LARRY HINKLE

v. Docket No. 94-T&P-612

WEST VIRGINIA DIVISION OF TOURISM AND PARKS/

WEST VIRGINIA DIVISION OF PERSONNEL

DECISION

Grievant, Larry Hinkle, employed by the Division of Tourism and Parks (Respondent) at Blackwater Falls State Park, filed a level four grievance appeal on October 21, 1994, in which he stated "I agree being classified as an equipment operator, if I am classified as an equipment operator II with a pay increase. I disagree with the back pay from October 16, 1993. I should be from 19 years ago." A level four hearing was conducted on March 10, 1995, and the matter became mature for decision at the conclusion of briefing on May 9, 1995.

Grievant was first employed by Respondent as a Camp Aide in October 1973. In June 1978, he was reclassified to Conservation Aide I. In March 1991 Mr. Hinkle filed a grievance alleging that he was misclassified. During the grievance process a job audit was performed which indicated Grievant's correct classification to be Conservation Aide II. It appears that a second grievance was filed on May 28, 1991, in which Grievant again requested to be reclassified as Equipment Operator II. This grievance was denied at levels one and two. What occurred at level three is in dispute. Respondent states that the matter was settled when Grievant accepted reclassification to Conservation Officer II and a one step pay increase. Grievant asserts that he did not pursue the grievance because he did not believe he could prevail.

On October 16, 1993, Grievant was reclassified as a Maintenance Worker, pay grade 2, as the result of the statewide reclassification project. Grievant appealed this determination to the Division of Personnel (Personnel) for reconsideration and initiated the present matter, asserting that he was performing the work of an Equipment Operator II. On May 12, 1994, Personnel ruled that, as a result of the reclassification review, Grievant would be classified as a Park Aide, pay grade 3. Subsequently,

Respondent issued a level three grievance decision on October 3, 1994, which held that Grievant should be classified as Equipment Operator, pay grade 4, with any back pay to October 16, 1993, the date the reclassification project became effective for Respondent.

Grievant concedes that he performs a variety of duties, including assisting the carpenter and electrician; however, he argues that his primary duties have always involved the operation of heavy equipment, including an endloader, bulldozer, large snow removal trucks, dump trucks, etc., whichentitle him to the classification of Equipment Operator (prior to the reclassification, Equipment Operator II).

Grievant claims that he began formal attempts at reclassification in April 1989, when he requested a review of his classification. Neither Grievant, nor his supervisor recall ever receiving a response to that request. Consequently, Grievant filed the first grievance in March 1991. Grievant asserts that he did not pursue that grievance past level three because he had no representation, was unfamiliar with the process, was faced with several members of management, and was directly advised by the hearing evaluator that he could not be classified as an Equipment Operator. Grievant argues that a situation which deprived him of a full and fair hearing cannot properly be characterized as a settlement. Rather, Grievant describes his decision as giving in to insurmountable odds. In light of Respondent's level three decision to reclassify him as an Equipment Operator, Grievant requests that the classification be retroactive to April 1989, when he first formally attempted to attain the classification. (See footnote 1)

Respondent and Personnel argue that consideration of Grievant's classification from 1989 through 1993 is barred from consideration at this time by the doctrine of res judicata. Because the present grievance involves the identical parties, cause of action, relief requested, and factual situation as the 1991 grievance, the Respondent asserts that Grievant is prohibited from relitigating matters subject to prior proceedings and a settlement. The only fresh evidence presented by Grievant, Respondent claims, is that effective October 1993, he met the criteria for classification as Equipment Operator, a fact which it has already conceded. Notwithstanding the concession, Respondent asserts that Grievant is entitled to no backpay because he has earned an annual salary above the minimum salary level for Equipment Operator since October 1993.

Res judicata is an equitable doctrine which bars the litigation of factual and legal issues on which a final judgment has previously been rendered, Wolfe v. Forbes, 217 S.E.2d 899 (W.Va. 1975), and

applies to quasi-judicial (administrative) proceedings. Liller v. W.Va. Human Rights Comm'n, 376 S.E.2d 639 (W.Va. 1988). To determine whether the doctrine controls in a given case, it is necessary to determine whether the cause of action in the second action is the same as in the first action. Generally, the party which alleges the applicability of res judicata bears the burden of proving: (1) the identity of the thing sued for; (2) identityof 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. Wolfe, supra; Maxey v. W.Va. Dept. of Health and Human Resources, Docket No. 93-HHR-007 (Feb. 28, 1995).

The evidence of record establishes that the complaint and requested relief in the present matter are identical to the complaint and relief stated in the 1991 grievance. The grievance involves the same parties, with the apparent exception of Personnel, which may not have participated in the earlier proceedings. However, this distinction alone does not result in a sufficient difference to preclude application of res judicata. Woodall v. W.Va. Dept. of Transportation/Division of Highways, Docket No. 93-DOH-393 (Feb. 2, 1994).

Clearly, this grievance is identical to that filed by Mr. Hinkle in 1991. It is unfortunate that due to a lack of experience or information, Grievant did not pursue the earlier grievance to level four. Although he may have perceived Respondent's representatives to have coerced him into withdrawing the earlier grievance, there is no evidence that Grievant was in fact precluded from proceeding to the next level. Accordingly, a second attempt to secure reclassification prior to 1993 cannot be considered.

In addition to the foregoing discussion it is appropriate to make the following formal findings of fact and conclusionsof law.

FINDINGS OF FACT

1. Grievant was first employed by the Division of Tourism and Parks in October 1973, as a Camp Aide at Blackwater Falls State Park.

2. Grievant was reclassified as a Conservation Aide I in 1978.

3. In 1991 Grievant filed a grievance alleging that he was misclassified and that his duties more

closely matched those of Equipment Operator II.

4. At level three, Respondent reclassified Grievant as a Conservation Aide II with a one step pay increase.

5. Grievant did not pursue the grievance to level four.

6. As the result of the statewide reclassification project, Grievant was reclassified as a Maintenance Worker, effective October 1993.

7. Grievant appealed this classification to Personnel for review and filed a grievance.

8. Subsequent to a review of the appeal by Personnel, Grievant was reclassified as a Park Aide.

9. At level three of the grievance process it was determined that Grievant would be reclassified as an Equipment Operator. Any backpay was awarded retroactive to October 1993.

CONCLUSION OF LAW

This grievance involves the same parties, cause of action, relief requested, and factual situation as that of a prior matter filed by Grievant in 1991 and pursued through level three. Further consideration of this issue is barred by the doctrine of res judicata. Wolfe v. Forbes, 217 S.E. 2d 899 (W.Va. 1975); Ramsey v. W.Va. Dept. of Health and Human Resources, Docket No. 90-H-478 (July 31, 1991).

Accordingly, the grievance is DENIED.

DATED July 18, 1995 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1 Testimony indicates that the position description completed by Grievant in October 1991, and relied upon by Respondent and Personnel, was altered with an assignment of percentages to the categories of work by someone other than Grievant. Additionally, Grievant asserts that he completed the form with a misunderstanding that he was to include every duty he had ever performed. This led to his inclusion of menial tasks which he has not performed since he was first employed. Due to the outcome herein, this issue requires no further consideration.