DONNA THOMASCHEK,

Grievant,

v. Docket No. 05-HE-437

FAIRMONT STATE UNIVERSITY,

Respondent.

D E C I S I O N

Donna Thomaschek ("Grievant"), employed by Fairmont State University ("FSU") as Campus Service Worker, filed a level one grievance on September 19, 2005, in which she alleged that contract workers were being improperly employed. For relief, Grievant requested that all positions be posted, that shift assignments be awarded based on seniority, and that overtime be awarded on a rotating basis. Grievant's immediate supervisor lacked authority to grant the relief at level one. The parties agreed to bypass level two. Following an evidentiary hearing, the grievance was denied at level three, and appeal was made to level four on December 8, 2005. At level four, Grievant, represented by John D. Grossklaus, Business Manager of Laborers Local 814, and FSU representative Elaine L. Skorich, Assistant Attorney General, agreed to submit the grievance for decision based on the level three record. The matter became mature for decision on February 10, 2006, the due date for filing proposed findings of fact and conclusions of law. (See footnote 1)

The following facts have been derived from a preponderance of the evidence made part of the level three record.

Findings of Fact

1. Grievant has been employed by FSU as a Campus Service Worker for approximately thirteen years. 2. Beginning in January 2005, FSU engaged contract workers to perform housekeeping duties previously assigned to Grievant, who was subsequently transferred to the afternoon shift at the Recreational Center. (See footnote 2)

3. Grievant and a co-worker filed a grievance asserting that the employment of contract workers was in violation of statutory provisions and policies. This grievance was denied at level four by decision dated May 24, 2005. *See Holley and Thomaschek v. Fairmont State*

Univ., **Docket No. 05-HE-101 (May 24, 2005). The decision was not appealed to a circuit court for review.**

4. Although the grievance was denied at level three by FSU President Daniel Bradley, certain measures of relief were to be afforded. Specifically, FSU employees who do not have computer terminals readily accessible are to be given instruction as to where and how to review online job advertisements, and are to be offered the opportunity to accept overtime assignments before the contract employees.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance 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); ***Howell v. W. Va. Dep't of Health & Human Res*****., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.** ***See also 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). "The preponderance standard generally requires proof that a reasonable person wouldaccept as sufficient that a contested fact is more likely true than not."** ***Leichliter v. W. Va. Dep't of Health & Human Res.*****, Docket No. 92-HHR-486 (May 17, 1993).**

FSU argues that because the issue of outsourcing has previously been litigated by Grievant, she is barred from pursing the matter a second time by the doctrine of ***res judicata.*** **Grievant offered no response to this argument. 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). Grievant has fully litigated the issues of whether services may be outsourced, and her shift change. A level four decision determined that FSU did not act improperly regarding either matter, and Grievant is barred from relitigating those issues.**

Because FSU has agreed to provide instruction to employees in the use of the online posting procedure, and to award overtime to state employees before contract employees, it appears there are no additional issues to be addressed.

In addition to the foregoing findings of fact and discussion, the following formal

conclusions of law are appropriate.

Conclusions of Law

1. The 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). 2. The issues of outsourcing services to contract employees and Grievant's shift change may not be relitigated because they were addressed in the level four decision *Holley and Thomaschek v. Fairmont State University,* Docket No. 05-HE-101 (May 24, 2005).

Accordingly, the grievance is 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." Any 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: MARCH 30, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievant elected not to file proposals.***

Footnote: 2

[2]Other services FSU and other institutions of higher education outsource includes the bookstore, food service, and pest control.