THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANTHONY MARASCIO, JR., and

ROBERT W. DEVAUL,

Grievants,

v. **Docket No. 06-DOH-207**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Anthony Marascio, Jr., and Robert W. DeVaul ("Grievants"), filed individual level one grievances on or about July 18, 2003, in which they alleged

I was improperly transferred and assigned duties outside of my former classification. My former position was reallocated to which I was not advised of my appeal rights or advised of my right to personally appear before the Director of Personnel to seek reconsideration of the reallocation action in accordance with the Administrative Rule West Virginia Division of Personnel. Failure to being [sic] properly advised of my appeal rights and the opportunity to appear before the Director of Personnel denied me the opportunity to seek reconsideration of the reallocation action.

For relief, Grievants requested "[t]o be reinstated to my previously held pay grade and to receive back pay and other entitlements to August 1, 2001. To be awarded appropriate retirement adjustment with reinstatement and to otherwise be made whole." The grievances were denied at levels one and two, and appeals were filed at level three on September 8 and 23, 2003. The grievances were consolidated, and after continuances for good cause, a hearing was conducted on December 20, 2005, and March 7, 2006. A level three decision denying the grievance was issued on June 8, 2006.

A claim of default at level three was filed by Grievants on June 15, 2006, and denied by Order dated August21, 2006. After an appeal of the Order was dismissed by the Circuit Court of Marion County, the grievance was returned to level four. DOH counsel Barbara Baxter filed a Motion to Dismiss, asserting that further consideration of the grievance is barred by *res judicata.* Grievants filed a written response on February 9, 2007, and a hearing on the Motion was held on February 20, 2007, in the Grievance Board's Westover office. Grievants appeared in person and represented themselves. Ms. Baxter appeared by telephone. At the close of the hearing, the parties waived the right to file proposed findings of fact and conclusions of law, and the issue is mature for decision. The following findings of fact are derived from the evidence offered during the Motion hearing, and from prior decisions issued regarding this issue.

Findings of Fact

1. Grievant Anthony Marascio, Jr., was first employed by DOH on October 1, 1998, as a Highway District Assistant Administrator.

2. Grievant Robert DeVaul was employed by DOH on December 22, 1997, as a Highway District Administrator.

3. In August 2001, a reorganization of DOH was implemented. As a result of the reorganization, the position classifications held by both Grievants were eliminated. Grievants accepted offers of alternative employment from DOH which resulted in a demotion in both title and salary. Grievant Marascio accepted a position of Inspector, while Grievant DeVaul accepted a position of Transportation Services Manager 2.

4. The reassignments were made through the process referred to as reallocation.

5. On August 29, 2001, Grievants and other DOH employees filed a grievance directly to level four alleging that their removal from their administrative positions and the resulting demotions, with loss of pay, reallocations, and/or transfers was arbitrary and capricious, that the notice they received prior to the change was insufficient, and that the Division of Personnel's ("DOP") Rules were not followed.

6. Noting some confusion arising from the cross-usage of the terms demotion, reallocation, and transfer, the Administrative Law Judge found that the personnel transaction had been properly completed, and the grievance was denied at level four. *Antolini, et al. v. Dep't of Transp./Div. of Highways and Div. of Personnel*, Docket No. 01- DOH-471 (Aug. 30, 2002).

7. The level four decision was affirmed on appeal to the Wood County Circuit Court, and by the West Virginia Supreme Court of Appeals in *Reese, et al. v. West Virginia Department of Transportation/Division of Highways and West Virginia Department of Administration/Division of Personnel*, 217 W. Va. 428, 618 S.E.2d 437 (2005).

8. Grievant Marascio again raised the issue of his demotion in a grievance filed on March 27, 2006. At level four, the Chief Administrative Law Judge determined that Grievant was precluded by *res judicata* from asserting any wrongdoing in a matter which had been fully litigated. *Marascio v. Dep't of Transp./Div. of Highways*, Docket No. 06- DOH-111 (Feb. 16, 2007).

Synopsis

Respondent argues that consideration of this grievance is barred by the doctrine of *res judicata*. Counsel asserts that this grievance is identical in every material aspect to *Antolini/Reese* , and therefore, Grievants have already had a full and fair opportunity to litigate the issues, which were in fact litigated. Grievants assert that the present matter differs from *Antolini*, which addressed the issue of transfer. Grievants now wish to assert that the 2001 personnel transaction was in violation of the Division of Personnel Rule which allows an employee the opportunity to address the director prior to a reallocation of his position. (See footnote 1) Grievants argue the reallocation was invalid because they were denied theopportunity to persuade the director to veto the proposed reallocation. Because the grievance, relief sought, parties, and setting are the same as in *Antolini*, further consideration is barred by *res judicata*.

Discussion

The maxim of *res judicata* is a well-established legal doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes "an absolute bar to a subsequent action involving the same claim, demand or cause of action." *Black's Law Dictionary* 678 (Abridged 5th Ed. 1983). *See Meeks v. Kanawha County Bd. of Educ*., Docket No. 96-20-095, (Feb. 28, 1997); *Woodall v. W. Va. Dep't of Transp*., Docket No. 93-DOH-393 (Feb. 2, 1994); *Ramsey v. W. Va. Dep't of Health & Human Serv*., Docket No. 90-H-478 (July 31, 1991).

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). 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).

All of the above criteria have been met in this case. Grievants were parties in the *Antolini* grievance which contested the personnel change. The issue was completely and fully adjudicated upon review by the West Virginia Supreme Court of Appeals. The distinction which Grievants now attempt to litigate was addressed in *Antolini* which noted that several terms apply to the personnel change at issue. The DOP Administrative Rule defines the relevant terms as follows:

Demotion: A change in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification.

Reallocation: Reassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position.

Transfer: The movement of an employee to a different subdivision or geographic location of the same or a different agency.

As stated in *Antolini*, a demotion can be a transfer and a reallocation. A person whose position is reallocated can be transferred, and if the duties of the position were changed to result in a decrease in responsibilities, then this reallocation could be a demotion. But the key issue is that Grievants were

demoted. This is the essential wordthat must be utilized, and the main piece of data Grievants needed to know, as demotion affected their pay grade and status. They were informed the action was a demotion, and they received this information along with notice of their right to file a grievance. To implement the demotion, Grievants' positions were reallocated, *i.e.,* assigned different duties and responsibilities to fit the new classification they were assigned. The reallocation was an integral part of the demotion, *i.e.,* there could have been no demotion without the reallocation. Their only alternative was to accept the demotion, and have their positions reallocated, or be terminated. This entire process has been reviewed by the State's highest Court which held

We affirm the circuit court's conclusion that the appellees provided the appellants with sufficient notice of the adverse employment actions. This notice received by the appellees was repeated, specific, and occurred over a substantial period of time, thus satisfying due process.

Reese, et al., supra.

Grievants' former classifications were eliminated, they cannot reclaim them. They were provided all the due process to which they were entitled regarding their demotion and the reallocation of their positions, and further consideration of this issue is barred by *res judicata.*

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law in support of 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. JeffersonCounty 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).

2. The exact issue presented here was fully litigated by the parties hereto, and a final decision was issued in *Reese, supra,* 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: MARCH 12, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.DOP Administrative Rule 4.7 provides: Position Reallocation - Whenever substantial changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. The incumbent or the appointing authority may seek areconsideration of the allocation action by submitting a written request to the Director within ten (10) calendar days of the effective date of the action.