THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

NORMAN STEPP,
Grievant,

v. **Docket No. 2008-1248-DOT**

DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant, Norman Stepp, is employed by the Division of Highways ("DOH"). He filed this grievance on, or about, August 16, 2007, under the old grievance procedure. His Statement of Grievance asserts he was unfairly demoted, and he avers has been harassed and his civil rights have been violated. The relief sought was to have his disciplinary action rescinded, the harassment to cease, and to be made whole in every way.

This grievance has a long procedural history. It was originally filed under the old grievance procedure. On September 4, 2007, a Level One hearing was scheduled and held. Neither Grievant nor his attorney, Michael T. Clifford, attended. The Grievance Evaluator requested Grievant submit proposed Findings of Fact and Conclusions of Law, but none were received. A Level One decision issued on September 24, 2007, denied the grievance.

Later, the DOH Grievance Evaluator asked Grievant if he wished to be transferred to the new grievance procedure, and on December 17, 2007, Grievant signed the transfer form. The grievance was then transferred to the Grievance Board for Level Two mediation under the new grievance procedure.[1] Several mediations were scheduled and continued.

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[1]In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance

On November 13, 2008, this case was again scheduled for mediation. DOH appeared, but neither Grievant nor his attorney attended. Grievant's attorney was called and given ten days to reschedule the mediation. The Grievance Board was later informed Grievant had filed a complaint with the Kanawha County Circuit Court on December 21, 2007, concerning the same issues raised in this grievance. Grievant's attorney requested this case be placed in abeyance, and this request was granted.

On June 15, 2009, the DOH, through its attorney Timbera C. Wilcox, filed a Motion to Dismiss, noting Grievant's circuit court case had been denied and Summary Judgement granted. *See* Kanawha County Circuit Court, Civil Action No. 07-C-2729. Order (Feb. 19, 2009). No response to this Motion to Dismiss was received from Grievant. On August 10, 2009, the undersigned Administrative Law Judge gave Grievant's attorney until August 24, 2009, to respond. Grievant's attorney was out of town, and his associate requested an extension. This request was granted, and Grievant's attorney was given until September 15, 2009, to respond. No response has been received, and this Motion is now mature for decision.

Synopsis

Respondent's Motion asserts this grievance has been resolved against Grievant at the circuit court level. Grievant has not responded to the Motion. A review of the circuit court's Order clearly reflects that all issues before the undersigned Administrative Law Judge have been resolved at the circuit court level, and this grievance must be DISMISSED from the docket of the Grievance Board.

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). Grievances which were pending prior to July 1, 2007, are 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 unless the parties opted to transfer to the new procedure. *See* Executive Order No. 2-07, May 8, 2007.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant filed this grievance on, or about, August 16, 2007.

2. This grievance was denied at Level One on September 24, 2007.

3. Grievant filed a complaint with the circuit court on December 21, 2007, encompassing the same issues raised by this grievance, as well as other issues. This complaint stated Grievant did not wish to proceed under the grievance procedure. See Number 14.

4. The complaint to circuit court included other issues not addressed in this grievance, including tort-like allegations. Additionally, Grievant requested punitive damages not available from the Grievance Board. *See Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (Mar. 30, 2004).

5. On February 19, 2009, after a scheduled hearing on the Motion for Summary Judgement, Judge James C. Stucky granted the DOH's Motion and resolved all issues against Grievant.

Discussion

When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994).

A review of the opinion of the circuit court clearly establishes that the issues brought forth by this grievance, as well as other issues outside the jurisdiction of this administrative body, have been resolved by that court. As stated in *Olson v. West Virginia University*, Docket No. 95-BOT-081DEF (June 13, 2005), "[t]his Grievance Board is bound by [a] Circuit Court's legal conclusions in this matter as 'the law of the case.'"[2] (*citing Parsons v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 97-DOH-289R (May 6, 1999)). See *Bass v. Kanawha County Bd. of Educ.*, Docket No. 92-20- 214 (Nov. 4, 1994); *Runyon v. Mingo County Bd. of Educ.*, Docket No. 93-29-481 (Apr. 4, 1994). *See also Tressler Coal Mining Co. v. Klefeld*, 108 W. Va. 301, 24 S.E.2d 98 (1943).

As stated by the West Virginia Supreme Court of Appeals in the Syllabus Point of *Lyons v. Grassilli Chemical Company*, 106 W. Va. 518, 146 S.E. 57 (1928), "[t]he Decision of the Court should ordinarily, be adhered to in other actions between the same or different parties growing out of the same cause of action, or a continuance thereof, and involving substantially the same set of facts considered in the decided case, especially where a different ruling would work great injustice to some of the litigants." Further, the West Virginia Supreme Court of Appeals stated in *State ex. rel Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947), "in a pending suit or action, a decision of the appellate court on a question of law once made, becomes the law of the case in future proceedings in a trial court in the same case, or even in a subsequent suit or action on the same cause of action. . . . (citations omitted)." In *Armstrong v. Armstrong*, 201 W. Va. 244, 496 S.E.2d 194,

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[2]The term "Law of the Case" "as generally used, designates the principle that if an appellate court has passed on a legal question and remanded the case to the court for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. Doctrine provides that when appellate court has rendered a decision and states in its opinion a rule of law necessary to decision, that rule is to be followed in all subsequent proceedings on the same action." Black's Law Dictionary 459 (Abr. 5th ed. 1983).

(1997), the West Virginia Supreme Court of Appeals discussed the law of the case doctrine and stated, "[t]he essence of this doctrine is that a court of general jurisdiction, not sitting as an appellate court, may not overrule the decision of another court of general jurisdiction. *See Chesapeake & W.R. Co. v. Washington C. & St. Louis R'y*, 99 Va. 715, 40 S.E. 20, 21 (Va. 1901) ('The proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not sitting in exercise of appellate power.')."

The issues raised by Grievant have been resolved by a court of higher jurisdiction. This Grievance Board has previously determined it "is bound by [a] Circuit Court's legal conclusions . . . as 'the law of the case.'" *Olson, supra, Parsons, supra. See Bass, supra; Runyon, supra*. As such, this Grievance Board does not have the authority or the jurisdiction to overturn a ruling by a circuit court. *See Pack v. Kanawha County Bd. of Educ.*, Docket No. 93-20-483 (June 30, 1994).

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994).

2. "This Grievance Board is bound by [a] Circuit Court's legal conclusions in this matter as 'the law of the case.'" *Olson v. W. Va. Univer.*, Docket No. 95-BOT-081DEF

(June 13, 2005)*, citing Parsons v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 97-DOH-289R (May 6, 1999). *See Bass v. Kanawha County Bd. of Educ.*, Docket No. 92-20- 214 (Nov. 4, 1994); *Runyon v. Mingo County Bd. of Educ.*, Docket No. 93-29-481 (Apr. 4, 1994). *See also Tressler Coal Mining Co. v. Klefeld*, 108 W. Va. 301, 24 S.E.2d 98 (1943).

3. "[I]n a pending suit or action, a decision of the appellate court on a question of law once made, becomes the law of the case in future proceedings in a trial court in the same case, or even in a subsequent suit or action on the same cause of action. . . . (citations omitted)." *State ex. rel Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947).

4. The Respondent has established that the issues raised by Grievant have been resolved by a court of higher jurisdiction. This Grievance Board "is bound by [a] Circuit Court's legal conclusions . . . as 'the law of the case.'" *Olson, supra, Parsons, supra. See Bass, supra; Runyon, supra*. This Grievance Board does not have the authority or the jurisdiction to overturn a ruling by a circuit court. *See Pack v. Kanawha County Bd. of Educ.*, Docket No. 93-20-483 (June 30, 1994).

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: January 22, 2010

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Janis I. Reynolds
Administrative Law Judge