THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

RUSSELL POWELL,

Grievant,

v. **Docket No. 06-CORR-308**

Sue Keller

Senior Administrative Law Judge

DIVISION OF CORRECTIONS and

DIVISION OF PERSONNEL,

Respondents.

D I S M I S S A L O R D E R

Russell Powell ("Grievant"), employed by the Division of Corrections ("DOC") as a correctional officer, filed a level one grievance on August 4, 2006, alleging that he had been denied veterans preference points on a promotion application in violation of *W. Va. Code* § 6-13-1. For relief, Grievant requested reinstatement of the preference points for an examination he completed in June 2006, a stay of any promotion pursuant to the examination, a re-interview of the applicants based on Grievant's revised score, and instatement to the position of Lieutenant. The grievance was denied at all lower levels prior to a level four appeal being filed on September 13, 2006. A pre-hearing conference call was conducted with Stephen Pope, Grievant's representative, DOC counsel Charles Houdyschell, Assistant Attorney General, and DOP counsel Karen O'Sullivan Thornton, Assistant Attorney General, on October 12, 2006. At that time, the parties requested a delay in scheduling the hearing until December 2006, to allow an opportunity to conduct discovery. DOC filed a "Motion To Dismiss" under cover letter dated November 29, 2006. Grievant responded on December 11 and 14, 2006, at which time the Motion became mature for a ruling. The following facts essential to this matter are undisputed.

Findings of Fact

1. Grievant is employed at the Northern Correctional Center ("NCC") as a Correctional Officer 3 ("Corporal"). Grievant is also a veteran of the United States military.

2. On or about May 9, 2006, DOC posted a position vacancy for Correctional Officer 5 ("Lieutenant").

3. Pursuant to DOC Policy Directive 132.02, following the written test an interview board reviewed those applicants who scored 70 or higher. Points were allocated for years of service, college education, the test score, supervisor's recommendation, interview, and written exercise.

4. Pursuant to statute and the DOP Administrative Rule, Section 3..99(d)(3.100), which provides that "[a]n additional 5 points [are] added to the final passing score on an open competitive examination of any veteran as defined by this rule."

5. The DOP Administrative Rule essentially restates the provision of *W. Va. Code* § 6-13-1, which states: "[f]or positions in any agency as defined in section four, article one, chapter five-f of this code or any other political subdivision of this state in which positions are filled under civil service or any job classification system, a preference of five points in addition to the regular numerical score received on examination shall be awarded to all veterans having qualified for appointment by making a minimum passing grade." 6. These points are not applied to promotional examinations.

7. At the conclusion of the review process, Grievant received a total of 194 points, while the successful applicant received 248.67 points.

8. Grievant has raised this issue in a prior grievance.

Discussion

DOC argues that this grievance must be dismissed because Grievant cannot show that the outcome would be different even if he had been awarded the preference points, therefore, the requested relief is in the nature of an advisory opinion which the Grievance Board does not issue. DOC further noted that the merits of this case had been previously addressed by the Grievance Board in *Chamberlain v. Division of Corrections*, Docket No. 99-CORR-250(Oct. 18, 1999), which was applied in Grievant's previous level four decision, *Powell v. Division of Corrections/Northern Correctional Facility*, Docket No. 06-CORR-102 (July 7, 2006) (hereafter referred to as *Powell I*).

Contrary to the requested relief stated on the grievance form, Grievant's representative replied to the Motion To Dismiss stating that, "[t]he actual promotion of the Grievant to the position he sought is not at issue here or is the ability of the Grievant to ultimately obtain that position." Rather, he asserts

that the issue herein is “whether DOC's and Department of Personnel policy of not permitting the use of points during promotional examinations is in contravention of or in direct violation of West Virginia Statute § 6-13-1.” This statement confirms that Grievant is indeed seeking an advisory opinion as to the validity of a policy and/or practice. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

Although not addressed by DOC, consideration of yet another grievance filed by Grievant seeking application of preference points is barred by the doctrine of *res judicata*. In *Powell I*, the Administrative Law Judge noted Grievant's claim that DOC's policy violatesthe cited statutory provision had previously been denied in *Chamberlain*, *supra*, and reiterated that a veteran has no statutory or regulatory right to preference rights after he has become a state employee and is a candidate for promotion. Grievant did not appeal this decision to circuit court for review.

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.

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. While Grievant argues that this claim differs because he is not seeking a change in position, he continue to argue that he should be eligible for preference points every time he applies for a promotion. That issuewas decided in *Powell I* and cannot be relitigated here.

The following conclusions of law support this decision.

Conclusions of Law

1. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR- 104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

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).

3. The exact issue presented here was fully litigated by the parties hereto, and a final decision was issued in *Powell v. Division of Corrections/Northern Correctional Facility,* Docket No. 06-CORR-102 (July 7, 2006), which is binding upon the parties. Accordingly, the Motion To Dismiss is **GRANTED**.

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: JANUARY 30, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE