THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SAMUEL DECAPIO and
SHELDON BEAUTY,
Grievants,

v. **DOCKET NO. 06-DOH-329R**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

RULING ON ISSUES ON REMAND

This matter is before the undersigned Administrative Law Judge on remand from the Circuit Court of Hancock County, by Order dated June 19, 2008. This grievance was filed on November 9, 2005. The statement of grievance reads: "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." A Dismissal Order was issued by Administrative Law Judge Denise M. Spatafore on November 15, 2006, dismissing this grievance on the grounds that the grievance was precluded by the doctrine of *res judicata*. The Administrative Law Judge found that the Grievants had already litigated the issue of whether they were exempt from overtime pay in *DeCapio/Beauty v. Division of Highways*, Docket No. 03-DOH-357 (Mar. 11, 2004). In that Decision, the Administrative Law Judge had concluded that the Grievants "were included within the administrative and executive

exemptions of the Fair Labor Standards Act and not entitled to overtime pay." Grievants appealed the Dismissal Order, and the remand followed.

The Circuit Court, apparently concerned that *pro se* Grievants may not have been given the opportunity to fully develop the evidence, remanded this grievance "for further evidentiary proceedings to determine whether either of the two exceptions [to the doctrine of *res judicata*] discussed [in the Order] should prevent application of *res judicata* to the instant grievance." The Court first Ordered "further proceedings in order to permit the parties to make an evidentiary record with respect to the impact, if any, that the [Division of Highways'] reorganization had on [the Grievants'] job responsibilities. After hearing the evidence, the agency shall determine whether the DOH reorganization resulted in a change of job classification, duties, or responsibilities that would constitute a change of circumstances such that *res judicata* should not apply."

The second area Ordered to be addressed was the assertion by Grievants that "some of the witnesses who testified in the first grievance proceeding had either been mistaken in their testimony or tried to conceal relevant information. The [Grievants] further assert that this conduct hindered their ability to prevail on their grievance." The Court Ordered that evidence be taken "on the issue of whether any conduct on the part of any witnesses associated with the DOH prevented fair litigation of the issues during the first grievance proceeding. Upon hearing the evidence, the agency shall determine whether any fraud, mistake, concealment, or misrepresentation took place such that it should preclude the application of *res judicata* to this second grievance."

In accordance with the Order of the Circuit Court, a level four hearing[1] was held before the undersigned Administrative Law Judge on March 10, 2009, for the purpose of taking evidence on the two issues identified by the Circuit Court. Grievants were represented by Lawrence L. Manypenny, Esq., Manypenny & Carey, and Respondent was represented by Barbara Baxter, Esq., Legal Division. Grievant DeCapio appeared by telephone and offered testimony, but Grievant Beauty did not appear at the hearing. The parties represented that the Circuit Court had retained jurisdiction of this matter[2], and that the undersigned should make a recommendation to the Court solely on the two issues identified by the Court. This matter became mature for consideration on November 6, 2009, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

The following findings of fact are properly made based upon the record developed at the level four hearing before the undersigned.

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[1] In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. *W. Va. Code* §§ 18-29-1 to 18-29-11 and *W. Va. Code* §§ 29-6A-1 to 29-6A-12 were repealed and replaced by *W. Va. Code* §§ 6C-2-1 to 6C-2-7 and *W. Va. Code* §§ 6C-3-1 to 6C-3-6 (2007). Under the former procedure, there were four levels to the grievance procedure, with the Grievance Board being the fourth level. The current procedure has three levels, with the Grievance Board being the third level. This grievance is being decided under the former statutes, *W. Va. Code* §§ 18-29-1 to 18-29-11, for education employees, and *W. Va. Code* §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See Executive Order No. 2-07*, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

[2] The case style in the Circuit Court of Hancock County is *DeCapio/Beauty v. W. Va. Dep't of Transp., Div. of Highways,* Case No. 06-AA-6.

Findings of Fact

1. Grievant DeCapio is employed by the Division of Highways ("DOH") as a Highway Administrator 2 in Hancock County.

2. Grievant Beauty retired on June 15, 2007. Prior to his retirement he was employed by DOH as a Highway Administrator 2 in Brooke County.

3. In November 2005, a reorganization occurred within DOH.

4. The 2005 reorganization changed the organization number for Grievant DeCapio from 0615 to 0680, and it changed the organization number for Grievant Beauty from 0605 to 0680. This change did not result in a change in Grievants' duties and responsibilities.

5. As a result of the 2005 reorganization, Grievants' names on the organizational chart were moved from the county level to the district maintenance organization. This did not change Grievants' duties and responsibilities.

6. Neither Grievant was transferred to a different headquarters after the change in organization numbers.

7. In 2006, after this grievance was filed, Grievants' titles were changed from County Supervisor to Highway Administrator 2.

8. Donnie Kimble was employed by DOH as a Supervisor 2 until his retirement on July 31, 2007, well after this grievance was filed, and after the level four Dismissal Order was issued.

9. Kathy Sobel was employed by DOH as a Maintenance Assistant until her retirement on June 24, 2005. She had prepared the annual budget for Hancock County for many years. When Ms. Sobel retired, Grievant DeCapio began preparing the budget.

Preparation of the budget for Hancock County had been Grievant DeCapio's responsibility prior to Ms. Sobel's retirement. The record does not reflect how much time Grievant DeCapio spends preparing the annual budget for Hancock County.

10. Sometime between late 2005 and 2007, the new administration at DOH implemented a new procedure for planning work, which is called the Core Maintenance Plan. Implementation of this Plan was not a part of the 2005 reorganization. At the time this grievance was filed in late 2005, this Plan was in the very preliminary phases of implementation. Grievants and other County Highway Administrators are required to prepare and present a six month work plan for approval, with goals for achieving a certain level of work in the three primary areas of maintenance: patching, mowing, and shoulders and ditching. The implementation of the Core Maintenance Plan increased somewhat the amount of paperwork Grievants were required to prepare, particularly in the first year of implementation, but Grievants' duties and responsibilities were not changed. Grievants were required to plan the activities of the employees in their counties both before and after the implementation of the Core Maintenance Plan, and these activities did not change.

11. Jeff Black, Director of DOH's Human Resources Division, worked for several years studying the issue of which DOH employees should receive overtime, and developing a new policy on when overtime should be paid to employees. He did not tell Grievants not to proceed with their grievance.

12. DOH has over 4500 employees, and Mr. Black's office processes thousands of transactions a year.

Discussion

This matter was remanded for a determination as to whether the doctrine of *res judicata* should apply, after consideration of two specific issues. "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.
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> 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."

Decapio/Beauty v. Dep't of Transp., Docket No. 06-DOH-329 (Nov. 15, 2006).

"In cases where the elements for *res judicata* are present, *res judicata* should nonetheless not be applied where a change in circumstances may have altered the rights of the parties:

> The doctrine of *res judicata* does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants.

Syl. pt. 2, *Blethen v West Virginia Dept. Of Revenue/State Tax Dept.*, 219 W. Va. 402, 633 S.E.2d 531 (2006)(per curiam); *quoting* Syllabus, *Huntington Brick & Tile Co. V. Public Service Commission,* 107 W. Va. 569, 149 S.E. 677 (1929)." *DeCapio/Beauty v. W. Va. Dep't of Transp., Div. of Highways,* Case No. 06-AA-6, Cir. Ct. of Hancock County (June 19, 2008.

The two issues placed before the undersigned by the Circuit Court of Hancock County will be addressed below.

<u>Issue Number 1:</u> Did the DOH reorganization result in a change of job classification, duties, or responsibilities that would constitute a change of circumstances such that *res judicata* should not apply?

Grievants pointed to several changes which have occurred at DOH. First, Grievants' organization numbers were changed. Grievants argued that after this changed, they could have been transferred from their counties to any place in the district. Respondent pointed out that it has always had the authority to transfer any employee as necessary in order to best serve the needs of DOH. Grievants argued this change made it easier to transfer them. Whether it did or did not make it easier to transfer Grievants, Grievants were not, in fact, transferred out of their counties, and they did not demonstrate that this change in organization number, or the change in the organization chart affected their duties or responsibilities in any way. At some point after the reorganization, Grievants' titles were also changed, but there is no evidence that this changed their duties or responsibilities.

Grievant DeCapio argued his duties changed when Kathy Sobel retired and he had to prepare the annual budget for Hancock County. First, any change in this area was not

the result of the reorganization. It was the result of Ms. Sobel's retirement. Further, the budget was Grievant's responsibility prior to Ms. Sobel's retirement. He had simply had the luxury of not being involved in this duty, because Ms. Sobel took care of it for him. Finally, no evidence was presented regarding the amount of time it takes Grievant DeCapio to prepare the budget, so that the undersigned would not be able to determine the impact this had on Grievant DeCapio's work situation. No testimony was offered that a similar situation had occurred with respect to Grievant Beauty. This situation does not constitute a change in responsibilities, or a change in circumstances such that *res judicata* should not apply.

Grievant DeCapio argued that his job duties changed when Mr. Kimble retired. He stated he now has no Supervisor 2, and he must perform the duties Mr. Kimble was performing. Whether this is true or not is not relevant to the issues before the undersigned as Mr. Kimble did not retire until mid-2007, well after the grievance was filed, and after the level four Dismissal Order was entered.

Finally, Grievants argued that the new requirement that they prepare a Core Plan resulted in a change in their duties. Although none of the witnesses could pinpoint the date when DOH began using the Core Plan, it appears that it would not have been in place at the time this grievance was filed. Further, the Core Plan at least initially increased the amount of paperwork County Administrators had to prepare, but it did not change their responsibility for planning the work of the county. It was just a new way of doing the same work, put in place by a new administration. Grievants did not indicate how much additional time it took them to complete this paperwork. The undersigned cannot conclude that this requirement changed Grievants' duties or responsibilities.

Grievants did not demonstrate that the DOH reorganization resulted in a change of job classification, duties, or responsibilities that would constitute a change of circumstances such that *res judicata* should not apply.

Issue Number 2: Did any fraud, mistake, concealment, or misrepresentation take place during the first grievance, which prevented fair litigation of the issues such that it should preclude the application of *res judicata* to this second grievance?

Before the issue at hand is addressed, the undersigned will point out that much of the testimony referred to by Grievants in support of their argument that Mr. Black misrepresented or concealed facts was given by Mr. Black at the level three hearing in the *second* grievance, held on July 31, 2006. For example, at page 5 of Grievants' Brief submitted in this matter, Grievants quote Mr. Black as saying in response to a question asked regarding Joe Reed, "I don't know, I really don't know the specifics of his position." As noted in Grievants' Brief, this testimony was given at the July 31, 2006 level three hearing. Likewise, on page 7 of Grievants' Brief, the testimony of Mr. Black regarding a policy being drafted and a classification/wage study, which is described as "clearly misleading," is unquestionably from the July 31, 2006 level three hearing in the *second* grievance. The question before the undersigned is quite clearly related to what occurred during the *first* grievance, not the instant grievance. Mr. Black's testimony at the July 31, 2006 level three hearing cannot be relied upon by Grievants to support their assertions of fraud, mistake, concealment, or misrepresentation during the first grievance, and any arguments made by Grievants which rely on this testimony will not be addressed.

Grievant DeCapio stated that Mr. Black seemed interested in working with him after "the level three hearing" to come up with an agreement on the issues he had with some

employees receiving overtime, and caused him to believe that the issue would be resolved, but then he did nothing. Grievant DeCapio did not make clear whether this was the level three hearing in the first grievance. He further stated that Mr. Black purposefully misled him so he would miss his appeal to level four. However, Grievants did not miss the appeal to level four in either the first or second grievance. Grievant DeCapio then said it must have been that they missed the appeal to the Circuit Court on the first grievance, although, he stated that it was the hearing examiner at level three that had encouraged the parties to try to resolve this issue. Grievant DeCapio did not state that Mr. Black had told Grievants not to file an appeal because they could resolve the situation, nor did he offer into evidence any relevant specific statements by Mr. Black upon which he relied to his detriment.

Mr. Black testified that he knew there were issues regarding who was being paid time and a half across a range of classifications, and there were no clear answers to the problem. He stated it took a long time to study the problem in an effort to resolve the issues, and agreed it might have taken too long. He denied that he purposefully misled the Grievants into believing the issue would be resolved so that they would not appeal to the next level.

It is unclear whether these discussions between Grievants and Mr. Black occurred after the level three hearing in the first grievance or the second grievance, although it appears to the undersigned that they occurred after the level three hearing in the second grievance. Even if they occurred after the level three hearing in the first grievance, Grievants did not demonstrate "any fraud, mistake, concealment, or misrepresentation . . ., which prevented fair litigation of the issues."

Grievant DeCapio also asserted that Mr. Black made misrepresentations at a previous hearing about who was being paid time and a half, because he said he did not know who was being paid time and a half. Grievant DeCapio believed that Mr. Black should have known this information because he has everyone's records.

Mr. Black explained that DOH has over 4500 employees, and his office processes thousands of transactions a year. Obviously, Mr. Black cannot be expected to recall from memory at a hearing the names of all employees of DOH who are being paid time and a half, nor can he be expected to know why any given employee is being paid time and a half, without looking at the records in his office. It is ludicrous to suggest that because Mr. Black did not know the answer to these questions, Mr. Black somehow misrepresented the facts, misled or defrauded Grievants.

The allegations of fraud, mistake, concealment, or misrepresentation were not proven.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "In cases where the elements for *res judicata* are present, *res judicata* should nonetheless not be applied where a change in circumstances may have altered the rights of the parties:

> The doctrine of *res judicata* does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants.

Syl. pt. 2, *Blethen v West Virginia Dept. Of Revenue/State Tax Dept.*, 219 W. Va. 402, 633 S.E.2d 531 (2006)(per curiam); *quoting* Syllabus, *Huntington Brick & Tile Co. V. Public Service Commission,* 107 W. Va. 569, 149 S.E. 677 (1929)." *DeCapio/Beauty v. W. Va.*

Dep't of Transp., Div. of Highways, Case No. 06-AA-6, Cir. Ct. of Hancock County (June 19, 2008.

2. Grievants did not demonstrate that the DOH reorganization resulted in a change of job classification, duties, or responsibilities that would constitute a change of circumstances such that *res judicata* should not apply.

3. Grievants did not demonstrate that any fraud, mistake, concealment, or misrepresentation took place during the first grievance which prevented fair litigation of the issues such that it should preclude the application of *res judicata* to this second grievance.

Accordingly, the undersigned concludes that Grievants have not demonstrated that the exception to the application of the doctrine of *res judicata* set forth above should apply.

Inasmuch as the parties have represented that the Circuit Court of Hancock County retained jurisdiction of this matter, it is not appropriate to include an appeal paragraph explaining the parties' right to appeal these findings. A copy of this Ruling will be supplied to the Circuit Court of Hancock County.

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BRENDA L. GOULD
Administrative Law Judge

Date: December 23, 2009