FRED CLARK, SR.,et al.,

Grievants,

v. Docket No. 03-HEPC-364

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

___Fred Clark, Sr., Greg Neely, Franklin Lawrence, Fred Blosser, Thomas Nine, Rodney Hart, and Lonnie Mayle, ("Grievants"), employed by West Virginia University ("WVU") as Asbestos Abatement Workers, filed a level one grievance on June 17, 2003, seeking advancement to pay grade 15, with back pay. Grievants also requested back pay from January 1994 to April 15, 1996. The grievance was denied at levels one, two, and three. Appeal was made to level four on November 24, 2003, and an evidentiary hearing was conducted on February 19, 2004. Grievants represented themselves, and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision on April 2, 2004, the due date for submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Rodney Hart, Franklin Lawrence, Frederick Blosser, Lonnie Mayle, Greg Neely, Fred Clark, and Thomas Nine have been employed by WVU at the Physical Plant as Asbestos Abatement Workers at all times pertinent to this grievance. 2. Effective January 1, 1994, a classification system commonly referred to as the "Mercer system" was implemented for all classified employees at all state institutions of higher learning. At this time, Grievants were classified as Asbestos Abatement Workers, pay grade 12.

3. In 1996 the Job Evaluation Committee (JEC) reviewed this job title, awarding additional 0.5 in the factor "Knowledge" to credit the employees for required certification. The increase from 4.0 to 4.5 increased Grievants' pay grade to 13. Grievants did not receive back

pay at that time, and did not file a grievance.

4. Grievants filed a grievance in January 2001, in which they alleged that full consideration had not been given to the potential dangers of their work. Grievants requested an upgrade to pay grade 14 or 15 at that time.

5. Grievants' 2001 grievance was placed in abeyance, along with many others, pending a review of the Physical Plant Job Family. This review was not completed until late 2002, to be implemented July 1, 2003.

6. As a result of this review, many job titles were collapsed, and Grievants' title was changed to Trades Specialist. Grievants remained in pay grade 13.

7. A level four hearing was conducted for Grievants' 2001 grievance on December 5, 2003, and a decision was issued on April 6, 2004.

Discussion

Respondent asserts that this grievance is essentially identical to a previously decided grievance filed by Grievants and denied at level four. If this claim is dispositive of the grievance, a discussion of the merits will be unnecessary. An assertion that a grievanceis precluded by res judicata is an affirmative defense that must be proven by Respondent by a preponderance of the evidence. 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. Human Rights Comm'n, 180 W. Va. 433, 440, 376 S.E.2d 639, 646 (1988); Hunting v. Lincoln County Bd. of Educ., Docket No. 01-22-629 (Apr. 16, 2002). 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 identicality of issues litigated is the key component to the application of administrative res judicata." Liller, supra. 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 West Virginia Supreme Court of Appeals has refined this test, holding, before the

prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. Syl. pt. 4, Blake v.Charleston Area Medical Center, Inc. 201 W. Va. 469; 498 S.E.2d 41 (1997); Harmon v. Fayette County Bd. of Educ., Docket No. 03-10-035 (May 6, 2003).

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).

Had the employees prevailed in their previous grievance, Grievants would not have had cause to file the present grievance. A level four decision issued in Nelson, et al. v. Higher Educ./W. Va. Univ., Docket No. 01-HE-064 (Apr. 6, 2004), addressed the merits of that grievance at the highest level of the grievance process. Grievants were all parties to the prior grievance. The issue addressed was identical to that presented herein, i.e., consideration of Grievants' working conditions and pay grade. Therefore, the prior administrative hearing in Nelson met the above-stated conditions, and serves as an absolute bar to consideration of the present grievance. **(See footnote 2)**

Conclusions of Law

1. An assertion that a grievance is precluded by res judicata is an affirmative defense that must be proven by Respondent by a preponderance of the evidence. 2. 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. Human Rights Comm'n, 180 W. Va. 433,

440, 376 S.E.2d 639, 646 (W. Va. 1988); Hunting v. Lincoln County Bd. of Educ., Docket No. 01-22-629 (Apr. 16, 2002).

3. "Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. pt. 4, Blake v. Charleston Area Medical Center, Inc. 201 W. Va. 469; 498 S.E.2d 41 (1997); Harmon v. Fayette County Bd. of Educ., Docket No. 03-10-035 (May 6, 2003).

4. This grievance is identical in every material aspect to Nelson, et al. v. Higher Educ./W. Va. Univ., Docket No. 01-HE-064 (Apr. 6, 2004),and is precluded by the prior final judgment in that action.

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 theWest 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: APRIL 20, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievants elected not to file post-hearing proposals.***

Footnote: 2

.Grievants concede this grievance is identical to the prior grievance, but explained that it was filed out of concern that the review was pending for so long.