

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**JACK TURNER,  
Grievant,**

**v.**

**Docket No. 2016-1056-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

**DISMISSAL ORDER**

Grievant, Jack Turner, filed a grievance against his employer, Division of Highways, on December 23, 2015, in which he challenged the nonpayment of tier raise back pay. Grievant seeks to be made whole in every way including payment of back pay with interest. A Level One conference was conducted on August 20, 2015, and the matter was denied by the Level One Grievance Evaluator Sandra Castillo. A Level Two mediation session was conducted on August 26, 2016. A Level Three hearing was scheduled before the undersigned on January 20, 2017; however, a phone conference was conducted on January 17, 2017, to address Respondent's Motion to Dismiss. The Level Three hearing was cancelled pending a ruling to the Motion to Dismiss. Grievant appeared by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Jason Workman, Legal Division. This matter became mature for consideration on the filing date for pleadings addressing the Motion to Dismiss on March 6, 2017.

## **Synopsis**

The issue in this grievance was raised by Grievant in a separate Level One grievance filed in May 2015 and decided at Level One of the grievance procedure on September 11, 2015. Grievant did not appeal that decision. This grievance is barred by the doctrine of *res judicata*.

The following Findings of Fact are based on the record of this case.

## **Findings of Fact**

1. Grievant filed this grievance on December 23, 2015, alleging nonpayment of tier raise back pay.
2. Grievant filed a prior Level One grievance, Docket No. 2015-1261-DOT, involving the same facts on May 8, 2015. The Level One decision, dated September 11, 2015, ruled that Grievant would receive tier pay adjustment and that back pay was not going to be paid. The decision went on to rule that Grievant was tiered properly after an amendment to the tier program, which removed the Class A-Commercial Driver's License requirement for tier 3 placement.
3. Grievant did not appeal the Level One decision.

## **Discussion**

Respondent correctly points out that this is the same grievance filed by this Grievant on May 8, 2015, which was assigned Docket Number 2015-1261-DOT. A decision was issued by the Level One Grievance Evaluator on September 11, 2015. 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.” *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2012-0907-WetED (Mar. 7, 2014). “Before the prosecution of a lawsuit [grievance] 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.” Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

This grievance involves the very same parties and issue as the grievance filed on May 8, 2015, and previously ruled on at Level One. Both grievances are the result of not being awarded back pay in relation to moving from one tier to another based on changes within the new guidelines. Grievant was clearly informed that there would not be back pay in the September 11, 2015, decision. 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 issues were litigated in the prior decision, it is undisputed that Grievant failed to appeal the Level One decision of Docket No. 2015-1261-DOT. 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. 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).

2. "Before the prosecution of a lawsuit [grievance] 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." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

3. This is the same grievance as filed by the same grievant against the same respondent on May 11, 2015. A decision was issued by the Level One Grievance

Evaluator 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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

**Date: March 31, 2017**

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**Ronald L. Reece**  
**Administrative Law Judge**