THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER PRESTON,

Grievant,

v. **Docket No. 07-DOH-098**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

and

DIVISION OF PERSONNEL,

Respondents.

DISMISSAL ORDER

Christopher Preston ("Grievant") employed by the Division of Highways ("DOH") as an engineer, filed a level one grievance on November 8, 2006, in which he alleged that "the WV Division of Personnel is misapplying the Pay Plan Implementation Policy and the West Virginia Administrative Rule Division of Personnel Chapter 29-6-10 Series I . . . ." Specifically, Grievant cites to an employee with two years of service who was reallocated from Highway Engineer Trainee to Engineer in Training II, and received a ten percent salary increase, instead of the five percent increase Grievant believes was correct. For relief, Grievant requests that the Division of Personnel ("DOP") review all salary increases given since the date of his employment, January 6, 1997. The review is to be completed by a committee of at least nine, current, full-time employees, including Grievant. Any raises found to violate the Policy or Administrative Rule, must be removed from that employee's salary immediately. This committee must also review all future salary increases to ensure compliance. The requested relief could not be granted at level one or level two. At level three, DOH filed a "Motion To Dismiss" the grievance, which was subsequently granted on the basis of *res judicata*. Grievant appealed to level four on April 5, 2007. DOH, represented by Barbara L. Baxter, Esq., and DOP, represented by Karen O. Thornton, Esq., Assistant Attorney General, renewed the

"Motion To Dismiss." Grievant, acting *pro se*, responded on July 11, 2007, at which time the matter became mature for decision.

The following facts have been derived from the documentation provided by the parties, and the level four decision issued in the matter of *Preston v. Department of Transportation/Division of Highways and Division of Personnel*, Docket No. 05-DOH-199 (Oct. 12, 2006) (*Preston I*).

Findings of Fact

1. Grievant has been employed by DOH for approximately nine years, and presently holds the classification of Highway Engineer 3, assigned to the Materials Division. Grievant previously held the classifications of Highway Engineer Trainee and Engineer In Training.

2. On November 15, 2004, Grievant filed a level one grievance in which he alleged discrimination and favoritism determined salary adjustments made as a result of reallocation within DOH. Specifically, Grievant asserted that some individuals received greater percentage increases than he, and were subsequently earning more.

3. Grievant pursued this grievance to level four where it was denied by decision dated October 12, 2006. That decision is now on appeal in the Kanawha County Circuit Court.

Discussion

Respondent's argue that the present grievance should be dismissed, citing the doctrine of *res judicata, i.e.,* as it is essentially the same as the grievance he filed in 2005. In the alternative, Respondents argue that even if the claim refers to other employees, Grievant has no standing. Grievant asserts that *res judicata* does not apply because there has been no final adjudication on the merits of the prior grievance, and the present grievance differs from the 2005 grievance because the evidence was disallowed in that matter. Grievant asserts that he does have standing since he has been personally harmed. Grievant's arguments are both in error.

The preclusion doctrine of *res judicata* may be applied 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 Med. 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). Again, Grievant argues that the present grievance does not involve his own salary increases, but rather focuses on the increases received by other employees when they were reallocated. Grievant claims “that the WVDOH and WVDOP have given certain employees raises that violate the Pay Plan Implementation Policy.” These allegedly improper raises were likely those to which Grievant referred in his prior grievance in which charged DOH and DOP with favoritism and discrimination. Grievant's perception that he has somehow fallen behind other employees is misdirected, and the only matter of concern is whether he has received the appropriate salary advancements. That issue was fully addressed in *Preston I,* and may not be relitigated in the present grievance. However, to the extent that this may be viewed as a different claim, it must be determined whether Grievant has standing to pursue the issue of whether other employees have received salary increases in excess of the Policy.

“Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ*., Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ*., Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ*., Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp*., Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth*., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It isnecessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the

basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue a grievance. *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990).

Grievant asserts that he has suffered an injury-in-fact, in that similarly situated employees have received illegal raises and now have a higher compensation which is unattainable for Grievant. Grievant states that he has simply “fallen behind these employees in pay compensation.” This argument of personal harm is contradictory to Grievant's response regarding *res judicata* in that it reveals his motivation for filing this grievance is continued frustration that some of his coworkers earn higher salaries. *Preston I*, determined that Grievant had not suffered personal harm, and is being compensated correctly. There are occasions when mistakes in an employee's salary occur, and they should be corrected as soon as practical; however, if any such mistakes have been made, Grievant has suffered no harm as a result. Grievant has no standing to challenge the salaries of coworkers.

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

Conclusions of Law

1. The preclusion doctrine of *res judicata* may be applied 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).

2. 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 Med. 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).

3. To the extent that Grievant claims to have suffered personal injury, the grievance is barred by *res judicata*, in that there has been a final administrative adjudication of this issue, involving the same parties, and same complaint relating to the Pay Plan Implementation Policy.

4. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ*., Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ*., Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is nocognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ*., Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp*., Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth*., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979).

5. Because any errors in calculating another employee's salary has had no adverse effect on whether Grievant is being properly compensated, Grievant has suffered no harm, and lacks standing to pursue this grievance.

Accordingly, the Motion To Dismiss is **GRANTED**, and the grievance ORDERED stricken from the docket of the Grievance Board.

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)(*but see Executive Order No. 2-07*, May 8, 2007). 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: AUGUST 13, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE