WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

SAMUEL DECAPIO and

SHELDON BEAUTY,

Grievants,

v. **Docket No. 06-DOH-329**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DISMISSAL ORDER

Grievants initiated this grievance on November 9, 2005, alleging unfairness in the payment of overtime by Respondent Division of Highways ("DOH"). After denials at the lower levels, this matter was appealed to level four on September 28, 2006. Respondent filed a Motion to Dismiss on the basis of *res judicata* on October 19, 2006. Grievants were provided an opportunity to respond to this motion, and they filed a responsive document on October 26, 2006. (See footnote 1) Grievants represented themselves in this grievance, and DOH was represented by counsel, Barbara L. Baxter.

The following material facts are undisputed:

Findings of Fact

1. On April 24, 2003, Grievants filed a level one grievance, which contained the following

statement of grievance:

> The state is unfair, unjust and discriminatory in their payment of overtime. I am subordinate to the Transportation Engineering Technologist and I report to the person in this position, who receives time and one-half for everything over forty (40) hours.
>
> Relief sought: I am requesting compensation at the rate of time and one-half for everything over 40 hours. I am also requesting to receive retroactive pay at the rate of time and one-half for all hours worked overtime from 1-1-02 until this grievance is settled.

2. The above-described grievance (hereinafter referred to as *DeCapio 1)* was denied at level four on the basis that Grievants' jobs were included within the administrative and executive exemptions of the Fair Labor Standards Act and not entitled to overtime pay. *See DeCapio/Beauty v. Div. of Highways*, Docket No. 03-DOH-357 (Mar. 11, 2004).

3. At the time they filed *DeCapio 1*, Grievants were employed as Highway Administrator 2s in Brooke and Hancock Counties, and their supervisor was a Transportation Engineering Technologist.

4. On November 9, 2005, Grievants filed the current grievance, alleging:

> The state is unfair, unjust and discriminatory in their payment of overtime. I am subordinate to the Transportation Engineering Technologist and I report to the person in this position, who receives time and one-half for everything over forty (40) hours.
>
> Relief sought: I am requesting compensation at the rate of time and one-half for everything over 40 hours. I am also requesting to receive retroactive pay at the rate of time and one-half for all hours worked overtime from11/02 until this grievance is settled.

5. Grievants' job titles and the title of their immediate supervisor have not changed since *DeCapio 1*.

6. In *DeCapio 1*, Grievants presented evidence and argument to the effect that they should not be exempt from receiving overtime pay, because their direct supervisor was allowed to receive overtime pay.

7. At the level three hearing in the instant matter, Grievants once again compared themselves to their supervisor and others, in support of their allegation that their positions should be eligible for overtime pay.

Discussion

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 2)

> 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.

All of the above criteria have been met in this case. While Grievants have argued that circumstances have changed, in that they are all now “grouped” as a district, rather than being divided by counties, there is no evidence that Grievant's title or duties, or their supervisor's title or duties, have changed in any substantial manner. Grievants continue to argue that their positions, which have remained the same since the prior grievance was filed, should be eligible for overtime pay. That issue was decided in *DeCapio 1* and cannot be relitigated here.

The following conclusions of law support this decision.

Conclusions of Law

1. 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). 2. The exact issue presented here was fully litigated by the parties hereto, and a final decision was issued in *DeCapio/Beauty v. Div. of Highways*, Docket No. 03-DOH- 357 (Mar. 11, 2004), which is binding upon the parties.

Accordingly, this grievance is **DISMISSED.**

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: November 15, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although not requested to do so, both parties filed further responsive pleadings on October 31 and November 3, 2006, respectively.

Footnote: 2

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).