THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CHARLES FORTNEY,

Grievant,

v. **Docket No. 06-30-170**

Denise M. Spatafore

Administrative Law Judge

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Charles Fortney ("Grievant") initiated this proceeding on March 28, 2006, seeking posting of a Physical Education teacher position at the new Mylan Park Elementary School. After denials at the lower levels, Grievant appealed to level four on May 24, 2006. After a level four hearing was scheduled, the parties elected to submit this matter for a decision based upon the record developed below. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on October 2, 2006. (See footnote 1)

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by the Respondent as a Physical Education teacher for 5½ years. His certification is Physical Education, K-12. 2. During the 2005-2006 school year, Grievant was assigned to three different schools, equating to a full-time position. Those schools were Westover Elementary, Suncrest Elementary and Riverside Elementary.

3. Respondent is currently constructing two new elementary schools, which are predicted to open in January of 2007. The two new schools will be Sky View Elementary and Mylan Park Elementary.

4. Due to the construction of the new schools, the following schools will close: Riverside Elementary, Westover Elementary, Arnettsville Elementary, Waitman Barb Elementary, and Cass Elementary.

5. Because of the anticipated school closures, Grievant was placed on the transfer list in the spring of 2006. For the current school year, he is assigned to a full-time Physical Education position at Mountainview Elementary.

6. During the 2005-2006 school year, Respondent posted positions for the two new consolidated schools. Those postings stated that, pursuant to a vote of school personnel, all employees of the closed schools would receive priority in filling positions.

7. A Physical Education teacher position was posted for Sky View Elementary, but not for Mylan Park. Grievant bid upon, but was not the successful applicant for, the Sky View position. (See footnote 2)

8. Since 1981, Respondent has contracted with West Virginia University ("WVU") to provide a physical education program to its school system. For the past 14 years, the program has been located at Cass Elementary. 9. Respondent anticipates continuing the WVU program at Mylan Park Elementary after Cass Elementary closes; this is why no Physical Education position was posted for the new school.

10. In August of 2003, Grievant filed a grievance alleging that Respondent violated the statutory posting requirements for vacant positions when it did not post a Physical Education position at Cass Elementary School, and provided those services through the WVU contract.

11. In a decision dated March 8, 2004, this Grievance Board ruled that the WVU contracted position was an exception to the statutory posting requirements, and the grievance was denied. (See footnote 3) That decision was affirmed by the Kanawha County Circuit Court in *Fortney v. Board of Education*, Civil Action No. 04-AA-38 (Sept. 8, 2004).

12. Grievant's "statement of grievance" in this case reads: "The Monongalia County Board of Education posted positions for Mylan Park School for the 2006-07 school year. Although there is a full time Physical Education position at the school, the position was not posted. Violation of WV Code

§ 18A-4-7a."

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). *See* W. Va. Code § 18-29-6. In this case, Respondent argues that the doctrine of *res judicata* bars Grievant's claim, in that he has previously grieved the issue of whether or not the WVU position should be posted, and he has received a final adjudication on the merits of that issue. 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 v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003); *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). Before the prosecution of a lawsuit may be barred on the basis of *res judicata* , three elements must be satisfied. (See footnote 4)

> 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.

Grievant's response to this allegation is that, while he is, indeed, contesting the failure to post the same position as in his prior grievance, he is currently asserting a specific challenge based upon his alleged rights pursuant to W. Va. Code § 18A-4-8f. That statuteprovides for priority for employees of closed schools when positions are filled at new, consolidated schools, pursuant to a majority vote of

classroom teachers. Nevertheless, the fact remains that, despite Grievant's new legal theory, he is challenging Respondent's authority not to post the WVU contracted position, regardless of its location. In order to decide that issue, the undersigned would be compelled to review the same facts and law which were presented in Grievant's prior challenge to the failure to post that position. Once moved to the new Mylan Park school, that position continues to be a position that is exempted from the statutory posting and filling requirements, as decided previously by this Grievance Board and affirmed by the Circuit Court. Therefore, this grievance is barred by *res judicata*.

The following conclusions of law support this decision.

Conclusions of Law

1. Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). *See* W. Va. Code § 18-29-6.

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 v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003); *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. Grievant's claim is barred by the doctrine of *res judicata*, because the exact same issue was previously litigated in *Fortney v. Monongalia County Board of Education*, Docket No. 03-30-349 (March 8, 2004).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 25, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented throughout this grievance by Mary Snelson of the West Virginia Education Association, and Respondent was represented by counsel, Harry M. Rubenstein.

Footnote: 2

Apparently, Grievant did not grieve or object to not receiving that position.

Footnote: 3

Fortney v. Monongalia County Board of Education, Docket No. 03-30-349 (March 8, 2004).

Footnote: 4

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).