PAMELA McBRIDE,

Grievant,

v. **DOCKET NO. 05-DJS-306**

DIVISION OF JUVENILE SERVICES/

SOUTHERN REGIONAL JUVENILE

DETENTION CENTER,

Respondent.

DECISION

Grievant Pamela D. McBride filed this grievance on August 25, 2005, seeking a salary increase for a period of time prior to her dismissal. Her stated relief sought is “I am entitled to the pay raise falsely promised to me upon my involuntary removal from my previous position August 24, 2004, through April 5, 2005; compensatory pay for the Division's actions and inactions which made it impossible for me to work from April 6, 2005, through the date of my re-employment elsewhere August 23, 2005; and for such other and proper relief as may best suit the circumstances of this grievance.” She does not seek reinstatement to her position with Respondent.

A level four hearing was held in the Grievance Board's Beckley office on October 17, 2005. Grievant was represented by counsel, J.W. Feuchtenberger, and Respondent was represented by counsel, Steven Compton. The matter became mature for decision on November 18, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Respondent asserts this grievance is untimely and/or barred by *res judicata* or collateral estoppel. Grievant contends that merits of the case were never heard, and that it was timely filed.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent for about fourteen years, ending with her termination on August 11, 2005, for job abandonment. She took sick leave beginning April 6, 2005, and only

worked one day since then.

2. On December 6, 2004, Grievant filed a grievance to challenge a transfer from her position as a Correctional Counselor I at Mercer County Southern Regional Juvenile Detention Center to a position as Community Resource Counselor. In that grievance, her request for relief was "[r]einstatement to my position as Correctional Counselor at the Mercer County Southern Regional Juvenile Detention Center in Princeton and relief from harassment and retaliation." That grievance was granted in full at level three without a level three hearing, and Grievant claimed a default at that level. A level four decision denied the default claim, finding the issue was moot due to the granting of the grievance. (See footnote 1)

3. The Statement of Grievance in the December 6, 2004, grievance was substantially identical to the Statement of Grievance filed in this matter, with the exceptionthat the current Statement of Grievance adds three paragraphs detailing why Grievant believed the relief granted in the prior grievance was insufficient.

4. Grievant did not appeal the level three decision in the prior grievance.

5. The level three decision in the prior grievance, dated June 10, 2005, directed Grievant to return to work at the assignment she requested in her relief sought, on June 13, 2005. Grievant did not return to work and communicated to Respondent that she would not do so. On June 15, 2005, Respondent informed Grievant that her failure to return to work would be considered job abandonment, quoted relevant sections of Respondent's policies regarding job abandonment and its consequences, and gave Grievant a second chance by directing her to return to work on June 21, 2005, or be dismissed from employment.

6. Grievant did not return to work, but her return date was stayed pending the outcome of her default claim. Following the dismissal of her default claim, Grievant was instructed to return to work on August 3, 2005, despite the fact that her counsel had informed Respondent that Grievant was still refusing to return to work.

7. Grievant did not return to work on August 3, 2005. On August 11, 2005, Acting Director Cynthia Largent-Hill informed Grievant by letter that her employment was terminated due to job abandonment.

8. Grievant accepted a position with a private employer on or about August 25, 2005.

Discussion

In this grievance, grievant does not challenge her dismissal for job abandonment, and admits she did not return to work when she was directed to do so. Instead, she claimsthat Respondent harassed her and created a hostile work environment, the exact same issues raised in her December 6, 2004, grievance. She now alleges these are the reasons she could not return to work.

Respondent asserts that the grievance is therefore barred by res judicata and/or collateral estoppel. These are affirmative defenses that must be proven by Respondent by a preponderance of the evidence. (See footnote 2) The tests for these defenses are similar. Before the prosecution of a lawsuit may be barred on the basis of *res judicata* , three elements must be satisfied. (See footnote 3)

> 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.

Collateral estoppel [or issue preclusion] will bar a claim if four conditions are met: *(See footnote 4)*

> The issue previously decided is identical to the one presented in the action in question;
>
> There is a final adjudication on the merits of the prior action;
>
> The party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and
>
> The party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Since Grievant is not challenging her dismissal for job abandonment, but is instead asserting that

a state of harassment and hostile work environment existed that prevented her return to work, these are the issues that must be compared between grievances. It is obvious that the present grievance is identical to the prior grievance in terms of its cause of action. The only addition to the present grievance is an amendment of the relief sought, and a claim that the relief granted in the prior grievance was insufficient. No new acts or circumstances constituting harassment are alleged, and since Grievant never returned to work, she could not have suffered a hostile work environment. Grievant filed a grievance over these issues, pursued it through level three, received a favorable judgment granting her the relief she sought in its entirety, and failed to further pursue the matter. Although she was not given a level three hearing, Respondent's failure in that regard was deemed justified by it grant of relief.

Grievant now argues that she is not estopped from asserting the same claims, because the granting of the relief she sought at level three, without a hearing, denied her the due process of litigating those claims. This argument was addressed in her default proceedings, where the Administrative Law Judge ruled that “grievance became moot on or about June 10, 2005, when DJS granted Grievant all of the relief she had requested in her written statement of grievance,” and “Grievant has failed to cite any legal authority that supports her proposition that she was entitled to a Level III hearing even after she had prevailed in her grievance and obtained all of the relief she requested.” (See footnote 5) The priorgrievance was heard at level one and two of the grievance procedure, and found to be meritorious by Respondent. Grievant cannot now claim she was unfairly awarded everything she asked for. Both *res judicata* and collateral estoppel bar this action by Grievant.

The reasons for Grievant's continued pursuit of this matter are understandable: her underlying grievances present charges of institutional retaliation against a legitimate whistleblower, and hint at a cover-up of the acts that became known to Grievant that she attempted to report in her capacity of EEO officer. If proven, these would be cause for serious concern, but Grievant never had the opportunity to put these allegations on record. Instead, Respondent found cause to settle the grievance at a lower, informal level. In so doing, Respondent followed the mandate to “make every possible effort to resolve disputes at the lowest level of the grievance procedure.” (See footnote 6) However, the purpose of the grievance procedure is not to make it a forum for airing the faults of the employer. It is “to provide a procedure for the equitable and consistent resolution of employment

grievances." (See footnote 7) This was accomplished by holding the required level one and two conferences, and the level three decision granting the grievance; Grievant's due process rights ended there.

Respondent also asserts, with respect to the new relief Grievant requests in this present grievance, that the claim is untimely. Grievant, in her relief sought, alleges she was promised a pay raise when she was reassigned effective August 24, 2004, but she never received it. Her statement of Grievance mentions this alleged promise, but the reliefsought in her prior grievance does not address the issue. However, the request for relief itself admits to its own untimeliness. Grievant had to have known she did not receive a raise on the first pay period after August 24, 2004, but did not file her claim to that entitlement until almost a year later. 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). 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). As to that new claim, the grievance is clearly untimely.

The following conclusions of law support this discussion:

Conclusions of Law

1. An assertion that a grievance is precluded by *res judicata* or collateral estoppel is an affirmative defense that must be proven by Respondent by a preponderance of the evidence. 156 C.S.R. 1 § 4.21 (2004). *See Vance v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003).

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." *Vance, supra*; *Liller v. W. Va. Human Rights Comm'n,* 376 S.E.2d 639, 646 (W. Va. 1988); *Hunting v. Lincoln County Bd. 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).

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. "'Collateral estoppel [or issue preclusion] will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.' *Syllabus Point 1, State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)." *Syllabus point 1, Haba v. The Big Arm Bar and Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996).

5. Grievant's claims of harassment and hostile work environment were previously fully litigated, successfully, by Grievant in *McBride v. Division of Juvenile Services*, Docket No. 05-DJS-205D (July 28, 2005), and is now barred by the doctrines of *res judicata* and collateral estoppel. 6. 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).

7. 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).

8. As to Grievant's claim that she did not receive a promised raise in August 2004, the grievance is untimely.

For the foregoing reasons, 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 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.

November 23, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

McBride v. Division of Juvenile Services, Docket No. 05-DJS-205D (July 28, 2005).

Footnote: 2

156 C.S.R. 1 § 4.21 (2004).

Footnote: 3

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).

Footnote: 4

Syl. pt. 1, Haba v. The Big Arm Bar and Grill, Inc., 196 W. Va. 129, 468 S.E.2d 915 (1996).

Footnote: 5

McBride, supra.

Footnote: 6

W. Va. Code § 29-6A-7(e).

Footnote: 7

W. Va. Code § 29-6A-1.