THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CECIL WILLIAM MORRIS,
Grievant,

v. **DOCKET NO. 2012-1460-HarED**

HARRISON COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

This grievance was filed by Grievant, Cecil William Morris, on or about June 22, 2012, against his employer, the Harrison County Board of Education. The statement of grievance reads:

> This grievance is against Sharon Haddix.
>
> 1. I grieve that payment of a substitute teacher for instructional days for the position in which I am employed at Norwood Elementary School was a "wasting or misappropriation of public funds," (WV Code 6-6-1) during any period from February 27, through June 1, 2012 when I was suspended illegally with and/or without pay.
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> 2. I grieve that by continuing to pay said substitute in my assigned position at Norwood Elementary School during my suspension with and/or without pay in excess of thirty days, that Sharon Haddix approved additional monies and paid for non-instructional days that were unnecessary and illegally created. These include days such as Election Day, Memorial Day, and other days when students were not present that did not require a substitute. The payment of these days and such others became required days to be paid once substitute teacher was assigned to my position for the remainder of the school year. The payment of these additional days was "wasting or misappropriation of funds" (WV Code 6-6-1) and "official misconduct, malfeasance in office, and incompetence" by Sharon Haddix as per (WV Code 6-6-7).
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> 3. I grieve that as an employee "from another profession who is properly licensed and who is employed to serve the public schools" and based on

> Sharon Haddix being the chief School Business Official and Treasurer for the Harrison County Schools and its Board of Education that Sharon Haddix has a responsibility to ascertain the legality of any funds delegated for her to pay before she authorized their payment (WV Code 18A-1-1).

The stated relief was:

> 1. I seek a detailed and itemized statement of all days paid to the substitute teacher who was assigned to work in my position at Norwood Elementary School from February 27, 2012 until June 1, 2012. I ask for the amount paid the substitute each day and the total amount paid said substitute.
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> 2. I request that the instructional days and the non-instructional days that were paid also be listed in a separate statement.
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> 3. I ask that an accounting of these days be given and explained at a Harrison County Board of Education public meeting, as items paid and approved by a Board of Education are public information (WV Code 29B-1-1, 2, and 3).
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> 4. I request that the total amount of the days that were determined to be paid for illegal suspension of me, beginning but not limited to the days that I was suspended in excess of thirty days by the Superintendent of Schools without Harrison County Board of Education approved, be reimbursed by Sharon Haddix personally to the Harrison County Board of Education as they were a "wasting or misappropriation of public funds" (WV Code 6-6-1) by Sharon Haddix and as per her license, experience, training, and her responsibility as keeper of the public funds (WV Code 18A-1-1).
>
> 5. I request that Sharon Haddix search financial records for the period of time for which Susan Collins has been Superintendent of Schools and list any and all other instances where "public funds have been wasted or misappropriated" (WV Code 6-6-1) in situations such as above.

On receipt of this grievance, Superintendent Susan L. Collins responded on June 26, 2012, stating that the employment of a substitute teacher did not directly impact Grievant's employment, and that to the extent the grievance related to Grievant's suspension, those issues were the subject of another grievance. Superintendent Collins concluded that the grievance was not "appropriate for a Level I hearing at this time." Grievant appealed to level two on July 16, 2012, and a mediation session was held on

January 31, 2013. Grievant appealed to level three on April 17, 2013. A pre-hearing conference was held at level three before the undersigned Administrative Law Judge on June 19, 2013, at the Grievance Board's Westover office on this grievance as well as several other pending grievances filed by Mr. Morris. Grievant was represented by Sharon Brisban, and Respondent was represented by Susan L. Deniker, Esquire, Steptoe & Johnson, PLLC. At that conference, Grievant's representative explained that the issue raised in this grievance is whether the appropriate deductions were made from Grievant's pay for the days he was suspended, and that, questioning the days a substitute was paid was a way Grievant thought this information could be obtained. The undersigned advised the parties that this issue had already been decided, and that she would be dismissing this grievance.[1] Grievant's representative was allowed to present written argument stating why this grievance should not be dismissed. This matter became mature for decision on July 11, 2013, on receipt of Grievant's written argument.

Synopsis

This grievance seeks to relitigate the very same issue recently decided by the undersigned. Grievant was given the opportunity to present evidence on the issue at hand at a level three hearing, and a level three decision was issued on that grievance by the Grievance Board on June 13, 2013, specifically ruling on the issue raised in this grievance, and Grievant did not appeal that decision. This grievance is barred by the doctrine of *res judicata.*

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[1] Mr. Morris has filed multiple grievances, several of which raised various issues related to his suspension and were consolidated. This grievance should have been consolidated with the earlier decided grievances regarding his suspension, but the undersigned overlooked this one.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Harrison County Board of Education ("HBOE") as a teacher at Norwood Elementary School.

2. On June 5, 2012, HBOE voted to uphold the Superintendent's recommendation that Grievant be suspended without pay for 24 days, from February 27, 2012, through the end of the 2011-2012 school year. Grievant filed a grievance contesting the suspension. The undersigned denied the grievance, upholding the suspension in a written decision styled *Cecil William Morris v. Harrison County Board of Education*, Docket No. 2012-1498-CONS (June 13, 2013).

3. One of the issues decided in the Decision issued June 13, 2013, was whether Grievant had been docked too many days of pay for the period of suspension. In this grievance, Grievant seeks to rehash this very same issue.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

The issue Grievant has raised in this grievance was already decided. A Decision was issued by the undersigned on June13, 2013, ruling on this issue, as follows:

> A final issue raised by Grievant is that he continues to assert that his pay and benefits were docked for more than 24 days. Respondent acknowledged that this could have occurred because of the wording of the suspension without pay, which was 24 days through the end of the school year, and that because of snow days, through the end of the school year could have been more than 24 days when payroll personnel were doing calculations. Respondent assured the undersigned that if Grievant had been docked more than 24 days, this would be corrected, and the undersigned advised the parties that they needed to work this out. Respondent's personnel did a detailed calculation and explanation to demonstrate that Grievant had been properly paid, yet Grievant's representative has continued to insist that she knew how to calculate Grievant's pay, her calculations show that Grievant was not properly paid, and she submitted a list of questions to Respondent regarding the calculations. She asserted that she did not believe she was going to get an answer from Respondent, and that Mr. Moore was supposed to set up a meeting with Ms. Reider to review the information. Respondent responded on June 3, 2013, that Mr. Moore had, in fact, assisted with scheduling a meeting between payroll personnel and Grievant's representative, but that Grievant's representative failed to show up for the meeting and has not responded to any telephone calls since then. Given the misrepresentations in the written argument, the undersigned has no confidence in the representations of Grievant's representative that Grievant was not properly paid. Respondent is responsible for properly calculating the pay of all its employees and is in the better position to do so. The undersigned concludes that it is more likely than not that Grievant was properly paid.

Cecil William Morris v. Harrison County Bd. of Educ., Docket No. 2012-1498-CONS (June 13, 2013).

"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.

> 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.
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> 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.

Decapio/Beauty v. Dep't of Transp., Docket No. 06-DOH-329 (Nov. 15, 2006). These elements have been met here.

"In cases where the elements for *res judicata* are present, *res judicata* should nonetheless not be applied where a change in circumstances may have altered the rights of the parties:

> The doctrine of *res judicata* does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants.

Syl. pt. 2, *Blethen v. West Virginia Dept. of Revenue/State Tax Dept.*, 219 W. Va. 402, 633 S.E.2d 531 (2006)(per curiam); *quoting* Syllabus, *Huntington Brick & Tile Co. v. Public Service Commission,* 107 W. Va. 569, 149 S.E. 677 (1929)." *DeCapio/Beauty v. W. Va.*

Dep't of Transp., Div. of Highways, Case No. 06-AA-6, Cir. Ct. of Hancock County (June 19, 2008).

In this instance, the issue is the exact same issue regarding the exact same incident and time period. No new facts have arisen, rather Grievant's representative simply continues to pursue the very same issue even though it has already been decided. This is exactly what the doctrine of *res judicata* is intended to prevent.

The undersigned would also note that the representations of Grievant's representative at the pre-hearing conference explaining what this grievance is about bear no resemblance to the statement of grievance. Were the undersigned to address the issues which would appear to have been raised in the statement of grievance, a dismissal order would be issued for lack of standing.

> "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. *See Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). Although poor morale among the workers resulting from such an error is a real and difficult

> problem, it simply does not give Grievants standing to contest [another employee's] reallocation, which did not otherwise personally harm them.

Mason, et al., v. W. Va. Dep't of Transp., Docket No. 00-DOH-345 (Mar. 28, 2001). Grievant was not personally affected in any way by the payment by HBOE of wages to a substitute teacher, and such matters are not grievable.

The following Conclusions of Law support the Dismissal of this grievance.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

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.' *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).

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.
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> Second, the two actions must involve either the same parties or persons in privity with those same parties.
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> 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.

Decapio/Beauty v. Dep't of Transp., Docket No. 06-DOH-329 (Nov. 15, 2006).

4. "In cases where the elements for *res judicata* are present, *res judicata* should nonetheless not be applied where a change in circumstances may have altered the rights of the parties:

> The doctrine of *res judicata* does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants.

Syl. pt. 2, *Blethen v. West Virginia Dept. of Revenue/State Tax Dept.*, 219 W. Va. 402, 633 S.E.2d 531 (2006)(per curiam); *quoting* Syllabus, *Huntington Brick & Tile Co. v. Public Service Commission,* 107 W. Va. 569, 149 S.E. 677 (1929)." *DeCapio/Beauty v. W. Va. Dep't of Transp., Div. of Highways,* Case No. 06-AA-6, Cir. Ct. of Hancock County (June 19, 2008).

5. The issue raised in this grievance is the exact same issue raised by Grievant in another grievance against this same employer, and related to the very same set of facts

in that grievance. A Decision was issued by the Grievance Board on that grievance two months ago, deciding the issue raised again in this grievance. The doctrine of *res judicata* precludes the relitigation of this grievance.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Dismissal Order 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 16, 2013