THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LEAH BRISENDINE and
CHRISTINE PROPPS
Grievants,

v. **Docket No. 2018-0294-CONS**

INSURANCE COMMISSION,
Respondent.

DISMISSAL ORDER

Grievants, Leah Brisendine and Christine Propps, are employed by Respondent, Insurance Commission, in the Credit Analyst 2 classification. They each filed identical grievances dated August 24, 2017. The grievance statement is detailed and alleges that Respondent is guilty of favoritism by seeking reallocations for an Office Assistant 3 while not seeking reallocations for another Office Assistant in the same agency. They also allege Respondent showed favoritism by giving a temporary ten percent salary increase to another Credit Analyst without offering the same opportunity to Grievants. As relief, Grievants seek a ten percent raise for themselves "and other employees in the Revenue Recovery Unit to compensate for favoritism" shown to the two employees.

The grievances were consolidated at level one and an order denying the grievances as not timely filed was issued September 1, 2017. Grievants appealed to level two by form dated September 11, 2017. Respondent filed a Motion to Dismiss dated November 14, 2017 and a mediation was conducted on November 15, 2017. Grievants appealed to level three by form dated November 21, 2017.

Respondent filed a renewed Motion to Dismiss dated January 19, 2018, and Grievants filed a Response to the Motion to Dismiss dated February 14, 2018.[1] This matter is mature for a ruling on the pending motions.

Synopsis

Respondent alleges the consolidated grievance is an attempt to relitigate a prior grievance related to the same issues which had been decided at level one and not appealed by the Grievants. Respondent argues that the issue of a temporary pay increase for a fellow Credit Analyst is barred from being litigated anew by the claim preclusion doctrine of *res judicata*. Respondent also alleges that the consolidated grievance was not timely filed. Grievants contend that the claims are different and seek different remedies. Grievants also point to recent events which they claim make their new grievance timely. There is sufficient difference between the claims filed in the two consolidated grievances to avoid preclusion of the second claim filed by *pro se* grievants.[2] Conversely, the point at which Grievants became aware of the underlying facts which are the basis for their claim occurred at such time as to make the filing of this grievance outside the mandatory statutory time limit for filing.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

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[1] Respondent was represented by Cassandra L. Means, Assistant Attorney General. Grievants appeared *pro se.*

[2] The Supreme Court has repeatedly admonished that the legislative intent was to create a simple, expeditious and fair grievance procedures, requiring flexible interpretation in order to carry out the legislative intent. *See Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989). The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Findings of Fact

1. Grievants, Leah Brisendine and Christine Propps, are employed by Respondent, Insurance Commission, in the Credit Analyst 2 classification.

2. Ms. Brisendine and Ms. Propps filed a level one consolidated grievance dated August 4, 2014, alleging a ten percent was given to another Credit Analyst 2 under the Division of Personnel ("DOP") *Pay Plan Policy* for his participation in the "Old Fund Account Resolution Project."

3. Grievants noted that the "Project/Team" incentive under the DOP *Pay Plan Policy* requires the employee to be "assigned to a long-term project outside the scope of the essential functions of the employee's position." Grievant's alleged that the "Old Fund Account Resolution Project" duties were within the essential duties of the Credit Analyst. As a remedy they sought to have the project and the accompanying salary increase for the co-worker rescinded.[3]

4. The grievance was denied at level one by a decision dated August 16, 2017. Grievants did not appeal that decision.

5. Grievants filed the present consolidated grievance dated August 24, 2017. In this grievance, Ms. Brisendine and Ms. Propps essentially allege that Respondent is guilty of favoritism by seeking reallocations with pay increases for an Office Assistant 3 while not seeking reallocations for another Office Assistant in the same agency. They also allege Respondent showed favoritism by giving a temporary ten percent salary increase to another Credit Analyst without offering the same opportunity to Grievants. This is the same Credit Analyst and the same project referenced in the prior grievance.

[3] Level one grievance form, Docket No. 2018-0196-CONS.

As relief, Grievants seek a ten percent raise for themselves "and other employees in the Revenue Recovery Unit to compensate for favoritism" shown to the two employees.

6. Grievants are not Office Assistants and have no personal stake in the reallocation of those positions within the agency.

7. Grievants were unequivocally notified that the co-worker Credit Analyst was given a ten percent raise for working in the "Old Fund Account Resolution Project" in a meeting on June 9, 2017. Grievants subsequently discovered that the Project continued until February 17, 2018.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. Va. Code §6C-2-1, *et seq*." W. VA. CODE ST. R. § 156-1-6.2.

Respondent avers that the grievance must be dismissed under the claim preclusion doctrine of *res judicata* and because it was not filed within the mandatory statutory guidelines. Timeliness and *res judicata* are affirmative defenses, and the burden of proving any affirmative defense by a preponderance of the evidence is upon the party asserting the defense. Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 3 (2008).

The doctrine of *res judicata* (also known as "claim preclusion") 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, 180 W.Va. 433, 440, 376 S.E.2d 639, 646 (1988). "Before the prosecution of a grievance may be barred on the basis of *res* judicata, three elements must be satisfied: 1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; 2) the two actions must involve either the same parties or persons in privity with those same parties. 3), the claim identified for resolution in the subsequent proceeding either must be identical to the claim 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).

The first grievance alleged that the Respondent violated the DOP *Pay Plan Policy* in seeking a temporary ten percent salary upgrade for a coworker under the Project/Team incentive portion of the policy because the duties in the project were part of the essential duties of the coworker's regular position. The remedy they sought was to rescind the pay raise given to the coworker. The present issue raises a totally different issue. While it related to the same project and employee, in this case, Grievants argue that Respondent showed favoritism by giving the project and raise to the coworker without also offering it to them. They also allege that Respondent had shown favoritism toward other employees. The remedy in this matter is not to rescind the salary increase but to extend it to Grievants and others for a period equal to the duration of the temporary project.

. These claims are not identical. They are different enough to not satisfy the third requirement necessary to satisfy the claim preclusion doctrine. Respondent did not prove that the consolidated grievance is barred by *res judicata.*

Grievants do not have standing to raise the issue of reallocation on behalf of the Office Assistant in their office. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.,* Docket No. 95-16-504 (Feb. 23, 1996). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant "must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, a grievant is without standing to pursue the grievance. *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-501 (Feb. 28, 1990). *Beard v. Bd. of Directors/Shepherd College*, Docket No. 99-BOD-268 (Apr. 27, 2000); *Elliott v. Randolph County Bd. of Educ*., Docket No. 98-42-304 (May 26, 1999); *Farley v. W. Va. Parkways Econ. Dev. Auth.,* Docket No. 96-PEDTA-204 (Feb. 21, 1997).

Grievants have no personal stake or recognizable interest in reallocation of Office Assistants since their positions are not in that classification. Even if the motive is purely altruistic, Grievants may not seek redress of harm for other employees when they are not harmed themselves. Accordingly, any portion of the consolidated grievance related to the Office Assistant positions must be dismissed.

Finally, Respondent alleges that the consolidated grievance must be dismissed because it was not timely filed. To be considered timely, and, therefore, within the jurisdiction of the grievance procedure, a grievance must be timely filed within the time

limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH-060 (July 16, 1997), *aff'd, Circuit Court of Kanawha County,* No. 97-AA-110 (Jan. 21, 1999).

Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *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 also 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); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey*

v. W. Va. Bureau of Empl. Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievant's were unequivocally notified that the co-worker Credit Analyst was given a ten percent raise for working in the "Old Fund Account Resolution Project" in a meeting on June 9, 2017. However, they did not file this grievance until August 24, 2017. Fifteen working days following June 9, 2017, would have fallen of on June 30, 2018. The grievance was not filed for nearly two months after that date.

Grievants point out that they discovered other things related to that project after June 9, 2017. They argue that the project did not officially end until February 17, 2018, and likely would not have ended then had Grievants not made inquiries. However, the source of the grievance is the payment of the coworker for participating in a project without giving the same opportunity to Grievants. The duration of the project goes to the amount of remedy Grievants may seek, not the source of the grievance. The date when Grievants became aware of the source of their claim was June 9, 2017. In order to meet the mandatory time lines for filing the grievance it had to be filed within fifteen days of that date which it was not. Accordingly, the consolidated grievance must be DISMISSED.

Conclusion of Law

1. "Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. Va. Code §6C-2-1, *et seq*." W. VA. CODE ST. R. § 156-1-6.2.

2. Timeliness and *res judicata* are affirmative defenses, and the burden of proving any affirmative defense by a preponderance of the evidence is upon the party asserting the defense. Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 3 (2008). In this case the Respondent is raising the affirmative defenses.

3. The doctrine of *res judicata* (also known as "claim preclusion") 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*, 180 W.Va. 433, 440, 376 S.E.2d 639, 646 (1988).

4. "Before the prosecution of a grievance may be barred on the basis of *res* judicata, three elements must be satisfied: 1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; 2) the two actions must involve either the same parties or persons in privity with those same parties. 3), the claim identified for resolution in the subsequent proceeding either must be identical to the claim 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).

5. Respondent did not prove that the consolidated grievance is barred by *res* judicata.

6. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.,* Docket No. 95-16-504 (Feb. 23, 1996).

7. In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant "must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979).

8. Without some allegation of personal injury, a grievant is without standing to pursue the grievance. *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-501 (Feb. 28, 1990). *Beard v. Bd. of Directors/Shepherd College*, Docket No. 99-BOD-268 (Apr. 27, 2000); *Elliott v. Randolph County Bd. of Educ.,* Docket No. 98-42-304 (May 26, 1999); *Farley v. W. Va. Parkways Econ. Dev. Auth.,* Docket No. 96-PEDTA-204 (Feb. 21, 1997).

9. Grievants have no personal stake or recognizable interest in reallocation of Office Assistants since their positions are not in that classification. Accordingly, any portion of the consolidated grievance related to the Office Assistant positions must be dismissed.

10. To be considered timely, and, therefore, within the jurisdiction of the grievance procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH-060 (July 16, 1997), *aff'd, Circuit Court of Kanawha County,* No. 97-AA-110 (Jan. 21, 1999).

11. WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1).

Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

12. W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

13. Grievants did not file the consolidated grievance within fifteen working days of becoming unequivocally notified of the Respondent's decision to grant their coworker a salary increase for working on a special project without giving the same opportunity to them.

Accordingly, the consolidated grievance is DISMISSED.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal 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: March 30, 2018.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE