GARLAND T. SALMONS, ET AL., .

.

Grievants, .

.

v. . DOCKET NO. 93-DOH-443

.

DEPARTMENT OF TRANSPORTATION/ .

DIVISION OF HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This is a joint grievance filed by Garland T. Salmons, Richard L. Damron, Jack Cooper, Larry Porter, Mark Huffman, Roger Swimm, John Walden, Teresa Copley, Dennis Dotson and Paula Sue Wilson (Grievants) against the West Virginia Department of Transportation, Division of Highways (DOH) on February 11, 1993, alleging "Grievants do not agree with the auditors report regarding payment of past travel time hours." After their grievance was denied at Levels I and II, a hearing was held at Level III on September 21, 1993. On October 7, 1993, Fred VanKirk, Commissioner of the Division of Highways, denied the grievance at Level III. Thereafter, Grievants timely appealed to Level IV.

Initially, at the request of the Grievants' representative, this matter was held in abeyance pending disposition of appeals contesting this Board's holding in Campbell v. West VirginiaDepartment of Natural Resources, Docket Nos. 90-DNR-081/179 (Aug. 30, 1991), and related cases following Campbell, which held that this Board does not have jurisdiction over grievances which allege violations of the Fair Labor Standards Act (FLSA) and similar wage and hour statutes. Thereafter, the undersigned became aware of a November 29, 1993 decision by the Circuit Court of Kanawha County in the appeal of Fry v. West Virginia Department of Health, Docket No. 91-HHR-334 (Oct. 18, 1991), rejecting this Board's rationale for the jurisdictional holding in Campbell. While Campbell and

cases consolidated therewith remain pending on appeal, further review of the pleadings in this matter in light of Fry revealed that another issue in Respondent's Motion to Dismiss was potentially dispositive of the issues raised by this grievance. Accordingly, the undersigned issued an Order dated April 22, 1994 providing both parties an opportunity to brief the remaining issues raised by the Respondent's Motion to Dismiss. Grievants did not respond to the Order while DOH filed a supplemental brief on May 12, 1994. Accordingly, this matter became mature for decision at that time.

BACKGROUND

The facts in this case are essentially undisputed. Respondent produced a Consent Judgment (A Ex 2) dated May 5, 1993, in a matter in the United States District Court for the Southern District of West Virginia styled Robert B. Reich, Secretary of Labor, U.S. Department of Labor v. West Virginia Department of Highways, Civil Action No. 2:90-0709 (Reich v. DOH). The pertinent portion of that Consent Judgment provides as follows:

> This action came to be heard on this day on the Pleadings filed herein by the parties and upon the joint representations of counsel for the parties that the matters at issue between them as expressed in said pleadings have been compromised, agreed and settled, the parties have agreed to the entry of this Consent Judgment.
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> By Order entered by the Court on April 1, 1991, this case was bifurcated into two trials. The first trial was to involve the issue of whether the defendant violated the provisions of Sections 7, 11(c) and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 80 Stat. 830, 88 Stat. 55, 29 U.S.C. §201, et seq.) as alleged in the Complaint. By Order entered by the Court on August 1, 1991, the agreement reached by the parties on all issues that were to be addressed in the first trial was approved. That Order set forth the criteria for determining the amount of back wages that were due as alleged in the Complaint. Pursuant to representations of the parties that an agreement could be reached on all remaining issues, a trial was not scheduled.
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> The parties have now represented to the Court that all issues have been resolved between the parties and that all back wages owed by the Defendant under the Complaint filed in this matter have been computed and paid. A list of all affected employees and the amounts of back wages paid to them has been submitted by the parties and is attached hereto and is designated Schedule A. The period for which these back wages were owed is through August 31, 1989.

The above-referenced "list" incorporated into the Consent Judgment as Schedule A is the "auditor's report" which is the subject of Grievants' present complaint.

DISCUSSION

Assuming, for the sake of argument, that this Grievance Board does have jurisdiction over claims involving the payment of wages under the FLSA and related federal or state legislation, (See footnote 1) theRespondent contends that the matter raised by this grievance has already been the subject of litigation in federal district court. Because DOH has attached documentation in support of its Motion to Dismiss to supplement the pleadings in this grievance, it is necessary to treat this Motion to Dismiss as if it were a Motion for Summary Judgment under Rule 56 of the West Virginia Rules of Civil Procedure. W. Va. R. Civ. P. 12(b)(6) (1994). See Chapman v. Kane Transfer Co., 160 W. Va. 530, 236 S.E.2d 207 (1977). In this state, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co., 148 W. Va. 160, 133 S.E.2d 770 (1963). However, where the moving party has supported his motion with proper documentation, the opposing party must set forth, by affidavit or otherwise, specific facts showing that there is a genuine issue for trial, in order to defeat a Motion for Summary Judgment. First Nat'l Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289 (1968).

In taking this approach it is noted that the Procedural Rules of the West Virginia Education and State Employees Grievance Board § 4.5 provides generally for motions without specifically providing for Motions to Dismiss or Motions for Summary Judgment. However,hearing examiners are authorized to take such actions "as will provide for the effective resolution of grievances not inconsistent with any rules and regulations of the board or the provisions of this article . . . ." W. Va. Code § 29-6A-5(b). Thus, deciding this grievance via the method of a Motion for Summary Judgment simply constitutes a determination that there are no material issues of fact pertinent to this grievance which warrant holding a further hearing at Level IV, while providing the parties with a final decision by this Grievance Board which may be appealed in accordance with W. Va. Code § 29-6A-7.

The uncontroverted evidence in this record, (See footnote 2) for purposes of ruling on a Motion for Summary Judgment, establishes that Grievants are dissatisfied with the amount of back pay they either received or failed to receive as a result of the Consent Judgment entered in Reich v. DOH on May 5, 1993. DOH attached the "Receipt for Payment of Back Wages" signed by Grievant Salmons

in the federal litigation on February 11, 1993, representing that this document was typical of the receipts signed by all Grievants, excepting Grievants Roger Swimm and Larry Porter, who "received no payout pursuant to the order entered in District Court." DOH Motion to Dismiss at 2. (See footnote 3) (Grievants Porter and Swimm filed claims under the Consent Judgment but the DOH auditors determined that they were not entitled to any compensation.) L III T at 10-14, 18-19; G Ex 4. Each receipt contains the following "Notice to Employee:"

> Your acceptance of back wages due under the Fair Labor Standards Act means that you have given up any right you may have to bring suit for such back wages under Section 17(b) of that Act. Section 16(b) provides that an employee may bring suit on his/her own behalf for unpaid minimum wages and /or overtime compensation and an equal amount as liquidated damages, plus attorney's fees and court costs. Generally, a 2-year statute of limitations applies to recovery of back wages. Do not sign this report unless you have actually received payment of the back wages due.

This grievance is also subject to the provisions of the Fair Labor Standards Act, including 29 U.S.C. § 216(c), which provides as follows:

> The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or section 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: Provided, That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of thissection for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected.

* * *

The DOH lead auditor who testified at the Level III hearing indicated that the auditor's report being

challenged by Grievants was prepared in accordance with specific guidance contained in an earlier Order from the District Court providing as follows:

> The parties hereby agree to entry of this Order. This Order applies only to those aspects of this case which were subject to resolution in the first trial scheduled in this case. With respect to the issue of what travel time is compensable, the parties hereby agree that travel time is compensable under the circumstances described below. The amount of time that employees were engaged in compensable travel, as set forth below, and the amount of back wages that are owed by the Defendant will be determined by the parties.
>
> Time spent traveling by employees of the Defendant which is considered compensable shall be subject to payment of back wages for the period beginning on February 3, 1988. Any travel time which does not meet any of the below criteria shall not be subject to back wage computation and payment. Back wages which are paid shall be computed at each employee's regular rate of pay for those workweeks in which the employee worked a total, including travel time, of less than forty hours. For all hours worked in excess of forty in a work week, including travel time, back wages shall be computed at one and one half the employee's regular rate of pay.
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> Wherefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:
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> 1. Drivers at beginning of day.
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> Travel time at the beginning of the workday from the pooling location to the remote job site by a Department of Highways employee as a driver in a State-owned vehicle is compensable in any of the following situations:
>
> (a) Before leaving the pooling location or at any stage of the trip from the pooling location to the remote job site,
>
> (1) the driver performs maintenance or servicing work on the vehicle, such as (but not limited to) checking oil or fuel, adding oil or fuel, checking the tires, or cleaning the windshield or other parts of the vehicle, or

(2) the driver loads onto or unloads from the vehicle, or carries on the vehicle, any equipment or supplies or materials, such as (but not limited to) samples of sand, rock, aggregate, concrete or other road construction materials; specialized equipment; or tools.

(b) Before leaving the pooling location the driver receives instructions as to the remote job site he is to go to that day, and the driver did not know prior to going to the pooling location what the job site would be.

(c) The driver carries as passengers in the vehicle any Department of Highways employees whose presence is needed on the remote job site.

(d) There is no field office at the remote job site.

(e) The driver's duties on the remote job site can only be performed if he has a vehicle on the job site (e.g., the job site is of a size which is too large to cover without a vehicle; there is more than one job site, and all job sites cannot be covered without a vehicle; or the driver uses the vehicle to do inspection work, such as inspecting resurfacing work or guard rails).

(f) The driver is required to drive a State-owned vehicle to the remote job site.

2. Drivers at end of day.

Travel time at the end of the workday from the remote job site to the pooling location by a Department of Highways employee as a driver in a State-owned vehicle is compensable in any of the following situations:

(a) Upon return to the pooling location, or at any stage of the trip from the remote job site to the pooling location,

(1) the driver performs maintenance or servicing work on the vehicle, such

as (but not limited to) checking oil or fuel, adding oil or fuel, checking the tires, or cleaning the windshield or other parts of the vehicle, or

(2) the driver loads onto or unloads from the vehicle, or carries on the vehicle, any equipment or supplies or materials, such as (but not limited to) samples of sand, rock, aggregate, concrete, or other road construction materials; specialized equipment; or tools.

(b) Upon return to the pooling location the driver receives instruction as to the remote job site he is to go to on the next workday, and the driver did not know prior to returning to the pooling location what the job site would be.

Gr Ex 5 (emphasis added)

DOH contends that this grievance is barred under the doctrine of res judicata. This Board first applied the doctrine of res judicata in Ramsey v. West Virginia Department of Health and Human Services, Docket No. 90-H-478 (July 31, 1991). Res judicata is a well-established doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Black's Law Dictionary 678 (Abridged 5th Ed. 1983). In Ramsey, this Board applied the holding of the West Virginia Supreme Court of Appeals in Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975), citing Margeurite Coal Co. v. Meadow River Lumber Co., 98 W. Va. 698 (1925), and Syllabus, Hannah v. Beasley, 132 W. Va. 814, 53 S.E.2d729 (1949), (See footnote 4) which recognized four conditions to meet in order to apply the doctrine of res judicata:

(1) identity in the thing sued for;

(2) identity of the cause of action;

(3) identity of persons, and of parties to the action; and

(4) identity of the quality in the persons for or against whom the claim is made. Id.

Contrary to DOH's argument in support of its Motion to Dismiss, Bechtel Petroleum, Inc. v. Webster, 796 F.2d 252 (9th Cir. 1986), does not stand for the proposition that FLSA claims may not be relitigated in another forum. Indeed, the Bechtel court declined to invoke the Anti-Injunction Act, 28

U.S.C. § 2283, to prohibit a state court action filed by employees who were covered by an FLSA enforcement action filed and settled in federal district court by the Secretary of Labor. Bechtel, supra, at 252-253. However, Bechtel is not controlling since the facts there involved additional claims under Alaskan wage and hour statutes, not just the FLSA. See Bechtel Petroleum, Inc. v. Webster, 636 F. Supp. 486 (N.D. Cal. 1985).

Review of the Level III transcript and pleadings in this matter reveals that this grievance involves a disagreement with regard to DOH's compliance with the terms of the consent judgmentin Reich v. DOH. Thus, the instant grievance is not a separate action but rather an effort to relitigate certain aspects of that action in another forum. Under the doctrine of res judicata, this is not permitted. Jarrard v. Southeastern Shipbuilding Corp., 163 F.2d 960 (5th Cir. 1947). See Brigido Urbino v. Porto Rico Ry. Light & Power Co., 68 F. Supp 841 (D. P.R. 1946); Woodall v. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994).

The instant grievance was initiated on February 11, 1993, several months before the Consent Judgment was approved by the District Court on May 5, 1993. Grievants thus had ample opportunity to pursue their disagreement over the back wages they received under the DOH auditor's report through the Department of Labor.

Obviously, this Board would need to rule upon the meaning and propriety of the federal district court's order in Reich v. DOH in order to grant or deny this grievance on its merits. However, the federal court which approved the decree is the appropriate forum for enforcement of its terms. See United States v. Fidakian, 465 F.2d 755 (5th Cir. 1972). Likewise, where, as here, one or more employees are claiming that they did not understand the release they were signing on the Department of Labor's standard receipt form for FLSA cases, the proper forum to seek reopening of the consent judgment is the court which approved the agreement in question. For these reasons, the undersigned concludes that the meaning and interpretation of the consent judgment entered by a federal district court, with the concurrence of the United States Department of Labor, constitutes a matter "in which authority toact is not vested with the employer" within the meaning of W. Va. Code § 29-6A-2(i). Thus, in this particular context, this grievance is affirmatively excluded from the grievance procedure for state employees.

Because of the foregoing conclusions it is not necessary to address the Respondent's claim that this grievance was not timely filed. However, it is noted that where the pleadings do not readily

indicate when the Grievants became aware of the matters giving rise to this grievance within the meaning of W. Va. Code § 29-6A-4, a Motion for Summary Judgment will not ordinarily be granted as a material question of fact remains in dispute. Aetna, supra. See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievants are employed by the Respondent Division of Highways (DOH).

2. On February 11, 1993 Grievants Salmons, Dotson, Huffman, Horn, Damron, Walden, Cooper and Copley received varying amounts of unpaid wages due under the Fair Labor Standards Act for the period between February 7, 1988 and September 3, 1989. This joint grievance was initiated at Level I that same day.

3. Grievants listed in Finding of Fact No. 2 were among over 300 DOH employees who were awarded back wages pursuant to an auditor's report prepared by DOH auditors. A Ex 2.

4. The DOH auditors determined each employee's entitlement to back wages in accordance with guidelines contained in a Consent Judgment entered in the United States District Court for the Southern District of West Virginia in the matter of Robert B. Reich, Secretary of Labor, U.S. Department of Labor v. West Virginia Department of Highways, Civil Action No. 2:90-0709, dated August 1, 1991. (Reich v. DOH). A Ex 2; G Ex 5; L III T at 16-18.

5. Claims for compensation submitted by Grievants Swimm and Porter were determined not payable under the guidelines described in Finding of Fact No. 4. G Ex 4; L III T at 18-19.

6. On May 5, 1993, the District Court entered another Consent Judgment in Reich v. DOH approving the back wages paid and incorporating the DOH auditor's report into the Consent Judgment as Schedule A. A Ex 2.

CONCLUSIONS OF LAW

1. This grievance involves an attempt to relitigate the terms of a consent judgment controlling the entitlement of Grievants to overtime pay and/or minimum wages under the Fair Labor Standards Act in a different forum contrary to the doctrine of res judicata. Jarrard v. Southeastern Shipbuilding Corp., 163 F.2d 960 (5th Cir. 1947). See Brigido Urbino v. Porto Rico Ry. Light & Power Co., 68 F. Supp. 841 (D. P.R. 1946); Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639 (W. Va. 1988); Woodall v. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994).

2. The essence of this grievance involves Grievants' disagreement with the terms and application of a Consent Judgmententered in federal district court in resolution of litigation brought in behalf of Grievants and other DOH employees by the Department of Labor, a matter in which authority to act is not vested with the employer, and is therefore excluded from the grievance procedure applicable to state employees. See W. Va. Code § 29-6A-2(i).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: September 30, 1994

Footnote: 1Because of the specific factual circumstances under which this grievance arose, it is not necessary to decide whether thisBoard's holding in Campbell v. W. Va. Dept. of Natural Resources, Docket Nos. 90-DNR-081/179 (Aug. 30, 1991), should be reversed at this time.

Footnote: 2The record in this matter, in addition to the pleadings referenced, includes a transcript of a hearing conducted at Level III of the grievance procedure on September 21, 1993.

Footnote: 3Grievant Salmons' receipt, along with receipts signed by Grievants Dennis Dotson, Mark A. Huffman, Paula S. Horn, Richard L. Damron, John Walden, Jack Cooper and Teresa Copley, were admitted at the Level III hearing as Agency Exhibit 1. Another copy of Grievant Salmons' receipt was admitted as Grievants' Exhibit 3 at Level III.

Footnote: 4Subsequent to Wolfe v. Forbes, the West Virginia Supreme Court of Appeals explicitly recognized that res judicata may be applied by an administrative agency 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." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). See Duvall v. Kanawha County Bd. of Educ., Docket No. 92-20-294 (Feb. 3, 1993).