**THE WEST VIRGINIA PUBLIC EMPLOYEES**

**GRIEVANCE BOARD**

**LEONA KETZ,**

**Grievant,**

**v.**

**Docket No. 07-41-374**

**RALEIGH COUNTY BOARD OF EDUCATION,**

**Respondent.**

## DECISION

Grievant, Leona Ketz, filed this grievance on June 29, 2007, claiming violations of W. Va. Code §§ 18A-29-1, 18-29-2(o), 18A-4-5b, 18-29-2(m), and ". . . a recent decision regarding employees being treated favorably above others with like assignments (261 days v. 240 days)." The relief sought by Grievant is, "[r]equesting my 261 day contract to be restored with back pay & any other related monetary benefits that would have been accumulated over the time in question to provide parity between other employees & myself from July 1, 2001."

The grievance was denied at levels one and two, and level three was bypassed. Grievant appealed to level four on August 1, 2007. (See footnote 1) A level four hearing was conducted before the undersigned on February 6, 2008, at the Grievance Board's hearing room in Beckley, West Virginia. Grievant appeared in person and by James R. Sheatsley, Esq. Respondent was represented by Gregory W. Bailey, Esq. The matter became mature for decision on March 14, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

## Synopsis

___Grievant has been employed by the Raleigh County Board of Education ("RCBOE") since September of 1986. Grievant is classified as an Accountant 3/Secretary 3 performing duties under

the supervision of Assistant Superintendent of Secondary Education, David Sievert. In 2001, RCBOE eliminated Grievant's two hundred sixty-one day position and replaced it with a two hundred forty-day contract, and placed Grievant on the list for transfer. Sometime after March 2001, a grievance was filed asserting that the RCBOE had failed to give proper notification pursuant to § 18A-2-7 of this change. This grievance was denied at level two.

Based on a change in circumstances which occurred in June 2001, the need to eliminate Grievant's position no longer existed, and Grievant's transfer was rescinded. Grievant remained in the same job position under a two hundred forty-day contract. In June 2001, Grievant filed a second grievance, asserting that her contract term should not have been reduced because there was a less senior employee who should have been affected by any economic factor causing the determination to reduce employees' contracts in the central office to a two hundred forty-day term. This grievance was denied at level two.

Grievant now asserts that her duties are substantially similar to another Secretary 3, in that they do perform like assignments and duties, and should have uniform treatment as set out in § 18A-4-5a. Additionally, Grievant asserts RCBOE's failure to grant her a twohundred sixty-one-day contract demonstrates discrimination. RCBOE counters that the doctrine of res judicata bars the litigation of issues raised in the instant grievance. In addition, RCBOE argues that Grievant's uniformity claim is without merit, and Grievant has not proven her claims of discrimination or favoritism.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Grievant has been employed by RCBOE since September of 1986. Grievant is currently employed as an Accountant 3/Secretary 3 under the supervision of the Assistant Superintendent of Secondary Education.

2. In 2001, RCBOE eliminated Grievant's two hundred sixty-one day position and replaced it with a two hundred forty-day contract term. In addition, RCBOE placed Grievant on the list for transfer.

3. A grievance was filed by the Grievant asserting that the RCBOE had failed to give proper notification pursuant to § 18A-2-7 of this status change. The grievance was denied following a level two hearing.

4. Based on a change in circumstances which occurred sometime in June 2001, the need to eliminate Grievant's position no longer existed, and Grievant's transfer was rescinded. Grievant was returned to the Accountant 3/Secretary 3 position under a two hundred forty-day contract.

5. Grievant filed a second grievance in June 2001, asserting that a reduction in her contract term should not have occurred because there was a less senior employeewho should have been affected by any economic factor causing the determination to reduce employees in the central office to a two hundred forty-day contract. The grievance was denied following a level two hearing by decision dated September 17, 2001. This decision was not appealed to the next level of the grievance procedure.

6. Grievant's current claim is a violation of the uniformity requirements set out in § 18A-4-5b as it relates to the term of her contract. Grievant compares her duties and assignments to Alma Willis. Ms. Willis is a Secretary 3 employed by the RCBOE since 1976. Ms. Willis works under a two hundred sixty-one-day contract.

7. The parties, issues, relief sought, and setting are the same in this grievance as in the grievances filed by Grievant in 2001.

**Discussion**

Respondent argues this grievance should be denied because the issues in this grievance are the same as the issues raised by Grievant in grievances filed by her in 2001, which were denied at level two and not appealed. The doctrine of res judicata is an affirmative defense that must be proven by Respondent by a preponderance of the evidence. 156 C.S.R. 1 § 3. *See Vance v. Jefferson County Bd. of Educ.*, Docket No. 03- 19-018 (May 27, 2003). The doctrine of res judicata may result in the dismissal of a grievance when a party seeks to litigate “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 (1988); *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. 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. *Blake v. Charleston Area Med. Ctr., 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).

The 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. 203, 393 S.E.2d 739 (1990). However, the Grievance Board has ruled that the doctrine is applicable to decisions issued at the lower levels of the grievance procedure which have not been appealed within the statutory time periods to the next level of the grievance procedure. *Ashley v. W. Va. Bureau of Senior Services*, Docket No. 00-BSS-506 (Aug. 1, 2000); *Dickens v. Raleigh County Bd. of Educ.*, Docket No. 01-41-356 (Aug. 29, 2001).

Although the factual situation was slightly different in the earlier grievance, this is the very same matter about which Grievant complained in her prior grievances. The issue of whether Grievant's two hundred sixty-one-day contract would be reinstated was adjudicated under the then-existing grievance procedure of § 18-29-1, *et seq.* Grievant's2001 grievances were between the exact same parties as the present grievance. Lastly, Grievant sought in 2001 to have her two hundred sixty-one-day contract reestablished, the same relief she is requesting in this grievance.

In arguing against applying this doctrine, Grievant points out that the current claim is a violation of § 18A-4-5b. (See footnote 2) At no time in any prior grievance proceeding did Grievant raise a violation of this specific statute. Therefore, there has not been a final adjudication on the merits in the prior action. In addition, the cause of action identified for resolution is not identical to the prior cause of action. This reasoning, in light of previous rulings by the Grievance Board, is unpersuasive.

The issues in this grievance were already decided at level two in 2001. (See footnote 3) Grievant knew that the RCBOE eliminated her two hundred sixty-one-day contract, and that she would continue working under a two hundred forty-day contact. The circumstances surrounding Ms. Willis being substantially similar to Grievant, and performing like dutiesand assignments existed in 2001. Ignorance of the legal requirements pertaining to uniformity does not excuse her failure to raise the statute in support of her claims in 2001.

As a general rule, ignorance of the law, “will not suffice to keep the claim alive.” *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991) (regarding timeliness); *Buck v. Wood*

*County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997). Here, Grievant was presented with the same setting in 2001 as she was in 2007. Grievant and Ms. Willis both work at the central office of the RCBOE. (See footnote 4) In addition, Ms. Willis has been employed by the RCBOE since 1976.

Grievant fails to note in her submissions that 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. (Emphasis added.) Due to the surrounding facts of this matter being the same in 2001 as they existed in 2007, had the uniformity assertion been presented in the 2001 grievance, it could have been resolved. For whatever reason, Grievant chose not to appeal the previous level two decisions, and they became final, binding decisions. The legal doctrine of res judicata precludes the undersigned from addressing the very same issue again.

Even were the merits to be addressed, Grievant failed to demonstrate she is performing like assignments and duties of Ms. Willis, or that the difference in employment terms between the two employees is related to anything other than their actual jobresponsibilities. Grievant is multi-classified (See footnote 5) as an Accountant 3 and Secretary 3, while Ms. Willis's classification is that of Secretary 3. Grievant indicated that she requested to be classified as an Accountant because she was required to perform duties within the Accountant classification. No evidence was offered that Ms. Willis performed duties within the Accountant classification. As Grievant and the employee against whom she seeks to compare her contract term are in different classifications, they are not performing like assignments and duties because they have additional duties in relation to the other classification Grievant holds. *See Allison v. Hancock County Bd. of Educ.*, Docket No. 97- 15-454 (Mar. 31, 1998); *Pate v. Summers County Bd. of Educ.*, Docket No. 97-45-188 (Feb. 5, 1998).

Furthermore, none of the responsibilities listed in Grievant's job description offered at level four overlap with those of Ms. Willis. Other than general clerical responsibilities, the job responsibilities of Ms. Willis involve substantially different assignments and duties than those performed by Grievant. While Grievant asserted at level four that several of her duties were similar to those performed by Ms. Willis, she admitted that a number of their duties were dissimilar. Grievant has once again in this grievance failed to demonstrate any violation of law, rule, or policy.

The following Conclusions of Law support the decision reached.

## Conclusions of Law

1. The doctrine of res judicata is an affirmative defense that must be proven by Respondent by a preponderance of the evidence. 156 C.S.R. 1 § 3. *See Vance v. Jefferson County Bd. of Educ.* , Docket No. 03-19-018 (May 27, 2003).

2. The doctrine of res judicata may result in the dismissal of a grievance when a party seeks to litigate “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 (1988); *Peters v. Raleigh County Bd. of Educ.*, Docket No. 95-41-035 (Mar. 15, 1995).

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.” *Blake v. Charleston Area Med. Ctr., 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. The issues in this grievance were already raised by Grievant in two separate grievances filed by her in 2001, and decided at level two of the grievance procedure that same year. The parties are the same, the relevant facts are essentially the same, and the requested relief is the same. Those decisions were not appealed. The legal doctrine of res judicata precludes the undersigned from addressing the very same issues again. 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. *See* W. Va. Code § 29-6A-7 (See footnote 1). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**Date: June 25, 2008**

**Ronald L. Reece**

**Administrative Law Judge**

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Footnote: 1

*In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.*

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Footnote: 2

*W. Va. Code § 18A-4-5b addresses the uniform treatment of county board of education service employees and states, in pertinent part:*

> *[C]ounty (salary) schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirement. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all regularly employed and performing like assignments and duties within the county . . ..*

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Footnote: 3

*The Grievance Board has held that in the event a grievant does not pursue a grievance at the next level, it is deem abandoned and the same grievance cannot be filed again. Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Hilmon v. Kanawha County Bd. of Educ., Docket No. 00-20-286 (May 31, 2001).*

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Footnote: 4

*Although not raised, the facts in the instant grievance indicate that this claim would also be untimely.*

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Footnote: 5

*"Multi-classification" is defined as "personnel employed to perform tasks that involve the combination of two or more class titles . . ." W. Va. Code § 18A-4-8.*