkins, Paula F.	03-T&R-198	New - Raises both issues		Venezia/Dascoli	
Kilmer, David	03-T&R-389	.	.	Venezia/Dascoli	.
Liller, Kristin B.	03-T&R-390	.	. (See footnote 4)	Venezia/Dascoli	.
Martin, Michael (See footnote 5)	04-T&R-416		.	Venezia/Dascoli	.
Mikeal, Shawn	03-T&R-415	.	.	Venezia/Dascoli	.
Miller, Cynthia L.	03-T&R-397		.	Venezia/Dascoli	.
Nutter, Tammy	03-T&R-412	.	.	Venezia/Dascoli	
Porter, William D.	03-T&R-387	.	.	Venezia/Dascoli	.
Rupe, Darlene B.	03-T&R-382	.	.	Venezia/Dascoli	
Sargent, Arville W.	03-T&R-391	.	.	Venezia/Dascoli	.
Saunders, Seretha O.	04-T&R-002	.	.	Venezia/Dascoli	.
Short, Pearl M.	03-T&R-407	.	.	Venezia/Dascoli	
Silvester, Kimberly A.	03-T&R-402	.	.	Venezia/Dascoli	.

Swinler, Janet C.	03-T&R-396	.	.	Venezia/Dascoli	.
Taylor, Cathy R.	03-T&R-404	.	.	Venezia/Dascoli	.
Waters, Daniel L.	03-T&R-392	.	.	Venezia/Dascoli	

Footnote: 1

A complete list of Grievants and their representatives is attached as Appendix A.

Footnote: 2

Formerly the Department of Tax and Revenue/State Tax Division. The name changed effective June 11, 2004, due to reorganizing legislation.

Footnote: 3

Two Bonnett grievants, Walter Bowers and Brenda Kuhn, are not parties to this grievance.

Footnote: 4

Filed June 3, 2004

Footnote: 5

Filed Feb. 26, 2004