THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANIEL LEE FROST,
Grievant,

v. **DOCKET NO. 2010-1564-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

DISMISSAL ORDER

Grievant, Daniel Lee Frost, filed a grievance against his employer, Bluefield State College, on June 4, 2010. The statement of grievance reads:

> Bluefield State College has not adhered to the Board of Governors salary policy #33 by fully funding the salary schedule for fiscal year 2010.

As relief Grievant seeks:

> Full funding of said salary schedule (BOG policy #33) as well as any back pay due to employees because of the time frame it takes to settle disputes.

Grievant filed a default claim on August 20, 2010, and an Order denying the default was issued by the Grievance Board on March 4, 2011. A hearing was held at level one on March 29, 2011, and the grievance was denied at that level on April 15, 2011. Grievant appealed to level two on April 25, 2011, and a mediation session was held on September 19, 2011. Grievant appealed to level three on September 23, 2011. On October 20, 2011, Respondent filed a Motion to Dismiss Based on the Doctrine of Res Judicata. No response to this Motion was filed by Grievant. Grievant is represented by Ben Barkey, West Virginia Education Association, and Respondent is represented by Kristi A.

McWhirter, Assistant Attorney General. This matter was assigned to the undersigned Administrative Law Judge for disposition on December 28, 2011.

Synopsis

This is the same grievance filed by Grievant in 2009. A level three decision was issued on that grievance by the Grievance Board on February 24, 2011, and Grievant did not appeal that decision. This grievance is barred by the doctrine of *res judicata.*

The following Findings of Fact are undisputed, and accepted as true for purposes of ruling on the Motion to Dismiss.

Findings of Fact

1. Grievant is employed by Bluefield State College as a Counselor II.

2. On November 3, 2009, Grievant filed a grievance asserting the following:

> The West Virginia State Legislature, the Higher Education Policy Commission and/or the Bluefield State College Board of Governors has yet to fully fund the Classified Salary Schedule as is found in W.Va. State Code § 18B-9-3 and was promised by the Board of Governors of Bluefield State College through Policy No. 33. Additionally, it is my contention this salary schedule was and still is antiquated before it was ever implemented it is now 10 years old.

The relief sought was:

> Immediate full funding of the salary schedule as was agreed upon by Board of Governors of Bluefield State College through Policy No. 33 and that classified receive the back pay from 01 July 2009 (FY 2010) as that was when Classified was promised the salary schedule would be funded by.

3. A decision was issued by the Grievance Board denying the grievance described in Finding of Fact Number 2, on February 24, 2011. Neither party appealed that decision.

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).

Respondent correctly points out that this is the very same grievance filed by this Grievant in 2009, which was assigned Docket Number 2010-0636-BSC. A Decision was issued by the Grievance Board on February 24, 2011, 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.
>
> 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).

This grievance involves the very same parties and issues as the grievance filed in 2009, and previously ruled on by the Grievance Board. That Decision became final on the parties when it was not appealed within the statutory time period, which has already run. There can be no change in circumstances which would alter the rights of the parties in this case, absent a statutory change. The earlier Grievance Board decision ruling on the issues presented here specifically found that "[n]o violation of Policy 33 has occurred by

Respondent not meeting the goal set for full funding. W.Va. Code § 18B-9-3 is clear - 'absent specific legislative appropriation' there is no statutory "guarantee" to classified employees as to when the salary schedule will be fully funded. *Dunn et al. v. Marshall*, 2009-0983-CONS (February 16, 2010)." *Frost v. Bluefield State College*, Docket No. 2010-0636-BSC (Feb. 24, 2011). Perhaps the undersigned needs to be more clear. There is no requirement that the salary schedule be fully funded. It is a goal, not a statutory requirement. This grievance can be filed every month of the year and the decision by the Grievance Board will be the same. The Grievance Board has no authority to require full funding of the salary schedule. The undersigned would note that when the institution has to expend its limited funds defending frivolous grievances, that leaves less money for funding other necessary services. The filing of the very same grievance over and over would therefore seem to be counterproductive to Grievant's ultimate goal.

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.
>
> 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.

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

4. This is the very same grievance as was filed by the same grievant against the same respondent in 2009. A Decision was issued by the Grievance Board on that grievance, and that Decision became final on the parties when it was not appealed by either party.

5. 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: January 12, 2012