THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ISMAIL S. LATIF,
Grievant,

v. **DOCKET NO. 2011-0923-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

This grievance was filed by Grievant, Ismail S. Latif, on December 23, 2010, against his employer, the Division of Highways. The statement of grievance reads:

> I work in Weston in District 7. I live in Morgantown. Several other WVDOH employees are parking their state vehicles at their domicile or a state facility close to their domicile.[1]

As relief Grievant seeks:

> I should be allowed to park my assigned state vehicle either at my domicile or a state facility close to my domicile like other employees are allowed in the state.

A conference was held at level one on January 10, 2011, and the grievance was denied at that level on February 1, 2011. Grievant appealed to level two on February 16, 2011, and a mediation session was held on April 25, 2011. Grievant appealed to level three on May 5, 2011. A level three hearing was held before the undersigned

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[1] In his proposed Findings of Fact and Conclusions of Law, Grievant asserted for the first time that Respondent "denies me overtime benefit[s], whereas it allows overtime benefit[s] by allowing similarly situated employee[s] to work in evenings and weekends." This is the first time Grievant has raised the issue of denial of overtime, and is a new grievance. This argument will not be addressed by the undersigned.

Administrative Law Judge on September 7, 2011, at the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Krista D. Black, Attorney, Legal Division. This matter became mature for decision on October 11, 2011, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

This is the same grievance filed by Grievant in 2008. A level three decision was issued on that grievance by the Grievance Board on July 8, 2009, and Grievant did not appeal that decision. Grievant was given the opportunity to present evidence at the level three hearing that facts had arisen since his last grievance which have altered his rights. Grievant presented no such evidence. This grievance is barred by the doctrine of *res judicata.*

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as the Traffic Engineer (Highway Engineer 4) in District 7, and is assigned to the District Headquarters in Weston, Lewis County, West Virginia. Grievant is the only Traffic Engineer assigned to District 7.

2. District 7 is comprised of the counties of Lewis, Upshur, Barbour, Braxton, Webster, and Gilmer.

3. Grievant has chosen to reside in Morgantown, Monongalia County, West Virginia, which is in District 4.

4. Grievant is required to report to work at the District 7 Headquarters in Weston each day. The most direct route from Morgantown to Weston is Interstate 79. The first county in District 7 along Interstate 79 south from Morgantown is Lewis.

5. Grievant is assigned a state-owned vehicle which he uses for work purposes. Grievant drives his personal vehicle to Weston each day from his home, a distance of approximately 130 miles round trip.

6. Grievant filed this same grievance in May 2008. A Decision was issued by the Grievance Board denying the grievance on July 8, 2009, Docket Number 2008-1608-DOT.

7. Grievant was made aware by an Order entered by the undersigned on August 31, 2011, that this grievance would be dismissed if he was unable to present evidence at the level three hearing that "facts have arisen since May 27, 2009, [the date of the level three hearing in the previous grievance] which have altered his rights."

8. The Decision issued on July 8, 2009, in the prior grievance found that Grievant's duties are primarily office (District) based. Grievant presented no evidence at the level three hearing in this matter that his duties have changed. Grievant's duties continue to be primarily office (District) based.

9. At the hearing held on May 27, 2009, in the previous grievance, Docket Number 2008-1608-DOT, Grievant presented evidence that Terry Matthews, Don Hall, Sr., and Farid Shoukry are employed by DOH, and are allowed to pool their state-owned vehicles at locations other than their work Headquarters. The level three Decision found that these employees were not similarly situated to Grievant. Grievant presented no evidence that the facts have changed since May 27, 2009, with regard to the

circumstances of these employees to whom Grievant once again pointed in the instant proceeding.

10. Unlike other Districts, District 7 does not have a Technician to assist Grievant, so Grievant performs some duties that a Technician would perform. District 7 has been without a Technician for four or five years, well before the hearing on the prior grievance.

11. Ed Goss is employed by DOH as the Environmental Coordinator at the District 7 Headquarters in Weston. Mr. Goss looks at sites, takes water samples, and does site assessments, and is field-based. He is allowed to pool his state-owned vehicle at the Upshur County Headquarters, located in District 7.

12. Hayes Cutright is employed by DOH at the District 7 Headquarters in Weston. His job is to maintain all the fuel tank facilities in the District, and do well monitoring at the facilities, and is field-based. He is allowed to pool his state-owned vehicle at the Upshur County Headquarters, located in District 7.

13. Patrick Miller is employed by DOH as a Construction Inspector at the District 7 Headquarters in Weston. He is assigned to construction projects, and is field-based. He is allowed to pool his state-owned vehicle at the Jane Lew Fire Department located in District 7.

14. Grievant presented no evidence that Mr. Goss, Mr. Cutright, or Mr. Miller were not allowed to pool their state-owned vehicle at the locations discussed above on May 27, 2009, so as to demonstrate that these facts arose after the level three hearing in the previous grievance, nor did he present any evidence that any of these three employees is office-based. In fact, Grievant did not know whether they were considered to be office-based or field-based.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

This is the very same grievance filed by Grievant in 2008. A Decision was issued by the undersigned on July 8, 2009, denying that grievance. "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).

Grievant was given the opportunity to present evidence that facts have arisen which may have altered his rights since the hearing in May of 2009 on his previous grievance. Grievant presented no such evidence. Grievant presented no evidence that his duties have changed so that he is now a field-based employee, rather than an office-based employee. Under DOH's Vehicle Policy, as discussed in the prior Decision, office-based employees may not pool their state-owned vehicles at a location other than the office.

Just as in the prior grievance, Grievant once again compared himself to Don Hall, Terry Matthews, and Farid Shoukry, arguing discrimination. The prior Decision specifically

found that Grievant was not similarly situated to these three employees, and this issue cannot be revisited again. As to the new evidence presented relating to employees Ed Goss, Hayes Cutright, and Patrick Miller, Grievant first did not demonstrate that facts had arisen with regard to the situations of these employees since the hearing in the previous grievance, which had altered his rights. Accordingly, the doctrine of *res judicata* precludes the consideration of the evidence presented. Moreover, these employees likewise are not similarly situated to Grievant. Their duties are completely different from Grievant's, and they are field-based. As discussed in the prior Decision, the DOH Policy on pooling vehicles specifically differentiates between field-based and office-based employees in its application.

The following Conclusions of Law support the Dismissal of this grievance.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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). *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).

3. 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.
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> 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).

4. "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).

5. This is the very same grievance as was filed by the same grievant against the same respondent in May 2008. A Decision was issued by the Grievance Board on that grievance, and that Decision was not appealed by either party.

6. No facts were presented which would lead to the conclusion that the rights of the litigants may have been altered since the Decision on the earlier filed grievance.

7. The doctrine of *res judicata* precludes the relitigation of this grievance.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: November 1, 2011