MERLE GLENN ODEN,

Grievant,

v. **Docket No. 06-DOH-004**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS, and
DIVISION OF PERSONNEL,

Respondent.

DECISION

___Merle Oden ("Grievant") initiated this proceeding on August 4, 2005, alleging he was not granted the proper amount of increment pay in 2004 and 2005. After denials at the lower levels, Grievant appealed to level four on January 11, 2006. After a level four hearing was scheduled, the parties agreed to submit this matter for a decision based upon the record developed below. This matter became mature for consideration upon receipt of Respondents' fact/law proposals on May 19, 2006. (See footnote 1)

___The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by the Respondent Division of Highways ("DOH") since June 29, 2000. His current classification is Transportation Worker 2, Equipment Operator. 2. Grievant suffered a work-related injury, for which he was absent from work from October 24, 2001, through December 28, 2001. He received Workers' Compensation benefits during that time.

3. If not for his injury and resulting absence, Grievant's anniversary for increment pay purposes would have been June 29, 2003.

4. The time period during which Grievant was absent due to his injury was deducted from his total years of service when his increment pay was calculated.

5. Pursuant to DOP rules, employees are not eligible to receive increment pay until they have completed three full years of service, so Grievant did not receive his first increment pay check until July of 2004. (See footnote 2)

6. Grievant filed a grievance on August 4, 2005, alleging he was denied the appropriate amount of increment pay. Although at level two, the supervisor recommended that Grievant receive an adjusted amount of increment pay, that decision was denied by DOH officials. Grievant never appealed the denial of that grievance.

7. The instant grievance was filed after Grievant received his 2005 increment pay, which he once again alleges is incorrect, due to the deduction of the time he was absent.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Respondents contend that this grievance was not filed in a timely fashion. 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. Once the employer has demonstrated 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. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, 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).

W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Respondents contend that Grievant's claim is untimely, in that he has known since July of 2003 that his injury-related absence was being deducted from his total years of service for increment pay purposes. Indeed, at the level three hearing, Grievant's testimony confirms that the issue he is grieving is that he has been “penalized” by the deduction of that specific time period in 2001 from his years of service. Also, there can be no question that Grievant has known about the “deduction” since 2003, the year he should have first been eligible for an increment check. This fact is further demonstrated by the prior grievance filing in 2004, at which time Grievant challenged the fact that his years of service had been reduced because of that absence.

Although not raised by Respondents, it is clear that, as to Grievant's increment pay in 2004, that issue has already been adjudicated and is barred from consideration by the doctrine of *res judicata*. 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." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003); *Liller v. W. Va. Human Rights Comm'n,* 376 S.E.2d 639, 646 (W. Va. 1988); *Hunting v. Lincoln County Bd. of Educ.*, Docket No. 01-22-629 (Apr. 16, 2002). *See 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). Before the prosecution of a lawsuit may be barred on the basis of *res judicata* , three elements must be satisfied. (See footnote 3)

> 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.

Clearly these requirements have been met here. Grievant challenged the calculation of his 2004 increment pay when it occurred, pursued a grievance, and did not appeal the denial of that grievance at level two. Accordingly, relitigation of that issue is not permitted now.

As to Grievant's 2005 increment pay and its alleged untimeliness, Respondents argue that Grievant's claim arises from a grievable event which occurred in 2003 when Grievant did not receive increment pay that year. It is well-established that "when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). *See Spahr v. Preston Co. Bd. of Educ*., [182 W. Va. 726,] 391S.E.2d 739 (1990).' *Nutter v. W. Va. Dep't of Health and Human Res*., Docket No. 94-HHR-630 (Mar. 23, 1995)." *Young v. Div. of Corrections and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001). The event giving rise to this grievance occurred over two years prior to the filing of the grievance, so it is untimely.

Nevertheless, regardless of its untimeliness, some brief discussion of the merits of this grievance would likely be helpful to the parties. The deduction of Grievant's absence from his years of service time was based upon DOP's "Annual Increment Policy," which provides for a payment equal to $50 times the employee's years of service, to be paid to every employee with three or more full years of service. However, "years of service," as defined in the policy, "excludes any period in which an employee is in a no-pay status . . . ." Accordingly, Respondents' long-standing practice was to exclude any time an employee was absent due to a work-related injury from his or her total years of service, when calculating increment pay.

However, as has been recently observed in several Grievance Board decisions, (See footnote 4) the "West Virginia Supreme Court of Appeals [has] determined denial of credit for years of service and annual leave while on TDD's was not related to a proper government purpose, and violated the

equal protection clause of Section 10, Article III, of the West Virginia Constitution." *Caruthers v. Dep't of Health & Human Res.*, Docket No. 06-HHR- 046 (Apr. 5, 2006) (citing *Canfield v. West Virginia Division of Corrections and West Virginia Division of Personnel*, 217 W. Va. 340, 617 S.E.2d (2005)). However, althoughthe Supreme Court has determined that state employers may no longer deduct such time from an employee's total years of service, this change is only to be applied prospectively:

> DOP revised its rule regarding the accrual of employee benefits while receiving TDD benefits to be effective the date of the Canfield Decision - July 6, 2005, with the provision that the changes were to be applied prospectively. This provision is in keeping with the holding in Bradley v. Appalachian Power Company, 163 W. Va. 332, 256 S.E.2d 879 (1979), that substantial public issues arising from statutory or constitutional interpretations that represent a clear departure from prior precedent will ordinarily favor prospective application. Absent a specifically directed retroactive application of the changes in Canfield, supra, the prospective application by DOP is upheld, and Grievant's claim from before July 6, 2005, is not covered.

Caruthers, *supra*.

Similarly, DOP's revised rule would not apply to Grievant's increment pay and its calculation, based entirely upon events which occurred prior to the effective date of the new rule. Accordingly, the calculation of Grievant's increment pay, based upon DOP's valid policy in place at the applicable time, was proper.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. 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 filingby a preponderance of the evidence. Once the employer has demonstrated 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. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997); *Higginbotham v. W. Va.*

Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); *Buck v. Wood County Bd. of Educ*., Docket No. 96-54- 325 (Feb. 28, 1997); *Parsley, et al. v. Mingo County Bd. of Educ.*, Docket No. 95-29-473 (Apr. 30, 1996); *Sayre v. Mason County Health Dep't, Docket No.* 95-MCHD-435 (Dec. 29, 1995).

3. A grievance must be initiated within ten days of the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. W. Va. Code § 29-6A-4.

4. 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." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 03-19-018 (May 27, 2003); *Liller v. W. Va. Human Rights Comm'n,* 376 S.E.2d 639, 646 (W. Va. 1988); *Hunting v. Lincoln County Bd. of Educ.*, Docket No. 01-22-629 (Apr. 16, 2002). *See 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).

5. Grievant's claim is barred due to its untimeliness and by the doctrine of *res judicata*.

Accordingly, this grievance is **DENIED**.

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." 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.

Date: June 16, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented himself throughout this grievance; the Division of Highways was represented at level two by counsel, Robert Miller, and at level four by counsel, Barbara Baxter; and the Division of Personnel was represented by counsel, Karen O'Sullivan Thornton.

Footnote: 2

Increment checks are issued every July.

Footnote: 3

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).

Footnote: 4

See Fincham v. Division of Corrections, Docket No. 05-CORR-400, (December 22, 2005), Cain v. Department of Transportation, Docket No. 05-DOH-402 (February 6, 2006), and Caruthers, infra.