BRIAN EDMOND,

Grievant,

v. **Docket No. 00-CORR-175**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

Brian Edmond ("Grievant") initiated this grievance on April 25, 2000, alleging he has been discriminated against by the Division of Corrections ("DOC") because he did not receive a 5% raise upon completion of the Officers' Apprenticeship Program ("OAP"), while other employees did. He requests a 5% pay raise from the date he completed the OAP, plus interest and attorneys' fees. The grievance was denied at level one on April 25, 2000, and at level two on April 28, 2000. A level three hearing was held on May 8, 2000, followed by a written decision denying the grievance dated May 10, 2000. Grievant was represented by John H. Jeffers, and DOC was represented by Warden Bill Haynes at the level three hearing. Grievant appealed to level four on May 18, 2000. Attempts to contact Grievant's representative and DOC legal counsel, Leslie K. Tyree, by telephone, regarding submission of this matter on the existing record, were unsuccessful. The undersigned issued an Order dated June 30, 2000, notifying the parties that this grievance would be submitted on the record if no objections were received by July 12, 2000. The parties did not respond to that Order. After several requests for the lower level record, the same was finally submitted to the undersigned on July 14, 2000, at which time this grievance becamemature for consideration.

This grievance was denied at levels two and three on the basis that Grievant had already litigated the exact issue presented in this case in a prior grievance, Gragg, et al., v. Division of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999). Grievant and more than fifty other correctional officers alleged in Gragg, supra, that they had suffered discrimination, because they had been denied a 5%

pay raise upon completion of the OAP. The grievants filed that claim in response to a prior Grievance Board decision, Livesay v. Division of Corrections, Docket No. 96-CORR-459 (Nov. 4, 1997), which found that DOC's practice regarding the 5% raises was discriminatory, (See footnote 1) and the Livesay grievants were granted the 5% raises with back pay to the date upon which each person completed the OAP. In response, the Gragg grievants filed their claim, alleging that it constituted discrimination for DOC to grant the raises with back pay to the successful grievants in response to the Livesay decision, while not granting it to them. The Gragg grievance was found to be untimely, because the grievants had known of DOC's practices regarding the 5% raises dating back several years, and "learning of the success of another employee's grievance" does not constitute "discovery" of the event giving rise to a grievance, which can toll the statutory time limitation requiring that a grievance be filed within ten days of the event upon which it is based. Pryor, et al., v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997); Adkins v. W. Va. Dept. of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996).

When confronted at the level three hearing with the fact that he had already filed agrievance regarding the denial of a 5% raise upon completion of the OAP, Grievant responded as follows:

> The reason that I have refiled it is obvious that it is a continuing practice. I filed because it was Livesay before, now it has been brought to my attention that Burl Simmons did not have to go through any of this to get his.

L II Tr. at 7. Specifically, Grievant has alleged in the instant case that Mr. Simmons received a 5% raise for completing the OAP this year, and he introduced a level three decision from Mr. Simmons' grievance regarding the raise, which states:

> Prior to a full evidentiary hearing at Level III, a telephonic communication was held between [the parties and grievance evaluator]. It was agreed to by all parties that grievant will be granted a 5% salary advancement for completion of the Apprenticeship Program, beginning February 15, 2000 (noon). No interest will be paid. Therefore, this grievance is GRANTED IN PART and DENIED IN PART.

Level III, Grievant's Exhibit (Emphasis in original).

The doctrine of res judicata may result in the dismissal of a grievance when a party seeks to relitigate "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, 180 W. Va. 433, ___, 376

S.E.2d 639, 646 (1988); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Four conditions must be met 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.

Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994), citing Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). "The identicality of issues litigated is thekey component to the application of administrative res judicata." Liller, supra.

However, this Grievance Board has applied this doctrine sparingly, "as the grievance process is intended to be a fair, expeditious, and simple procedure, and not a `procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). "Generally, res judicata will be applied by the Grievance Board only when the grievance `involves the same parties, cause of action, relief requested, and factual situation as that of a prior matter' which has actually been decided by the Board. Woodall v. W.Va. Dept. of Transportation, Docket No. 93-DOH-393 (Feb. 2, 1994)." Farley/Stover v. Mason County Bd. of Educ., Docket No. 94-26-639 (Feb. 28, 1995), footnote 3 (emphasis in original).

Although there is a slight factual variation in the instant grievance, that is, yet another correctional officer--Mr. Simmons--has utilized the grievance process to obtain the somewhat elusive (yet ever disputed) 5% raise for completion of the OAP, Grievant is still attempting to relitigate the claim previously litigated in Gragg, supra. Regardless of the identity of the employee to whom Grievant wishes to compare himself, he is still seeking to prove discrimination has occurred in DOC's refusal to grant him the 5% raise for his completion of the OAP in 1994, a benefit which undisputedly has been conferred on other officers, for various reasons which need not be discussed here. Grievant has had his “bite at the apple” on this issue, and the legal doctrine of res judicata precludes the undersigned from addressing the very same issues again.

This discussion is hereby supplemented by the following finding of fact and conclusions of law.

Finding of Fact

The parties, facts and issues presented in this proceeding are exactly the same as in Gragg, et al., v. Division of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999).

Conclusions of Law

1. The doctrine of res judicata may result in the dismissal of a grievance when a party seeks to relitigate "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 (1988); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Four conditions must be met 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.

Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994), citing Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975).

2. The issues raised in this grievance were already raised by the Grievant and decided in Gragg, et al., v. Division of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999), the parties are the same, the relevant facts are the same, and the requested relief is the same. The legal doctrine of res judicata precludes the undersigned from addressing the very same issues again.

Grievant's claim has already been fully adjudicated by this Board in Docket No. 98- CORR-330, and it is appropriate that this matter be, and the same hereby is, **ORDEREDDISMISSED AND STRICKEN** from this Board's Docket.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 16, 2000 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

See Gragg, supra, for a detailed discussion of the background information surrounding the 5% raises and DOC's practices regarding them.