

KAREN ASHLEY,

Grievant,

v.

DOCKET NO. 00-BSS-506

**WEST VIRGINIA BUREAU OF SENIOR
SERVICES/DIVISION OF PERSONNEL,**

Respondents.

D E C I S I O N

Grievant, Karen Ashley, filed this grievance on January 21, 1999, alleging she is misclassified, and that the misclassification is a result of retaliation on the part of her employer, the West Virginia Bureau of Senior Services ("BSS"). The grievance was denied at the lower levels of the grievance procedure, and Grievant appealed to level four on November 30, 1999. At that time, she filed another grievance protesting a letter of reprimand she had received on January 14, 1999. As the incident and issues involved in that grievance had already been addressed in the lower levels of the original January 21, 1999, grievance, the grievance was allowed. The two grievances were consolidated, and a level four hearing was held on July 24, 2000, at which time this case became mature for decision. Grievant was represented by Christopher G. Moffatt, Esq., Reed, Moffatt & Associates; BSS was represented by Jeffrey G. Blaydes, Esq., Assistant Attorney General; and the Division of Personnel ("Personnel") was represented by Ginny Fitzwater.

FINDINGS OF FACT

The following findings of fact are adopted in part from the Level III decision issued by Jack C. McClung, Grievance Evaluator, on November 16, 1999, and are made based upon the evidence presented at level three.

1. Prior to June 1997, Grievant was employed by the West Virginia Department of Health and Human Services as a Secretary II.
2. In June 1997, Grievant was one of several employees transferred to BSS. Grievant retained her Secretary II classification.
3. Grievant reported to work for two days at BSS, and went on sick leave thereafter. When Grievant returned from sick leave, she performed the work of a receptionist.
4. Grievant was reallocated from a Secretary II to an Office Assistant I on January 6, 1998, by Personnel. Personnel based its decision on the fact that Grievant's new receptionist duties better fit the job description for an Office Assistant I.
5. Grievant filed two grievances related to the reallocation, on November 4, 1997, and January 15, 1998. The grievances were consolidated and a level three decision was rendered denying the grievances on April 30, 1998, by Mr. McClung. LIII Bureau Ex. 2. [\(See footnote 1\)](#)
6. Grievant did not appeal the level three decision issued on April 30, 1998.
7. Grievant subsequently filed the two grievances which are the subject of this decision.
8. The issues involved in this grievance are the same as the issues involved in the prior grievance.

AFFIRMATIVE DEFENSE

BSS and Personnel raise timeliness and res judicata as defenses to the instant grievance. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29- 122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health

Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93- BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). BSS and Personnel first argue that Grievant is time barred from bringing this grievance, as it pertains to the same matters that were adjudicated in the level three decision of April 30, 1998, following the first misclassification grievance. Secondly, BSS and Personnel contend the issues in this grievance have previously been decided, and the instant grievance should be barred by the principles of res judicata.

It is undisputed that Grievant never filed an appeal to the April 30, 1998, level three decision denying the first grievance. An employee who is dissatisfied with a level three decision must file an appeal with the Grievance Board within five days of receipt of the level three decision. W. Va. Code § 29-6A-4(d)(1). Grievant testified that she directed the level three grievance evaluator to mail a copy of the level three decision to her attorney, who would be responsible for filing the appeal. The grievance evaluator did not send a copy of the decision to Grievant's attorney, but did send a copy directly to Grievant. Grievant did not file an appeal herself, nor, apparently, did she contact her attorney at the time she received the decision. By the time Grievant and her attorney discovered he had not received a copy, the time for filing an appeal had expired, and Grievant did not attempt to appeal to level four.

Grievant argues that, since misclassification is a continuing violation, it is immaterial whether she appealed her first grievance to level four, as she could file a misclassification grievance at any time. While it is true that misclassification is a continuing violation, there are limits to a grievant's attempts to gain relief. The West Virginia Supreme Court has held that an employee can contest a misclassification at any time, but only once. Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995). Furthermore, the preclusion 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, 180 W. Va. 433, 376 S.E.2d 639 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). "The identity of issues litigated is the key component to the application of administrative res judicata Res judicata focuses on whether the cause of

action in the second suit is the same as in the first suit." Liller, at 646.

Grievant does not contend that her duties have changed significantly since the level three decision of April 30, 1998, which would render her further misclassified. Rather, Grievant is quite clear that the events which she would have the undersigned consider in her claim of misclassification are those events which occurred prior to that level three decision, and which were, in fact, matters addressed in the first misclassification grievance. Grievant's misclassification grievance was heard and adjudicated, culminating with the April 30, 1998 level three decision. Grievant did not appeal that decision to level four, and her claim of misclassification ended there.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Fraley v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1992).
2. Where an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996).
3. An employee who is dissatisfied with a level three decision must file an appeal with the Grievance Board within five days of receipt of the level three decision. W. Va. Code § 29-6A-4(d)(1).
4. Grievant did not file an appeal of the April 30, 1998, level three decision, and her attempts to claim the instant grievance, filed on January 21, 1999, constitutes an appeal of that decision is time-barred. An employee can contest a misclassification, but only once. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).
5. The preclusion 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). See also, Boyer v. Wood County Bd. of Educ., Docket No. 96-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995).
6. "The identity of issues litigated is the key component to the application of administrative res judicata . . . Res judicata focuses on whether the cause of action in the second suit is the same

as in the first suit.” Liller, supra. 7. The issue to be adjudicated in the instant grievance, i.e, whether Grievant was misclassified as a result of her reallocation to Office Assistant I on January 6, 1998, is the same issue that was litigated in Grievant's first misclassification grievance, and denied at level three by decision dated April 30, 1998.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 1, 2000

[Footnote: 1](#)

References to the level three Transcript and Exhibits will be “Tr., p. ___”, and “LIII ___ Ex. ___”.