

APPEAL NO. 33182

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

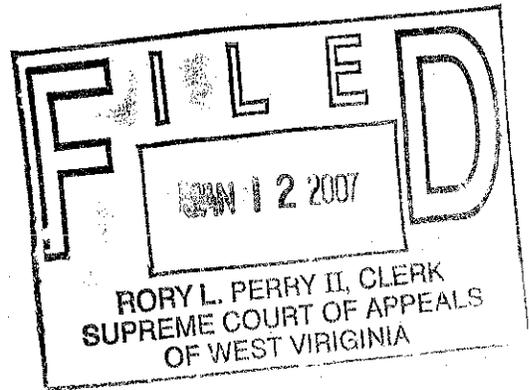
STEPHEN J. ANTOLINI,
ROGER MCCLANAHAN,
and MICKEY SYLVESTER,

Appellants,

v.

WEST VIRGINIA DIVISION OF
NATURAL RESOURCES,

Respondent.



RESPONSE TO PETITION

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RESPONSE TO PETITION

The West Virginia Division of Natural Resources responds to the Appellants' assertion that *res judicata* does not operate to bar the Appellants' continued litigation of their appeal of the Administrative Law Judge's decision in their grievance. Appellants ignore the fundamental legal principle that *res judicata* applies to all issues litigated or *that could have been litigated* in proceedings. The ALJ's decision was appealed in three separate circuit court proceedings. The Appellants had notice of and the opportunity to participate in the proceedings. To find that *res judicata* does not apply leaves state agencies subject to multiple and inconsistent decisions by various circuit courts and thwarts the stated goals of *res judicata*. Accordingly, the Circuit Court's application of *res judicata* was proper.

I. PROCEDURAL HISTORY

This appeal was precipitated by a grievance filed by three conservation officers, Sgts. Stephen Antolini, Mickey Sylvester, and Charles McClanahan, against the Division of Natural Resources (hereinafter the "DNR"). The three sergeants alleged favoritism and discrimination because Regional Training Officers, who are also of the rank of sergeant, were paid more than they were. The DNR presented uncontroverted evidence at the grievance hearings at Levels III and IV that the difference in pay was due to merit increases given to Regional Training Officers. This evidence was offered by Major Dave Murphy, supervisor for the Regional Training Officers, who requested the merit increases. Moreover, the merit increases were approved by the Division of Personnel.

Despite the rather narrow focus of the grievance, the ALJ handed down a Level IV grievance decision that declared the *merit increases* to be invalid, even though the merit increases were not at issue, nor were the Regional Training Officers parties to the grievance. The final decision purported to grant the relief sought by the grievants "in part" and therefore, the decision denied the grievants' request for relief "in part." Specifically, the ALJ's decision ordered the DNR to rescind these merit increases and granted no direct relief to the original grievants.¹ Accordingly, contrary to the representation in this Appeal, the grievants did not prevail on their theories of favoritism and discrimination.

On November 18, 2003, Sgt. Rexrode, a Regional Training Officer whose salary was directly affected by the ALJ's decision, filed a Motion for Temporary Injunction, Motion to

¹ A copy of the ALJ's Decision and Order is attached as Exhibit 1 to the West Virginia Division of Natural Resources' Brief and Proposed Orders filed in Kanawha County Circuit Court, Civil Action No. 03-AA-193 (Judge Paul Zakaib, Jr.) (hereinafter referred to as "DNR's Brief and Proposed Orders").

Intervene and Appeal of the Level IV Grievance Decision in Grant County Circuit Court, the circuit court for the county in which he resides. This venue was correct, and the circuit court had jurisdiction over the appeal, pursuant to W. VA. CODE § 29-6A-7, which allows appeal either in Kanawha County Circuit Court or in the circuit court of the county in which the grievance occurred. Notice of this appeal and the motion to intervene in the grievance proceeding was given to the three sergeants who filed the original grievance and their representative during the grievance proceedings, Norman Henry, who works for the Masters Law Firm.² In fact, the grievants and their representative also received notice of the December 22, 2003 scheduling conference to set a briefing schedule in the appeal filed in the Grant County Circuit Court and had full opportunity to participate in this hearing.

On November 21, 2003, the Grant County Circuit Court entered an Order granting Sgt. Rexrode's Motion to Intervene in the grievance proceeding and the Motion for Injunction and Stay of the ALJ's decision at Level IV.³ This injunction provided relief to *all* of the Regional Training Officers.

On November 26, 2003, four other Regional Training Officers filed an appeal nearly identical to the one filed by Sgt. Rexrode in Grant County in Kanawha County Circuit Court, Civil Action No. 03-AA-181, seeking exactly the same relief. The Appellants concede that Kanawha County is a proper venue for appeal. In fact, on December 11, 2003, the original grievants filed an appeal in Kanawha County Circuit Court – Civil Action No.03-AA-193. In other words, the same ALJ decision was simultaneously appealed in three separate actions in two different circuit courts.

² Formerly the Masters & Taylor law firm.

³ A copy of this Order is attached as Exhibit 2 to the DNR's Brief and Proposed Orders.

Judge Frye presided over the appeal of the Level IV ALJ decision in Grant County, set a briefing schedule, and accepted briefs from interested parties, including the Sgt. Rexrode and the DNR. Importantly, this appeal was the first filed and allowed Sgt. Rexrode to participate as an *intervenor* in the appeal of the ALJ decision. The Appellants had notice of this appeal and the opportunity to participate.

After considering the record and the briefs, on March 5, 2004, Judge Frye issued an Order *vacating* the Level IV decision and specifically finding that the grievants had not suffered any discrimination.⁴ The DNR was ordered to continue to pay the Regional Training Officers the salaries that reflected the merit increases awarded.⁵

Significantly, once this Order was issued by Judge Frye, the DNR was under court order to provide the same relief that sought by the remaining Regional Training Officers in Kanawha County.⁶

Judge Frye's Order fully and finally adjudicating the merits of the ALJ's Level IV Grievance Decision was not appealed.

On March 8, 2005, the Kanawha County Circuit Court entered an order granting summary judgment on behalf of the *intervening* Regional Training Officers. The Motion for Summary Judgment specifically asked for this Court to "[f]ollow Grant County Circuit Court

⁴ A copy of this Order is attached as Exhibit 3 to the DNR's Brief and Proposed Orders.

⁵ Further, on April 1, 2004, even though the DNR did not oppose the appeal – in fact, the DNR's brief supported the appellant's position – and was not the cause of the appeal, the DNR was ordered to pay attorneys' fees in the statutory amount of \$1,500.00.

⁶ Ultimately, the relief sought in Kanawha County was granted, and the DNR again paid attorneys' fees in the amount of \$1,500.00. That the DNR was forced to pay attorneys' fees twice for identical outcomes – an outcome that the DNR did not oppose and, in fact, supported – is illustration of why the doctrine of *res judicata* must be applied.

Judge Frye's ruling *vacating the decision and Order* of the Administrative Law Judge dated October 28, 2003." (emphasis added).⁷ Judge Zakaib granted the Motion for Summary Judgment without reservation or modification of this request for relief.⁸ Moreover, Judge Zakaib noted that the Appellants had no objection to granting the Motion for Summary Judgment. This final Order granting summary judgment was not appealed.

Accordingly, the third and final appeal of the ALJ's decision was barred by the doctrine of *res judicata*.⁹ All issues in front of the Court have been fully and finally litigated in Grant County, in a proceeding of which the Appellants had full notice and an opportunity to participate. The DNR should not be subject to potentially conflicting rulings by two separate circuit courts on the same Order. Moreover, Judge Zakaib vacated the decision and Order of the administrative law judge in Civil Action No. 03-AA-181 with the full participation of the Appellants. It is disingenuous to argue that the Appellants' issues could not have been litigated when Judge Zakaib considered the entire decision and Order, and specifically found, as Judge Frye had, that the Appellants did not suffer from favoritism or discrimination. Two separate circuit courts vacated decision and Order, and accordingly, all issues in this appeal have been fully and finally adjudicated on two separate occasions. There is no relief left to seek.

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A copy of the Motion for Summary Judgment is attached as Exhibit 4 to the DNR's Brief and Proposed Orders.

⁸ A copy of this Order is attached as Exhibit 5 to the DNR's Brief and Proposed Orders.

⁹ Arguably, *res judicata* applied to the first Kanawha County Circuit Court proceeding.

II. STATEMENT OF FACTS

The original grievance was that the DNR had showed favoritism and grossly discriminated against the grievants.¹⁰ This was never proven by the grievants by a preponderance of the evidence.

The DNR offered testimony at the Level III and Level IV hearings of Major David E. Murphy, the senior officer in charge of field operations.¹¹ Major Murphy testified regarding the Regional Training Officers (also referred to as "RTOs") position and that the RTOs received a merit increase recommendation by Colonel Jim Fields, Chief of Law Enforcement. (Transcript of Level III hearing at pp. 21-27 (hereinafter "Tr. Level III")).¹² The DNR offered uncontroverted testimony that the raises received by the RTOs were merit raises. In the course of this testimony, Major Murphy explained the history of the RTO position as this was relevant to why he felt that merit increases were appropriate for these officers. The ALJ construed this testimony as proving that the increases were not merit based – a convoluted finding that requires complete distortion of the evidence presented.¹³

Major Murphy testified that he recommended the merit increases to Colonel Fields and that the merit increases went through the state system of pay increases. Tr. Level III at p. 26:18-23. This process involves not only the DNR personnel office, but also the Division

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The Statement of Grievance is attached as Exhibit 8 to the DNR's Brief and Proposed Orders.

¹¹

Subsequent to these hearings, Dave Murphy was promoted to the rank of Lt. Colonel.

¹²

The transcript of the Level III hearing is attached as Exhibit 9 to the DNR's Brief and Proposed Orders.

¹³ The Level III Hearing Examiner, Jack McClung, heard the same evidence and came to the opposite conclusion, finding that the merit raises were legal and proper and that the DNR had not shown favoritism or discrimination.

of Personnel. There is no evidence anywhere in the record that the merit increase was anything but recognition of the outstanding performance of duties assigned to the officers. The Major's testimony was quite clear, and there is no allegation -- nor did the ALJ find -- that Major Murphy's testimony is not credible.

Sgt. Sylvester testified on behalf of the three grievants. Sgt. Sylvester opined that all sergeants do the same work and that RTOs had no supervisory responsibilities. (Tr. Level III at pp. 16-18).

Following the Level III hearing, the evaluator, Jack McClung, forwarded a Recommended Decision and Order to the Director of the DNR¹⁴ that the grievance be denied. The Recommended Decision and Order found that the merit increase was recommended by Colonel Fields and that the jobs of field sergeant and RTO are completely different. The Recommended Decision and Order also made the following conclusions of law:

1. In the case of *Largent v. W. Va. Div. of Health*, 452 S.E.2d 42, 192 W. Va. 239 (1994), the West Virginia Supreme Court of Appeals held that: It does not violated the principle of pay equity for the state to pay employees within the same classification differing amounts. W. VA. CODE § 29-6-10.
2. "An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary, capricious or contrary to law or properly established policies or directives." *Terry v. W. Va. Div. of Highways*, Docket No. 91-DOH-186 (Dec. 30, 1991). The Division of Natural Resources' actions with respect to merit raises appear to be consistent with the law as set forth in *Terry*, and not unreasonable, arbitrary and capricious or contrary to law, or properly established policies or directives.
3. Grievants failed to prove the violation of any statute, rules or regulations or policies on the part of the Division of Natural Resources.
4. Grievants failed to prove the allegations constituting their grievance by a preponderance of the evidence.

¹⁴ The Recommended Decision and Order is attached as Exhibit 10 to the DNR's Brief and Proposed Orders.

Level III Recommended Decision and Order, p. 10.

The DNR adopted the Recommended Decision and Order as its decision and the grievants appealed.

At Level IV all three grievants testified. In addition to the points raised at Level III, at Level IV the grievants argued through testimony that pay should be equalized within the DNR ranks although this is not required by statute. (Transcript of Level VI hearing at p. 28 (hereinafter "Tr. Level IV")).¹⁵ The base pay for conservation officers is set by statute.¹⁶

This is the "*minimum*" annual salary. The statute specifically authorizes merit increases:

Nothing in this section prohibits other pay increases as provided for under section two, article five, chapter five of this code: Provided, That any across-the-board pay increase granted by the Legislature or the governor will be added to, and reflected in, the minimum salaries set forth in this section: and that *any merit increases granted to an officer* over and above the annual salary schedule listed in subsection (b) of this section are retained by an officer when he or she advances from one rank to another.¹⁷

Major Murphy also testified at the Level IV hearing. Major Murphy testified clearly, and from personal knowledge, that the pay increases received by the RTOs were merit increases. Tr. Level IV at pp. 61-62. This testimony was not refuted or rebutted. Furthermore, there was no prohibition against any qualified officer applying for an RTO

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The transcript of the Level IV hearing was attached to briefing in this matter. The Appellants' representative at Level IV offered to have the tapes of the Level IV hearing transcribed. The transcript was sent to the DNR. There are numerous mistakes – including referring to DNR's counsel as the "female voice" – and portions of the transcript labeled as inaudible. The DNR assumes that this transcript is a result of the quality of tapes provided by the grievance board and is grateful that Appellants' representative attempted to transcribe the tapes at all.

¹⁶ W. VA. CODE § 20-7-1c(b).

¹⁷ *Id.*

position should one become vacant and no prohibition against any officer receiving a merit increase should one be recommended.¹⁸

The grievants offered no evidence at either Level III or Level IV that they had been denied merit increases or that they had not been considered for merit increases. The grievants merely requested that their pay level be raised to that of the RTOs who had received the merit increases. Ironically, the DNR could not do this if it wanted to since the only way to increase pay within the state system is by (1) promotion; (2) merit increase; or (3) annual increment increase.¹⁹ In short, other than the fact that merit increases were not given to all sergeants, there is no evidence of any discrimination or favoritism. In point of fact, if all of the sergeants had received merit increases, that would be more suspect than if actual meritorious individuals received merit increases to the exclusion of those whose performance was not up to that level.

The ALJ attempted to sidestep the uncontroverted evidence offered by the DNR by dictating to the DNR what evidence it would have to present in order to meet its burden. The ALJ would have had the DNR introduce the evaluation forms of those employees who received merit increases in order to prove the merit. This was a clear abuse of discretion on the part of the ALJ. This arbitrary and capricious requirement was both clearly erroneous and contrary to law.

The DNR offered testimony of a senior officer who testified from personal knowledge that the merit increases given to the RTOs were just that – based on merit.

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It should be noted that since this grievance was filed an RTO position became vacant and was filled. None of the grievants applied for that position. The successful candidate, Sgt. William Persinger, is paid the base pay for sergeants and has not received a merit increase, although he may be recommended for one in the future, as could any deserving officer.

¹⁹ W. Va. Code R. §§ 143-1-5.4, 143-1-5.8, 143-1-5.9.

Moreover, the increases made their way through the personnel system of the state – further evidence that they were merit based. Requiring confidential personnel records of state employees to be offered up as evidence and provided to another state employee merely because that employee did not receive a merit raise is both improper and a violation of the privacy of an employee who has no participation in the proceedings – and quite possibly, no knowledge that the proceedings are even occurring. Further, confidential employee personnel evaluations are protected from disclosure by statute, and the Division of Personnel’s administrative rules, *See* W. VA. CODE §§ 29-6-16 and 29B-1-4(2); W. VA. CODE R. §§ 143-1-19 and 143-1-20. The suggestion that these confidential and highly sensitive documents are not only relevant – but mandatory – in grievance proceedings in which the employees themselves are not parties puts state agencies in the untenable position of forfeiting grievances or violating the law in order to prove the agencies’ proper conduct. Finally, the agencies themselves do not have the final say in merit increases – the Division of Personnel is required to approve such increases, providing the necessary, and confidential, oversight to the process.

Despite the clear weight of the testimony, ALJ Paul Marteney found that the grievants had proven discrimination and favoritism. With absolutely no evidence to support his conclusion, the ALJ found that the merit raises were “pretextual” and rescinded them. The ALJ’s findings were clearly erroneous and properly vacated.

III. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The Appellants' Appeal Is Precluded by the Doctrine of *Res Judicata* as the Issues Raised in This Appeal Were Decided by the Grant County Circuit Court and the Kanawha County Circuit Court in Two Separate Proceedings.

The decision and Order of the ALJ has been vacated on two occasions – first by Judge Frye after his consideration of the entire record and brief submitted by the parties to that appeal and again by Judge Zakaib when summary judgment was granted in Civil Action No. 03-AA-181. On both occasions, the Appellants had full notice of the proceedings and the opportunity to participate. In fact, with respect to the summary judgment granted by the Kanawha County Circuit Court, not only did the Appellants participate, they specifically *did not object* to the entry of the Order vacating the entire decision and Order. Neither the Order entered by the Grant County Circuit Court or the Order entered by the Kanawha County Circuit Court in Civil Action No. 03-AA-181 was appealed by the Appellants. Plainly all issues related to the decision and Order of the ALJ have been fully and finally litigated with respect to the Appellants and the DNR. *Res judicata* applies to bar any further consideration by the circuit court.

Res judicata or “claim preclusion” applies when there is a final judgment on the merits that precludes the parties or their privies from relitigating issues that were decided *or could have been decided* in the earlier action. *Slider v. State Farm Mut. Auto Ins. Co.*, 210 W. Va. 476, 480, 557 S.E.2d 883, 887 (2001), *quoting State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995) (*citing Allen v. McCurry*, 449 U.S. 90, 94 (1980)) (emphasis added). There are two rationales for the application of *res judicata*. The first is to permit “repose on the part of defendants who have been subject to suit.” *Id.* (citations omitted). The second

rationale is to conserve judicial resources and foster “reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id. quoting Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 220 (1983) (quoting *Montana v. United States*, 44 U.S. 147, 153-54 (1979)). Both rationales are implicated in the present proceedings.

There are three requirements for applying *res judicata*: (1) there must have been a final adjudication on the merits by a court having jurisdiction over the proceedings in a prior action; (2) the present action and the prior action must involve either the same parties or persons in privity with those parties; and (3) the cause of action identified as the resolution in the present action must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, if it had been presented, in the prior action. *Id.* at Syl. Pt. 2.

All three requirements are met in this instance. The decision and order of the ALJ in the grievance brought by the Appellants against the DNR has been appealed in three separate actions. Judge Frye in Grant County allowed intervention in the grievance and then fully and finally adjudicated the decision and order vacated after consideration of the underlying record and briefs filed.

Contrary to the assertions by Appellants, once intervenor status has been granted, those intervenors become parties to the proceedings. *See e.g.* W. VA. R. CIV. P. 24; *Stern v. Chemtall, Inc.*, 217 W. Va. 329, 617 S.E.2d 876 (2005). Appellants attempt to argue that while the RTOs were entitled to intervene because they were entitled to relief from the decision and order, they were not parties to the grievance. This claim ignores the function of intervention and the resulting legal status of the parties. Intervenors become parties, entitled to assert defenses and claims for relief – even counterclaims. *See Stern v. Chemtall, Inc.*,

217 W. Va. at 334, 617 S.E.2d at 881. The whole point of intervenor status is “to ensure that none of the parties is prejudiced by the potential of duplication of efforts and possible inconsistent results.” *Id.* at 339; 886. This is *precisely* why *res judicata* was correctly applied and should be allowed to stand.

The Appellants had both notice and opportunity to participate in that proceeding. Further, Judge Zakaib again finally adjudicated the decision and order by vacating it again with summary judgment in Civil Action No. 03-AA-181 – a case in which the Appellants not only appeared, but in which they participated. In fact, the Appellants specifically had no objection to the entry of summary judgment. In both instances the courts at issue had jurisdiction over the appeal. *See* W. Va. Code 29-6A-7.

All issues relating to the Appellants’ appeal could have been fully and finally litigated in either of the earlier filed RTO appeals. All of the appeals *cited identical grounds*. As grounds for their appeal to the circuit court, the Appellants cited:

1. The decision is contrary to law;
2. The decision exceeds the Administrative Law Judge’s statutory authority;
3. The decision is clearly wrong in view of the reliable, probative and substantial evidence of the whole record;
4. The decision is arbitrary, capricious, characterized by an abuse of discretion and is clearly an unwarranted exercise of discretion;
5. The decision results in the unlawful taking of property and property rights of the Grievants/Petitioners;
6. The action and conduct of the Administrative Law Judge violated due process rights of the Grievants/Petitioners; and
7. S.J. Antolini, R.C. McClanahan and M.A. Sylvester reserve their rights to allege such other grounds for appeal as may be evident from the record.

Petition for Appeal, pp. 2-3.

These grounds are *identical* to the grounds for appeal in Civil Action No. 03-AA-181,²⁰ which was dismissed on summary judgment by Judge Zakaib. Moreover, these grounds for appeal are *identical*²¹ to the grounds alleged in the Petition for Appeal considered by the Grant County Circuit Court.²² The important point is that the identical cause of action has been considered by the Grant County Circuit Court and this Court.

The third requirement is most frequently the focal point of the *res judicata* analysis. The precise cause of action does not actually need to be litigated in the prior action as long as the claim could have been raised and determined. *Id.* at 481, 888, quoting *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 477 498 S.E.2d 41, 49 (1997). The *res judicata* analysis, therefore, encompasses issues of joinder as a party's failure to present an issue may preclude the issue's determination in subsequent proceedings. *Id.* It is not necessary for the issue to have been formally stated in the prior proceeding, but rather, it is "sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits." *Id.* (quoting Syl. Pt. 1, *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S.E. 16 (1890)).

The test applied to determine whether the issue in the two proceedings is identical in West Virginia is the "same evidence" approach. *Id.* That test is articulated as a test "to

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The Petition for Appeal in Civil Action No. 03-AA-181 is attached as Exhibit 6 to the DNR's Brief and Proposed Orders.

²¹ This is not surprising given that the grounds for appeal enumerated in W.VA. CODE § 29-6A-7(b) are numbers 1-4.

²² The Petition for Appeal filed in Grant County Circuit Court is attached as Exhibit 7 to the DNR's Brief and Proposed Orders.

inquire whether the same evidence would support both actions or issues.” *Id.* (quoting *White v. SWCC*, 164 W. Va. 284, 290, 262 S.E.2d 752, 756 (1980)).

In the present scenario, since circuit courts are to rely on the underlying record of the grievance proceedings for this appeal, the same evidence has been considered for all three appeals of the order and decision of the ALJ.²³ The Appellants designated that record for their appeal in circuit court. They offered no new evidence for Judge Zakaib’s consideration. Furthermore, all appeals – and appellants – cited exactly the same grounds for appeal. Accordingly, both Judge Frye and Judge Zakaib were considering exactly the same issues – the same issues that the Appellants now claim that they did not have a chance to litigate.

Res judicata is designed to foster repose in the final decision of a court and to preserve judicial resources. Should this Court find that *res judicata* does not apply both of those purposes are thwarted. The DNR – and all agencies of this state – would be open to potentially conflicting orders from circuit courts of this State. Presently, the DNR is operating under the order issued by the Grant County Circuit Court based on appeal of the ALJ’s decision and order. Should the Kanawha County Circuit Court, considering exactly the same decision and order, come to a different conclusion and issue a ruling inconsistent with the Grant County Order, the DNR would be put in the position of being unable to comply with the mandate of one of the circuit courts considering the *same decision and order and the same issues*. Not only can the DNR not rest easy in following a circuit court’s order, but the potential for inconsistent judicial decisions is immense. Further, two separate circuit courts have considered the same decision and order, the same evidence and the same

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The court’s ruling shall be upon the entire record made before the hearing examiner, and the court may hear oral arguments and require written briefs. The court may reverse, vacate, or modify the decision of the hearing examiner or may remand the grievance to the appropriate chief administrator for further proceedings. W.VA. CODE § 29-6A-7(d).

grounds for appeal – ample opportunity for the Appellants to have presented their case. Judicial economy is not served by allowing these issues to be litigated again. These are precisely the results the doctrine of *res judicata* seeks to avoid. There is no legal or procedural precedent for requiring a litigant to defend the same action simultaneously in multiple venues,²⁴ particularly when the issues have been fully and finally adjudicated. Not only does this not make general legal sense, there is nothing in the grievance statutes that indicate this is the expected, desired, or anticipated outcome of the appeal process.

IV. PRAYER FOR RELIEF

Wherefore, in light of the foregoing the DNR requests that this Court decline to grant the petition for appeal as the application of the doctrine of *res judicata* was properly applied by the Kanawha County Circuit Court.

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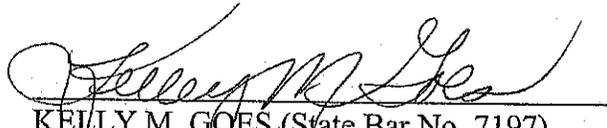
Should this Court decline to apply the doctrine of *res judicata* then this appeal could have been brought in nine separate venues since each Regional Training Officer – and there are six, each stationed in a different county – could have filed an appeal in his home county, and the original grievants reside in three additional counties. Thus, the DNR could be subject to sorting through the competing Orders of nine separate Circuit Courts – possibly ten if one of the employees did not already reside in Kanawha County. This result is clearly nonsensical.

Respectfully submitted,

WEST VIRGINIA DIVISION OF
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CERTIFICATE OF SERVICE

I, Kelley M. Goes, Special Assistant Attorney General, hereby certify that the foregoing "Response to Petition" was served upon the following counsel of record by depositing the same in United States first class mail, postage prepaid, this 12th day of January, 2007, addressed as follows:

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