

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HEIMO RIEDEL,

Grievant,

v.

Docket No. 2017-2469-WVU

WEST VIRGINIA UNIVERSITY

Respondent.

DISMISSAL ORDER

Grievant, Dr. Heimo Riedel, was employed by Respondent, West Virginia University. On June 23, 2018, Grievant filed *pro se*¹ a grievance against Respondent stating the following:

This grievance addresses the termination of my employment effective 6/30/2017 that was communicated by WVU provost McConnell. I have filed a considerable number grievances addressing various violations by WVU mostly by the department chair over more than two years (that have not been heard) including the violation of my academic freedom – and the termination is retaliatory to my grievance activity. The stated allegations of insubordination and substantial and manifest neglect of duty are false. The notice represents a wrongful termination since my tenured appointment supports my academic freedom and protects me from capricious dismissal. The termination was recommended by the department chair (in contradiction to the recommendation of the departmental annual review committee) and my appeals were not properly reviewed at subsequent levels – instead the chair’s recommendation was simply signed off at higher levels.

The relief sought states:

I request to be reinstated to resume my appointment as Professor with tenure and to be compensated for all lost income, lost benefits and any other disadvantages, damages and losses that have resulted or will result in the future to me or to my academic activities as a result of the actions at WVU. In addition, I request to be compensated for the distress and suffering that I am and have been exposed to. The termination and its recommendation specifically violate WVU BOG policy 2 and the WV grievance code as shown below. I request that appropriate disciplinary

¹ “Pro se” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *BLACK’S LAW DICTIONARY*, 8th Edition, 2004 Thompson/West, page 1258.

action to be taken in response to these and other violations of policy and procedure.

Grievant had previously filed twelve grievances against West Virginia University. The assigned administrative law judge consolidated these under West Virginia Public Employees Grievance Board Docket No. 2015-1774-CONS. He then disposed of them via a Dismissal Order dated October 31, 2017 after finding that “[o]n June 23, 2017, Grievant submitted paperwork to retire from employment,” that “[a]fter filing his grievance, Dr. Riedel retired,” and that Grievant “retired from employment with West Virginia University and was not terminated from employment.”

At level one of the current grievance, the hearing examiner issued a dismissal order on November 17, 2017, without hearing. Grievant appealed to level two on December 2, 2017. Respondent filed Respondent’s Motion to Dismiss on December 20, 2017 along with a document² signed by Grievant on June 23, 2017, evidencing Grievant’s retirement election. On January 4, 2018, Grievant filed his Response to Respondent’s Motion to Dismiss with Notification of Termination of Employment³ containing an effective termination date of June 30, 2017. On January 8, 2018, the Chief Administrative Law Judge declined to rule on Respondent’s Motion to Dismiss, as a ruling would be premature due to the existence of a factual dispute regarding the nature of Grievant’s separation from employment. A mediation session was held on March 16, 2018. An Order of Unsuccessful Mediation was entered on March 20, 2018. Grievant appealed to

² This document was titled “State of West Virginia – Public Employees Insurance Agency Retirement Health Benefits and Basic Life Insurance Enrollment Form” and had a processing date of June 26, 2017.

³ The Notice of Termination of Employment was issued on June 5, 2017 by Joyce McConnell, Provost and Vice President for Academic Affairs.

level three of the grievance process on April 5, 2018. A telephone hearing was held on June 29, 2018. Both parties appeared by phone: Grievant *pro se* and Respondent by Assistant Attorney General Samuel Spatafore. The parties were notified in person and by email that the level three hearing was cancelled and that the undersigned would issue a ruling on Respondent's Motion to Dismiss.

Synopsis

Grievant filed a grievance premised on the same claim of wrongful termination that had been dismissed in Docket No. 2015-1774-CONS. Respondent filed a motion to dismiss. A preponderance of the evidence establishes that the parties are precluded from relitigating the issue of whether Grievant retired or was terminated from his employment. Accordingly, this grievance is dismissed.

The following Findings of Fact have been proven by a preponderance of the evidence based on the Respondent's motion to dismiss, Grievant's response thereto, and the findings of fact and conclusions of law made in Docket No. 2015-1774-CONS. The Findings of Fact 1 – 17 have been adopted from the Dismissal Order issued on October 31, 2017, Docket No. 2015-1774-CONS.

Findings of Fact

1. Grievant was a Professor in the Department of Biochemistry of West Virginia University's School of Medicine.

2. On March 30, 2015, Grievant filed an action challenging the ratings given to him by the chairman of the Department of Biochemistry in his most recent annual review. Grievant disagreed with the good ratings provided by his chairman in the areas of teaching and service.

3. On April 24, 2015, Grievant filed his second grievance, assigned Docket No. 2015-1194-WVU, which alleged retaliation, harassment and discrimination.

4. On May 7, 2015, Grievant filed his third grievance, assigned Docket No. 2015-1246-WVU, which alleged retaliation and denial of academic freedom.

5. On August 7, 2015, Grievant filed his fourth grievance, assigned Docket No. 2016-0124-WVU, which alleged retaliation when his Department Chair required that he follow directives related to teaching.

6. On August 10, 2015, Grievant filed his fifth grievance, assigned Docket No. 2016-0115-WVU, which alleged retaliation when Grievant was questioned about the contents of his leave form.

7. On November 10, 2015, Grievant filed his sixth grievance, assigned Docket No. 2016-0838-WVU, which alleged retaliation related to teaching issues.

8. On November 11, 2015, Grievant filed his seventh grievance, assigned Docket No. 2016-0839-WVU, which alleged retaliation related to a photography assignment.

9. On December 16, 2015, Grievant filed his eighth grievance, assigned Docket No. 2016-1031-WVU, which alleged retaliation pursuant to the request for him to limit repetitive use of exam questions.

10. On February 16, 2016, the parties and the hearing examiner met for a pre-hearing conference on the above grievances. During the conference, Grievant's request that he be allowed to conduct extensive discovery prior to scheduling a hearing was denied. Grievant's refusal to accept the ruling made further progress in the procedure

unattainable. On February 16, 2016, Grievant was advised that the grievances would be waived to the Grievance Board. Grievant stated no objection to the waiver at that time.

11. On February 24, 2016, at the conclusion of the pre-hearing conference, grievances one through eight were waived to level three.

12. On March 17, 2016, Grievant filed his ninth grievance, assigned Docket No. 2016-1440-WVU, which alleged retaliation and harassment pursuant to an issue regarding his teaching.

13. On March 21, 2016, Grievant filed his tenth grievance, assigned Docket No. 2016-1455-WVU, which alleged retaliation in relation to an evaluation received by his Department Chair.

14. On March 25, 2016, the Grievance Board consolidated level three grievances one through ten into Docket No. 2015-1774-CONS.

15. On April 12, 2016, Grievant filed his eleventh grievance, assigned Docket No. 2016-1530-WVU, which alleged retaliation pursuant to teaching issues.

16. On April 19, 2016, Grievant filed his twelfth grievance, assigned Docket No. 2016-1568-WVU, which alleged Respondent failed to notify his Department Chair that Grievant had filed another grievance against him.

17. The eleventh and twelfth grievances were consolidated into Docket No. 2015-1774-CONS.

18. On October 31, 2017, the assigned administrative law judge made the following findings of fact in his Dismissal Order in Docket No. 2015-1774-CONS: "On June 23, 2017, Grievant submitted paperwork to retire from employment" and that Grievant "retired from employment with West Virginia University and was not terminated

from employment.” Grievant appealed this Dismissal Order to the Circuit Court of Kanawha County, which has yet to address the appeal.

19. The termination alleged in the current action is the same termination alleged in Docket No. 2015-1774-CONS.

Discussion

“A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party’s failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party’s failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

The Grievance Board is renewing its consideration of Respondent’s Motion to Dismiss. As the grievances in the current action are the same grievances that were dealt with in Docket No. 2015-1774-CONS, any dismissal analysis must include consideration of the concepts of *res judicata* and *collateral estoppel*. “Res judicata’ bars relitigation of the same cause of action between the same parties where there is a prior judgment,

whereas ‘collateral estoppel’ bars relitigation of a particular issue or determinative fact.” BLACK’S LAW DICTIONARY 1306 (6th ed. 1990).

Res judicata and *collateral estoppel* are affirmative defenses. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2008). The burden of proof is on the Respondent to demonstrate that its motion to dismiss should be granted by a preponderance of the evidence. “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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The grievances in the instant matter are the same grievances previously dealt with in Docket No. 2015-1774-CONS. Grievant alleged in both the prior and current grievance that Respondent wrongfully terminated him in retaliation for his grievance activity. In his response to Respondent’s Motion to Dismiss, Grievant alleged that on June 5, 2017, he was notified that his employment termination by Respondent would be effective on June 30, 2017. Respondent alleged in Respondent’s Motion to Dismiss, to which it attached a document signed by Grievant on June 23, 2017, evidencing his retirement, that Grievant had retired (prior to his termination date) and that his grievance is therefore moot. This Grievance Board previously determined in a Dismissal Order entered in Docket No. 2015-1774-CONS that Grievant retired and had not been terminated. In this Dismissal Order, issued on October 31, 2017, it determined that the issues raised in the grievance were moot because Grievant had retired.

While the Respondent's Motion to Dismiss did not specifically use the terms *collateral estoppel* or *res judicata*, it did state as an apparent basis for dismissal of the current action the Grievance Board's prior Dismissal Order issued on October 31, 2017, due to Grievant's retirement. "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. § 159-1-6.2 (2008). A judge may construe a pleading "as to do substantial justice." W. VA. R. CIV. P. 8 (f).

The Grievance Board has the authority to dispose of claims using *res judicata* or *collateral estoppel*. "For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identity of the issues litigated is a key component to the application of administrative *res judicata* or *collateral estoppel*." Syl. Pt. 2, *Vest v. The Board of Education of the County of Nicholas*, 193 W.Va. 222, 455 S.E. 2d 781(1995).

"Before the prosecution of a [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 Medical Center, Inc.* 201 W. Va. 469, 498 S.E.2d 41 (1997); *Harmon v. Fayette County Bd. of Educ.*, Docket No. 03-10-035 (May 6, 2003). Because there was not a final adjudication of the entire grievance on the merits in Docket No. 2015-1774-CONS, *res judicata* does not apply to the current action.

Grievant's claim of wrongful termination is premised on the termination of his employment. Therefore, the application of the Board's prior determination that Grievant retired in June of 2017 would render moot Grievant's claim of wrongful termination and thereby preclude this Board from hearing the grievance under the doctrine of *collateral estoppel*. "Collateral estoppel [or issue preclusion] will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.' Syllabus Point 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)." Syllabus point 1, *Haba v. The Big Arm Bar and Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996). An analysis shows that each of the above conditions is satisfied. First, the issue in the current action regarding whether Grievant retired or was terminated by Respondent in June of 2017 is the identical issue decided in Docket No. 2015-1774-CONS. Grievant acknowledged at the July 29, 2018 phone conference that the grievances and termination alleged in the current action are the same grievances and termination alleged in Docket No. 2015-1774-CONS. Second, even though the prior action was not fully litigated, it was a final adjudication on the question of whether Grievant

retired or was terminated by Respondent in June of 2017. Third, Grievant was a party to the prior action. Fourth, Grievant had fair opportunity to litigate the issue of termination and retirement in the prior action and is continuing to exercise this opportunity through his ongoing appeal of the prior Dismissal Order. To allow the current grievance to move forward would grant Grievant a second chance to litigate the issue of whether he retired or was terminated.

As the current grievance is premised on Grievant's allegation that he was terminated by Respondent, and as this Board previously determined that Grievant retired and was not terminated, this grievance is moot and therefore dismissed.

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

Conclusions 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. § 159-1-6.2 (2008). "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. VA. CODE ST. R. § 156-1-6.11.

2. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party’s failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party’s failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

4. “For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identity of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel.” Syl. Pt. 2, *Vest v. The Board of Education of the County of Nicholas*, 193 W.Va. 222, 455 S.E. 2d 781(1995).

5. “Collateral estoppel [or issue preclusion] will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.’ Syllabus Point 1, *State v. Miller*, 194 W. Va. 3, 459

S.E.2d 114 (1995)." Syllabus point 1, *Haba v. The Big Arm Bar and Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996).

6. The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

7. Respondent has proven by a preponderance of the evidence that this grievance is precluded by the doctrine of *collateral estoppel*.

Accordingly, this 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: July 20, 2018

Joshua Fraenkel
Administrative Law Judge