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 KENNETH PRZYBYL,  
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 Appellant,  
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 v.  
 ANTHONY EARL, Secretary,  
 Department of Natural Resources,  
 VERNE KNOLL, Deputy Director,  
 Bureau of Personnel,  
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 Respondents.  
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 Case No. 76-243  
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**OFFICIAL**  
 INTERIM  
 OPINION AND ORDER

Before: DEWITT, Chairperson, HESSERT, MORGAN, and WARREN, Board Members.

NATURE OF THE CASE

This is an appeal of the denial of a grievance at the third step pursuant to Section 16.05(7), stats.

FINDINGS OF FACT

These findings are made solely for the purpose of deciding the respondent's motion to dismiss. The background of this case goes back to a previous appeal before the board, 76-112. This appeal concerned the denial of a reclassification request which was communicated to appellant on May 13, 1976. Appellant's appeal of that denial reached the board June 16, 1976. The respondent moved to dismiss on the grounds that the appeal was untimely. At the prehearing conference the appellant indicated that if he could avoid the timeliness issue by submitting a new reclassification request, he would withdraw the appeal and proceed along those lines. The board attorney subsequently advised Mr. Przybyl as follows:

"It appears that a new reclassification request may be immediately submitted for Mr. Przybyl's position. However, the Department of Natural Resources might refuse to process it since an identical request had been submitted and processed so recently. If this occurs, Mr. Przybyl may then file a grievance based on the Department's nonaction." (letter from K. Anderson, 9/16/76).

Mr. Przybyl then withdrew his appeal and stated that he intended to request a new reclassification from DNR and would appeal nonaction through the grievance procedure. Case no. 76-112 accordingly was dismissed on October 1, 1976, "at the request of the appellant."

In the meantime the appellant filed a grievance requesting reclassification on September 29, 1976. This was denied at the third step on October 21, 1976, on the grounds that there had been no change in the appellant's duties since the review and denial in May. This denial was appealed to the board. At the pre-hearing conference the respondent moved to dismiss the appeal on the grounds (1) that the appeal was actually an appeal from respondent's May 4, 1976, decision denying the reclassification request and therefore was untimely; (2) the October 1, 1976, dismissal order is res judicata to the instant appeal; and (3) if the board were to take jurisdiction of the appeal it would in effect nullify the fifteen day time limitation on appeal contained in Section 16.05(2), stats.

#### CONCLUSIONS OF LAW

It simply does not follow that appellant is appealing the March, 1976, reclassification denial. He is appealing the October 21, 1976, denial of his grievance requesting reclassification. The fact that the October 21st decision rests in part on the March decision does not make this appeal an appeal of the March decision.

As to the res judicata argument, the doctrine does not apply to a voluntary withdrawal. See 46 Am Jur 2d judgments Section 492: "A voluntary dismissal, nonsuit, or discontinuance of an action is generally regarded as a mere withdrawal of the plaintiff's claim, which does not have the effect of an adjudication on the merits and does not bar the plaintiff from maintaining another action on the same cause of action."

The question framed by the motion to dismiss really goes to the merits - whether the agency was justified in its resolution of this grievance at the third step. The motion to dismiss does not appropriately reach this issue and must be denied.

ORDER

The respondent's motion to dismiss is denied and this appeal shall be scheduled for hearing in due course.

Dated April 25, 1977. STATE PERSONNEL BOARD

  
Laurene DeWitt, Chairperson