THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JEFFREY BAKER,
Grievant,

v. **Docket No. 2011-1393-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant, Jeffrey Baker, filed a grievance against his employer, Division of Highways, on March 29, 2011. The statement of grievance reads:

> Respondent fraudulently claimed that Grievant was denied light duty because none is available in SRIC.

As relief Grievant seeks:

> To be made whole, including back pay with interest & restored benefits.

A hearing was held at level one on May 12, 2011, and the grievance was denied at that level on June 1, 2011. Grievant appealed to level two on June 3, 2011, and a mediation session was conducted on October 25, 2011. Grievant appealed to level three on November 4, 2011. On March 12, 2012, Respondent filed a Motion to Dismiss based upon the doctrine of *res judicata*. No response to this Motion was filed by Grievant. Grievant is represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent is represented by Robert Miller, Division of Highways' Legal Division. This matter was assigned to the undersigned Administrative Law Judge for disposition on April 2, 2012.

Synopsis

This is the same grievance filed by Grievant in 2009. A level three decision was issued on that grievance by the Grievant Board on January 28, 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 as a Transportation Worker 2 Equipment Operator in the Marion County Maintenance Department with the Division of Highways.

2. On November 2, 2009, Grievant filed a grievance asserting that:

> I was not allowed to return to work on light or modified duty, but other employees have been allowed to return to modified or light duties.
>
> Grievant sought full wages and benefits from November 10, 2008, to February 23, 2009.

3. A Decision was issued by the Grievance Board denying the grievance described in Finding of Fact Number 2 on January 28, 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 2010-0552-DOT. A Decision was issued by the Grievance Board on January 28, 2011. The 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.

"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. PublicService 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. Both grievances are the result of not being allowed to return to work during the 2008-2009 snow removal and ice control season, and Grievant's assertion that he was the victim of discrimination. 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 ths case, absent a statutory change. The earlier Grievance Board decision ruling on the issues presented here specifically found that "Grievant failed to establish that he was the victim of discrimination" based on the evidence submitted at the hearing. This issue was ruled upon in the first grievance and cannot be relitigated here.

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).

2. The 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. This is the same grievance as 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.

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 (2008).

Date: June 12, 2012

Ronald L. Reece
Administrative Law Judge