WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHARON STONE,
Grievant,

v. **Docket No. 2010-0876-CabED**

CABELL COUNTY BOARD
OF EDUCATION,
Respondent.

D I S M I S S A L O R D E R

Grievant, Sharon Stone, initiated a grievance against Cabell County Board of Education, Respondent on January 2, 2010. Grievant appealed to Level Two on March 10, 2010; and further documents were filed on June 9, 2010, purporting to appeal to Level Three all stating that:

> The Faculty Senate of Barboursville Middle School asserts that the Cabell County Board of Education is acting in an unfair and uneven manner by allowing some Cabell County contracted employees to work less than others for the same pay.

As relief, Grievant sought: "(1) Enforcement of the eight (8) hour work day for all, or (2) Hourly compensation equivalent to those who work for fewer than eight (8) hours... ." Both the complaint and the requested relief are the same as those asserted in a former grievance (Docket No. 2009-1641-CabED) initiated by Grievant on May 26, 2009.

On May 20, 2010, Respondent filed a Motion to Dismiss the instant grievance highlighting the repetitiveness of the two grievance actions. Citing the doctrine of *res judicata,* among other rationale, Respondent highlighted that there is no provision in the grievance procedure that permits a "do-over," or the ability to file twice and reopen a dismissed matter.

A telephonic conference was conducted on July 29, 2010, to address the issue(s) of the pending motion. Grievant appeared by legal counsel, Andrew J. Katz, Esquire, and Respondent appeared through its counsel, Rebecca M. Tinder of Bowles Rice McDavid Graff & Love LLP. Oral argument was presented by both parties. Further, the parties were given leave to file written memorandums to address contested issue(s) deemed relevant to the pending Motion to Dismiss. Grievant's Counsel was specifically requested to show cause why the Motion to Dismiss should not be granted.

This matter became mature for decision upon receipt of the last of the parties' memorandum/argument documents on or about August 18, 2010. Both parties submitted written arguments. Upon consideration of the file, arguments presented and pertinent law, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant Sharon Stone is employed by the Respondent Cabell County Board of Education at Barboursville Middle School. Further, Grievant is President of Barboursville Middle School Faculty Senate.

2. Grievant contends that she and her co-workers at Barboursville Middle School are working longer work days than other Cabell County school employees without receiving additional compensation.

3. Grievant initiated this grievance on January 2, 2010. Grievant, Sharon Stone, was the only named grievant when she filed the current grievance on January 2, 2010, and was the only person to sign the grievance form on that date. No other individual was listed specifically by name or signed the grievance form.

4. A Level One Conference transpired. Grievant appealed to Level Two on March 10, 2010, and then appealed to Level Three on June 9, 2010.

5. Grievant Stone was the only person to sign the grievance form and file the Level Two appeal on March 10, 2010.

6. In a former grievance, initiated on May 26, 2009, (Docket No. 2009-1641-CabED) Grievant filed virtually the identical same grievance statement and requested the same relief as requested by the January 2, 2010, grievance.

7. Grievant's former grievance, initiated on May 26, 2009, stated:

> The Faculty Senate of Barboursville Middle School asserts that the Cabell County Board of Education is acting in an arbitrary and capricious manner by allowing some Cabell County contracted employees to work less than others for the same pay.

and requested: "(1) Enforcement of the eight (8) hour work day for all, or (2) Hourly compensation equivalent to those who work fewer than eight hours... ."

8. The parties participated in a Level One Conference held in the Barboursville Middle School auditorium on June 9, 2009, regarding the issues presented by the grievance (Docket No. 2009-1641-CabED).

9. A decision rendered on June 11, 2009, denied the May 26, 2009, grievance. This was a four page decision on the merits issued by Respondent and signed by Superintendent William A. Smith.

10. Grievant received the June 11, 2009, decision and filed a grievance form on July 15, 2009, to appeal the decision directly to Level Three of the grievance process before the West Virginia Public Employees Grievance Board (Grievance Board).

11. Grievant contacted the Grievance Board by written correspondence dated July 29, 2009, and received by the Board on July 30, 2009. Said document specifically requested that the May 26, 2009, grievance (Docket No. 2009-1641-CabED) be dismissed.

12. Grievant's July 29, 2009, written request for the dismissal of her 2009 grievance stated:

> With reference to Sharon Stone, Grievant v. Cabell Board of Education, Respondent, Docket No. 2009-1641-CabED, please be advised that I would request that this grievance be dismissed. Since our request for a time line waiver was denied and I am unable to meet with the Faculty Senate of Barboursville Middle School during the summer break, I would request the dismissal of this grievance.

13. A Dismissal Order, dated September 4, 2009, was entered by the undersigned Administrative Law Judge dismissing and striking the matter from the dockets of the Grievance Board.

14. There was no appeal of the September 4, 2009, Dismissal Order (Docket No. 2009-1641-CabED) rendering the Level One Decision the final determination on the merits.

15. The instant grievance, which was filed on January 2, 2010, and appealed to Level Two on March 10, 2010, is an exact repeat of the 2009 grievance which was dismissed.

16. On May 20, 2010, Respondent's Counsel filed a Motion to Dismiss, requesting the dismissal of the instant grievance. Respondent's Motion provided justification for the request. Respondent further requested a telephonic conference be held on the matter.

17. Grievant, by legal counsel, filed a reply to Respondent's Motion on or about June 8, 2010. Grievant opposed the dismissal of the instant grievance.

18. Subsequently, the grievance form sent to the Grievance Board from Grievant professing to appeal this matter to Level Three on or about June 9, 2009, included a list of names purporting to be fellow grievances to the instant matter. None of the listed individuals had signed the grievance form.

19. Respondent filed a "Renewed" Motion to Dismiss, on or about July 22, 2010, specifying the legitimacy of the request pursuant to recognized principles of law and West Virginia Code.

20. An employee may withdraw a grievance by filing a written notice of withdrawal with the Grievance Board and the grievance may not be reinstated by the grievant unless reinstatement is granted by the chief administrator or the administrative law judge. See W. VA. CODE § 6C-2-3(d)

21. No permission was intentionally granted to reinstate the issues of the 2009 grievance (Docket No. 2009-1641-CabED) by a duly empowered decision maker of the Grievance Board. No request identified or recognized as seeking permission to reinstate the 2009 grievance is a part of the record.

22. A telephonic conference was scheduled to address issues relevant to the pending Motion to Dismiss.

23. There has been no grievance form properly submitted by any employee of Respondent, other than Grievant Sharon Stone, indicating a desire to be a party to this grievance. Further, no employee of Respondent has requested or been granted the right to intervene. See W. VA. CODE § 6C-2-3(f).

24. A telephonic conference was conducted on July 29, 2010, where the parties argued their respective positions with regard to the issue(s) of the pending motion. All known and recognized parties of this grievance participated in the telephonic conference.

25. The parties were also provided with additional time to present written arguments deemed relevant to the instant matter. Both parties filed written documents addressing the issues pertinent to each's position.

Discussion

Respondent, by counsel, has moved for the dismissal of the instant grievance. When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *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).

In general, Respondent's position is that the parties had a full and fair opportunity to litigate the issues in controversy the first time this grievance was filed by Grievant and, as a result, Grievant should be prevented from proceeding with the current proceedings. The parties are the same, the issue is the same, and the adjudication on the merits became final upon the withdrawal of the grievance in September 2009. In support of its Motion, Respondent, by counsel, asserted: 1) the doctrine of *res judicata* applies in the

circumstances of this matter to preclude the re-litigation of the identified cause of action; 2) no permission was requested or obtained to reinstate the 2009 grievance, *citing* W. VA. CODE § 6C-2-3(d); and 3) as filed, Grievant Stone is the only Grievant of this grievance before this Grievance Board.

Grievant, by counsel, argues against the granting of Respondent's motion and dismissal of this grievance. Counsel's argument has matured with time but essentially, it is argued that there exists equitable rationale for denial of the motion. Grievant admits that there is some statutory support for Respondent's position; however, the rule of liberality that guides the construction of the rules and regulations pertaining to education employees permits this grievance to go forward and the Board should take notice of the fact that the withdrawal of the original grievance and the filing of the new grievance was done without the aid of counsel or representation.

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).

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. 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).

Respondent in support of its contention that the doctrine of *res judicata* applies to the instant situation provided that the three elements of *res judicata* are present and have been satisfied in the fact pattern of this matter: (a) there has been a final adjudication on the merits in the prior action by an adjudicating authority having jurisdiction of the proceedings; (b) each party herein is the same as the parties, and appearing in their same capacity, in the previous action; and (c) Grievant is pursuing the same claim that was resolved in 2009, the identical cause of action or such that could have been resolved by

the prior action. *Antolini v. W.Va. Division of Natural Resources*, Syllabus Point 1, *W.Va. Supreme Court No. 33183* (Feb. 14, 2007), *citing* Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997)). The undersigned tends to agree. The Grievance Board has held that in the event a grievant does not pursue a grievance at the next level, it is deemed 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).

W. VA. CODE § 6C-2-3(d) provides that "[a]n employee may withdraw a grievance at any time by filing a written notice of withdrawal with the chief administrator or the administrative law judge. The grievance **may not be reinstated by the grievant** unless reinstatement is granted by the chief administrator or the administrative law judge." (emphasis added). Grievant admits that she "did not formally move [for the grievance] to be reinstated." Failure to do so is in contradiction of the plain language in W. VA. CODE § 6C-2-3(d). Instead, Grievant simply started over by filing another Level One grievance form with the same allegations and request for relief as in her former grievance. This is improper. No permission was requested or obtained to reinstate the 2009 grievance.

Grievant, Sharon Stone, was the only named grievant when she filed the current grievance on January 2, 2010, and was the only person to sign the grievance form on that date and the Level Two appeal on March 10, 2010. It was not until just prior to and after Level Two discussions, wherein the singularity of Grievant's filing was brought to the attention of Grievant, that a list of *potential* grievants was attached to the Level Three appeal. Respondent's formal Motion to Dismiss the instant grievance was initially filed on

May 20, 2010. Grievant was aware of the issue prior to Level Two Mediation which transpired on May 26, 2010. The Level Three grievance form was filed on or about June 9, 2010. On no document filed in the instant grievance, including the Level Three appeal, has any employee of Respondent other than Sharon Stone, executed a grievance form evidencing intent to join in this grievance. Further, no employee of Respondent has requested or been granted the right to intervene. See W. VA. CODE § 6C-2-3(f).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002), (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the granting of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. *Clutter v. Dep't of Agric.,* Docket No. 2009-1372-AGR (May 28, 2009).

To be considered a party and therefore within the jurisdiction of the Grievance Procedure, a grievance must be filed pursuant to WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. W. VA. CODE § 6C-2-3(e)(2) provides that "a grievance may be filed by one or more employees on behalf of a group of similarly situated employees. Any similarly situated employee shall complete a grievance form stating his or her intent to join the group of

similarly situated employees." It is established that the only employee of Respondent who completed a grievance form in the instant grievance is Sharon Stone. Grievant, admittedly, did not comply with the statute in adding potential parties to the grievance and, as a result, all others listed on the attachment to her grievance are not deemed to be parties.

There are limits to the rule of liberality that guides the construction of the rules and regulations pertaining to education employees. Even in light of that much cited legal principle Grievant's position is not persuasive. In the circumstances of this case, Grievant's counsel did not establish a proper basis to excuse the numerous shortcomings of Grievant's posture in this matter. The facts and circumstances surrounding this Grievant's filing is incongruent with the rule of liberality and the contours of substantial compliance.

Grievant had a full and fair opportunity to litigate the issues in controversy the first time this grievance was filed. The grievance was dismissed by request. There is no doubt that the parties are the same, the issue is the same, and the adjudication on the merits became final upon the withdrawal of the grievance in September 2009. Grievant's failure to proceed with that litigation serves to bar her from proceeding with this grievance.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *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).

2. The jurisdiction of the Public Employees Grievance Board is limited to the granting of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. *Clutter v. Dep't of Agric.,* Docket No. 2009-1372-AGR (May 28, 2009). To be considered a party and therefore within the jurisdiction of the Grievance Procedure, a grievance must be filed pursuant to WEST VIRGINIA CODE §§ 6C-2-1 *et seq*.

3. 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).

4. 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).

5. "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).

6. The issues in this grievance were already raised by Grievant in a separate grievance filed by her in 2009, and decided at Level One 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. Grievant did not follow through with her appeal. Grievant specifically requested this Board to dismiss the matter. The legal doctrine of *res judicata* precludes the undersigned from addressing the very same issues again.

7. Grievant has not demonstrated sufficient evidence to excuse the filing of this grievance matter outside of applicable statutory provisions. No permission was requested or obtained to reinstate the 2009 grievance. Grievant had a full and fair opportunity to litigate the issues in controversy.

Accordingly, the Respondent's motion to dismiss is hereby **GRANTED**, and this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: September 20, 2010

Landon R. Brown
Administrative Law Judge