JOHN R. BROWN,

Grievant,

v. **DOCKET NO. 97-HHR-260**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU OF PUBLIC HEALTH, and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, John R. Brown, filed a grievance dated January 9, 1997, stating he "was inappropriately denied a reallocation to a Program Manager I" class title, and requesting as relief "reallocation to a Program Manager I" class title. Relief could not be granted at Levels I and II of the grievance procedure. A Level III hearing was held, and the grievance was denied in a May 19, 1997 decision. The matter was advanced to Level IV on May 22, 1997, where, by agreement of the parties, it was submitted for decision on the record developed below. The record includes grievance documents, the Level III hearing transcript (referred to as "Tr." herein) and eleven items of documentary evidence presented by the Grievant at the Level III hearing (referred to as "Gr. Ex." herein). The record was supplemented by Level IV submissions of a June 10, 1997 memorandum from Grievant, with an attachment, and Respondents' brief. This matter became mature for decision on June 23, 1997.

ISSUES

1. Whether Grievant has proven by a preponderance of the evidence that he is misclassified as a Chief Sanitarian; (See footnote 1) 2. Whether Grievant has proven that the "best fit" for his position is Health and Human Resources Program Manager I ("Program Manager I"); and
3. Whether Respondent has shown favoritism in its treatment of employees in the Public Health Sanitation Division ("PHSD").

FINDINGS OF FACT

1 1. Grievant is classified as a Chief Sanitarian, and has been so classified for many years.

2 2. Brown v. Dept. of Health and Human Resources, Docket No. 94-HHR-178 (Oct. 19, 1994)("Brown I"), determined that Grievant was properly assigned the Chief Sanitarian classification as a result of the statewide reclassification, rather than the Program Manager I classification.

3 3. The class specifications for Chief Sanitarian and Program Manager I have not changed since Brown I was decided.

4 4. Grievant's job duties today are essentially the same as they were at the time Brown I was decided. To summarize, Grievant oversees and manages the Respondent's wastewater treatment program, including training and certifying wastewater treatment operators; maintaining a database of certified operators; assisting state, federal, local and private entities with wastewater-related issues; proposing, drafting, and reviewing rules, regulations, procedures, manuals and memoranda of understanding; public speaking and authoring articles, manuals and tests; and other duties. Grievant did not and does not now supervise any subordinate employees. 5 5. Grievant's job duties could be found to fit under either class specification, and Grievant meets the minimum qualifications of both.

6 6. Grievant works in the Environmental Engineering Division ("EED") of the Bureau of Public Health.

7 7. Barbara Napier and Forrest Adkins work in the PHSD, and are classified as Chief Sanitarian and Registered Sanitarian, respectively. Neither is classified as Program Manager I. (Gr. Ex. 5; Tr. pp. 7-10.)

8 8. Joseph Wyatt and Max Fisher work in the PHSD, and both currently hold the title of Program Manager I. Both persons have supervisory duties. (Gr. Exs. 2 and 11; Tr. pp. 10-12 and 15-17.)

DISCUSSION

1. MISCLASSIFICATION/REALLOCATION:

DOP's rules define reclassification as "revision by the State Personnel Board of a class or class series which results in redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." W. Va. DOP Admin. Rule, 143 C.S.R. 1, §3(78). Reallocation is defined as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or difficulty of duties and

responsibilities assigned to the position or to correct a position misclassification." W. Va. DOP Admin.Rule, 143 C.S.R. 1, §3(77). Grievant does not allege that the class specifications at issue have changed, such that it affects his classification. Indeed, the class specifications appear identical to the portions of specifications cited in Brown I. Thus, there is no basis for reclassification due to a redefinition of the nature of the work performed by the class or class series.

Grievant has not expressly claimed that his duties have changed significantly since the statewide reclassification, which resulted in his classification as Chief Sanitarian in December of 1992. Comparison of his current job duties (as described in his Position Description, Gr. Ex. 6; and his testimony at the Level III hearing, Tr. pp. 29-37) and his job duties as described in Brown I shows that his duties have not changed significantly. While some minutia may have changed, such changes do not indicate a need for reallocation. Kuntz v. Dept. of Health and Human Resources, Docket No. 96-HHR-301 (Mar. 26, 1997) at 9. Grievant continues to spend the vast majority of his time administering the wastewater program. He still administers this program without the assistance of subordinate employees. Thus, there is no basis for reallocation due to a significant change in the kind or difficulty of duties and responsibilities assigned to Grievant's position.

The issue, then, is whether the duties performed by Grievant fall within the class specification. Id. As discussed below, this issue has previously been decided.

2. RES JUDICATA and STARE DECISIS:

Res judicata is a well-established legal doctrine stating thata 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). "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). This Board has previously applied the doctrine of res judicata to repetitive grievances. Woodall v. W. Va. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dept. of Health and Human Serv., Docket No. 90-H-478 (July 31, 1991).

In Woodall and Ramsey, this Board applied the holding of the West Virginia Supreme Court of Appeals in Wolfe v. Forbes, 159 W. Va. 34, at 39, 217 S.E.2d 899 (1975), which recognized four

conditions which are required in order for res judicata to apply:

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.

Careful review of the decision in Brown I, as well as the pleadings and evidence presented in this grievance, shows that the present grievance is identical to the grievance filed in Brown I, with the possible exception of Grievant's favoritism claim and some minimal additional evidence, both of which are discussed below. Although in this grievance he seeks "reallocation" and in Brown I he sought to challenge his "classification," the different terminology does not dictate that the issues are different. Both here and in Brown I, Grievant argues that his duties and responsibilities are those of a Program Manager I, and that the duties of other Program Manager I's cannot be distinguished from his. Both here and in Brown I, Grievant seeks a change in his classification, from Chief Sanitarian to Program Manager I. Grievant is complaining about the same issue and seeking the same relief. Thus, there is identity in the thing sued for, and in the cause of action. The same parties are involved, obviously. As noted above, the quality in the persons for or against whom the claim is made are identical, as neither the class specifications at issue nor Grievant's job duties have changed significantly. The doctrine of res judicata applies to his misclassification claim.

Brown I dictates the outcome here. Although Grievant "manages" the wastewater program, in the lay interpretation of those words, he still does not supervise subordinates, and his job duties are essentially the same as they were in 1994. Grievant's job duties still are consistent with the class specification for Chief Sanitarian, and DOP's rationale for classifying Grievant as a Chief Sanitarian is still not so illogical or inconsistent as to be labelled clearly wrong. Brown I at 11.

3. FAVORITISM:

The issue of favoritism was not directly addressed in Brown I. Thus, a new issue has arguably been raised in this grievance whichhas not been previously litigated, and to which the doctrine of res judicata does not apply. However, the doctrine of stare decisis requires that this decision abide by previously decided cases. Fuchs v. Brooke County Bd. of Educ., Docket No. 94-05-010 (Apr. 29, 1994), at 8. In this instance, stare decisis means that I acknowledge that Brown I established that Grievant's job duties are consistent with the Chief Sanitarian class specification, as noted above. It

does not dictate the outcome of Grievant's favoritism claim.

"Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code §29-6A-2(h). Like discrimination, it involves treating an employee or employees in a different manner from a similarly situated employee, where such different treatment is not based upon some valid, employment- related reason. Heller v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-318 (May 9, 1997); Britner v. Dept. of Health and Human Resources, Docket No. 91-DHS-059 (Apr. 26, 1994). The grievant must show that the employer had an illegal or improper motive, or bias, in taking its action. Graff v. W. Va. Div. of Rehab. Servs., Docket No. 92-RS-489 (July 26, 1993); Heller at 6.

Where a grievant shows some disparity in the treatment of employees, and the employer is unable to provide a legitimate reason for the disparity, the grievant will prevail. Adkins v. W. Va. Div. of Highways, Docket No. 92-DOH-146 (Sept. 3, 1992). Similarly, where the employer offers a legitimate reason, but thegrievant shows the reason is merely a pretext, the grievant will prevail. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

Here, Grievant claims that employees in the Public Health Sanitation Division were promoted to Program Manager I, while employees in the Environmental Engineering Division were not. However, the evidence does not prove that Grievant was similarly situated to named employees in the PHSD. (See footnote 2)

First, comparisons with Mr. Adkins and Ms. Napier are unnecessary, because Mr. Adkins is a Registered Sanitarian, and Ms. Napier is a Chief Sanitarian for PHSD. (Tr. pp. 7-10, Gr. Ex. 5.) Both received these classifications in 1992, during the statewide reclassification which was the subject of Brown I. Mr. Adkins is not similarly classified, being neither a Chief Sanitarian nor a Program Manager I. Ms. Napier continues to hold the Chief Sanitarian title, as does Grievant. Thus, she has not been given any preferential treatment.

Mr. Fisher was the only person in the PHSD who had been classified as Chief Sanitarian, and was apparently promoted to Program Manager I sometime after Brown I was decided. Minimal evidence was presented regarding Mr. Fisher's job duties, or the manner in which his promotion occurred. However, it appears thatthere were significant changes in Mr. Fisher's job duties, and that he supervises at least one subordinate. (Gr. Ex. 4; Tr. pp. 22- 26.) This evidence is insufficient to

carry Grievant's burden of proving that he is similarly situated to Mr. Fisher.

Grievant's favoritism allegation would fail, even if he proved that he and Mr. Fisher were similarly situated. In Brown I, DOP pointed out distinctions in job duties between Grievant and those in the Program Manager I class specification. Particular emphasis was given to the difference in supervisory duties, which Grievant does not have. Differences in supervisory duties continue to distinguish the positions, and provide a legitimate reason for treating Mr. Fisher differently.

No favoritism in making the respective classification decisions can be shown. Even if it could, DOP has already proven a legitimate, job-related reason for its decision.

CONCLUSIONS OF LAW

1 1. This Grievance Board has recognized the principle that "finality is desirable in the law," and applied it to grievance procedures. Spurlock v. Lincoln County Bd. of Educ., Docket No. 97-22-019 (May 29, 1997), and cases cited therein. Consistent with this principle, the doctrine of res judicata applies to preclude grievants from relitigating issues which were resolved in prior grievance decisions. Id.; Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Woodall v. W. Va. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994). 2 2. To the extent a grievance involves the same parties, cause of action, relief requested, and factual situation as that of a prior matter decided by this Grievance Board, such issues are barred from further consideration by the doctrine of res judicata. Meeks; Woodall. See also Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975); Ramsey v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-478 (July 31, 1991).

3 3. The doctrine of res judicata applies in this grievance, to the extent that Brown v. Dept. of Health and Human Resources, Docket No. 94-HHR-178 (Oct. 19, 1994), decided that 1) the Division of Personnel's interpretations of the class specifications for Program Manager I and Chief Sanitarian are not clearly erroneous and must be accorded great weight; and 2) Grievant's job duties best fit with the class specification for Chief Sanitarian.

4 4. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code §29-6A-2(h).

5 5. To prevail on a claim of favoritism, Grievant must show, by a preponderance of the evidence:

5.a a. that he is similarly situated, in a pertinent way, to one or more other employees;

5.b b. that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a significant particular; and

5.c c. that such differences were unrelated to actual job responsibilities of the grievant and/or the other employees.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 6 6. Grievant has not proven that he is similarly situated to another employee who has been treated in a significantly different manner, nor that any differences in treatment were unrelated to actual job responsibilities of each person.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the circuit court of the county in which the grievance occurred. 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.

Dated: July 31, 1997 **JENNIFER J.MEEKS**

Administrative Law Judge

Footnote: 1

The official class specification title is "Sanitarian- Chief," but for convenience and consistency with the testimony, is referred to as Chief Sanitarian.

Footnote: 2

Grievant's comparison of his position with that of Mr. Wyatt, who is currently classified as a Program Manager I in the PHSD, was extensively discussed in Brown I, and need not be addressed again here.