JENNIFER LESTER ELLIS,

Grievant,

v. Docket No. 96-29-366

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jennifer Ellis, appeals to Level IV for the second time over the Mingo County Board of Education's ("MCBOE") failure to select her for an Adult Basic Education ("ABE") position. Although a Level II hearing was not held after Grievant was not selected the second time, the parties stipulated to this selection with a Level II decision, and agreed Grievant would then come to Level IV. A Level IV hearing was held on October 17, 1996, and this case became mature for decision on November 12, 1996, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

A brief review of this case's history should be helpful in understanding the issue before the undersigned. (See footnote 1) Grievant and Mr. Craig Clay were placed on the preferred recall list at the end of the 1995-1996 school year. Grievant did not receive notice of the ABE position and did not apply for it. When she learned of Mr. Clay's appointment to the position, she filed a grievance contesting MCBOE's failure to send her a posting of the position as required by W. Va. Code §18A-4-7a, and requested as relief that MCBOE repost the position. At Level IV, in Ellis I, Grievant also argued that her position on the preferred recall list entitled her to the ABE position, as she had greater seniority than Mr. Clay. Grievant further argued she would have received a position at Varney Elementary ("VE") if she had first received the ABE position.

Administrative Law Judge Mary Jo Swartz found Grievant was entitled to receive notice of the position as required by W. Va. Code §18A-4-7a, but the provisions of the statute did not automatically entitle her to the position as it was not "a `lateral area' for which she had been certified or licensed." Ellis I, supra. Judge Swartz found the preferred recall provisions had no application to this specific, fact-based situation.

Judge Swartz directed MCBOE "to consider whether Grievant was better qualified than the

successful applicant under the second set of factors in W. Va. Code §18A-4-7a, and if she [was] found to be the better qualified candidate, Grievant [was to] be compensated in back pay, benefits and seniority for the Adult Basic Education Teacher position for the time period the position was held by the successful applicant." Id. The facts at the second Level IV hearing were not in dispute and will be set out below in the following Findings of Fact.

Findings of Fact

1. On July 31, 1996, Superintendent Everett Conn and Assistant Superintendent Johnny Fullen evaluated Grievant and the successful applicant for the Kermit ABE position utilizing the second set of factors in W. Va. Code §18A-4-7a.

2. The candidates were tied after each received credit in four of the seven criteria, and Superintendent Conn made the final decision to select Mr. Clay again.

3. Mr. Clay was inaccurately given credit for ABE teaching experience. At the time of the evaluation, Mr. Fullen incorrectly believed Mr. Clay had taught in the ABE program. At the Level IV hearing he stated he may have been in error.

4. As agreed to by the parties, Mr. Fullen, after the Level IV hearing, submitted a record of Mr. Clay's work experience. This record indicates that in 1993, Mr. Clay had been selected for an ABE position, but he took another position without ever working in the ABE position.

5. The matrix completed by Mr. Conn and Mr. Fullen was in error, and the parties should not have been tied as Mr. Clay should have received credit in only three areas and Grievant should have received credit in four areas. (See footnote 2) 6. At this Level IV hearing, the parties agreed if Mr. Clay did not have the prior teaching experience, Grievant was the most qualified applicant for the position.

7. Mr. Clay worked in the ABE position for fourteen hours at twenty dollars an hour for a total of $280.00.

Discussion

One of the issues discussed in Ellis I was the effect Grievant's not receiving the Kermit ABE position had on her ability to receive a later posted position at VE. Testimony revealed teachers would apply for this ABE position, not because they wanted to have this job, but because they would

then have preference, as a regular employee, for a subsequently posted position. In fact, Grievant's testimony in Ellis I was she was looking for the ABE posting because she knew a position at VE would be posted shortly after that, and she would be more likely to get it if she had regular employee status. Both Grievant and Mr. Clay applied for the VE position, and Mr. Clay received it although Grievant had more seniority than he.

At this hearing, Grievant again argued that if she had received the ABE position, she would have then received the position at VE. She requested seniority from the date Mr. Clay received the ABE position to the present and asked this Grievance Board to "assume that she would have received the Varney position." Grievant's Proposed Findings and Conclusions. This argument was discussed in some detail at Grievant's Level II and Level IV hearing in Ellis I. AJL Swartz listened to these arguments andremanded the case with the previously discussed directions. See text, supra at 2. The relief Grievant seeks was apparently seen as too speculative and was not granted, and Grievant's potential relief was limited to the amount of compensation Mr. Clay received for the time he served in the ABE position. This prior ruling on the appropriate relief cannot and will not be relitigated.

The relitigation of this issue is barred by the doctrine of res judicata. "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.'" Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). The doctrine of res judicata requires the following four conditions to be the same:

(1) identity in the thing sued for;

(2) identity of the cause of action:

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

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

Syl. Pt. 2, Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). Further, "[t]he indenticality of issues litigated is the key component to application of administrative res judicata . . ." . Liller at 646. The prior administrative hearing in Ellis I met these stated requirements.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. According to the criteria set out in W. Va. Code §18A-4- 7a, Grievant was more qualified for the position of ABE teacher at Kermit, as Mr. Clay did not have prior ABE experience.

2. MCBOE no longer has control over the Kermit ABE position, thus, the relief of posting the position cannot be granted. Ellis I, supra.

3. "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.'" Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). 4. The doctrine of res judicata requires the following four conditions to be the same:

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

Syl. Pt. 2, Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d

899 (1975).

5. The prior administrative hearing in Ellis I met the above-stated requirements.

6. An issue which has previously been litigated at Level IV between the parties and resolved by the Administrative Law Judge, cannot and will not be relitigated.

Accordingly, this grievance is **GRANTED**, in part and **DENIED**, in part. MCBOE is directed to follow the relief directed in Ellis I and pay Grievant $280.00, the amount of money Mr. Clay received during the time he was in the position. All other relief is specifically denied, in accordance with Ellis I.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of * County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 28, 1997

Footnote: 1

The majority of this history is compiled from Ellis v. Mingo County Bd. of Educ., Docket No. 96-29-164 (June 28, 1996)(Ellis I). The parties requested that the record below from the prior grievance be considered in this grievance.

Footnote: 2

Grievant also questioned the ratings in the degree level factor. It is not necessary to discuss that issue as Mr. Clay was incorrectly given credit for experience he did not have and Grievant is the most qualified applicant.