BILLY TOLER

v. **Docket No. 94-DOH-1142**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS

DECISION

The grievant, Billy Toler, is employed by the Respondent Division of Highways (DOH) as a Transportation Worker I in its Wyoming County office. He initiated this grievance at Level I July 11, 1994, alleging that he had been improperly denied an "across-the-board" raise granted state employees by the Legislature during its 1994 session. The grievant's supervisor and the Level II evaluator found that they were unable to grant relief and the grievance was denied at Level III following a hearing held February 7, 1995. Appeal to Level IV was made March 6, 1995, and the parties subsequently agreed to submit the case for decision on the record developed at the lower levels. (See footnote 1) Proposed findings of fact and conclusions of law were submitted by May 2, 1995.

Much of the factual background of the case is not in dispute. From April 1969 to December 1981, the grievant was employed by the Alcohol Beverage Control Commission (ABCC). In January 1993, DOH hired him as a temporary employee. DOH attempted to elevate him to permanent status in May 1993, but the West Virginia Division of Personnel (Personnel) disapproved the action on the basis that the grievant had been terminated from his employment with ABCC for cause. (See footnote 2) The ensuing grievance over DOH's decision to retain him in a temporary capacity reached Level IV September 10, 1993. (See footnote 3)

During a Level IV hearing held November 30, 1993, the grievant entered into settlement negotiations with DOH and Personnel. The hearing was continued indefinitely on the representation of the parties that a tentative verbal settlement agreement had been reached. Subsequently, a settlement agreement dated December 14, 1993, between the grievant, DOH and Personnel was prepared.

The agreement provided that, in exchange for the grievant's withdrawal from the grievance, DOH

would "re-submit the necessary paperwork for the reinstatement of Grievant at the same pay and classification as previously submitted." Personnel agreed "to approve the reinstatement of the Grievant, said reinstatement to be implemented no later than thirty days after execution of the agreement by all parties." The agreement contained anacknowledgement by the grievant that he had read and fully understood its terms.

All parties had signed the agreement by January 18, 1994. (See footnote 4) The grievant was reinstated on January 31, 1994. The case was dismissed per order dated March 4, 1994.

The Legislature, during its 1994 session, awarded state employees a one-thousand dollar ($1,000.00) pay raise effective July 1, 1994. Personnel issued instructions for implementing the raise on April 14, 1994. Those instructions, in pertinent part, provided,

> All employees hired for permanent full-time and permanent part-time positions on or before January 4, 1994 are eligible for and shall be given the across-the-board increase as a salary adjustment. This includes employees hired on a provisional basis or for a probationary period in a permanent position on or before January 4, 1994. Individuals hired for permanent full-time and permanent part-time positions after January 4, 1994 are not eligible for this salary adjustment.

Since the grievant did not achieve permanent employee status until January 31, 1994, he was not given the increase.

The grievant's sole argument is that he was actually rehired on November 30, 1993, the date he and DOH and Personnel appeared for the Level IV hearing in the previous complaint, and, as noted, entered into settlement negotiations. DOH maintains no settlementwas reached until January 18, 1994, when its commissioner signed the written agreement. DOH contends that since the grievant was reinstated January 31, 1994, the terms of the agreement were fulfilled well within the period allowed.

The Grievance Board has previously ruled that a state employee is not officially "hired" until the appointing authority has taken all steps required to make the appointment. Ollar v. W.Va. Dept. of Health and Human Resources, Docket No. 92-HHR-186 (Jan. 22, 1993). The grievant herein has produced no evidence whatsoever to show that he and DOH and Personnel reached any terms other than those embodied in the December 14, 1993 written agreement. The provision in the agreement granting the respondent agencies thirty days to effect the grievant's reinstatement is abundantly clear. The grievant's signature thereon is conclusive proof that he fully understood that he would not

be reinstated for up to thirty days from the date it was executed by all parties. His assertion that he believed that he had been reinstated on November 30, 1993, is simply not credible.

All evidence of record supports that no formal action was taken on November 30, and that the parties had simply reached a tentative agreement. Further, there is no evidence of record to indicate that either DOH or Personnel purposely delayed drafting the agreement or obtaining the signatures thereon. It seems reasonable that the agreement was drafted within two weeks of the November 30 discussions and finalized thirty-four days later. Since the grievant does not question Personnel's April 14, 1994instructions on the pay raise and the January 4, 1994 "cutoff" date established therein, (See footnote 5) there can be no finding that DOH or Personnel committed any wrongdoing.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Wyoming County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: May 19, 1995

Footnote: 1The record consists of the transcript of the Level III hearing; the decisions rendered at Levels I through III; Grievant's Level III Exhibits 1 through 7; Grievant's Level IV Exhibits 1 & 2; and Agency's Level III Exhibits 1 & 2.

Footnote: 2Personnel's regulations prohibit the reemployment, at least on a permanent basis, of persons whose employment has been terminated for disciplinary reasons.

Footnote: 3The case was styled Toler v. Division of Highways/Division of Personnel, Docket No. 93-DOH-368. The undersigned was the presiding Administrative Law Judge in the case.

Footnote: 4Personnel counsel and Director of Personnel Robert Stephens signed the agreement on January 13, 1994. DOH counsel and Commissioner of Highways Fred VanKirk signed on January 18, 1994. Although the grievant and his

counsel did not date their signatures, the record suggests that they signed prior to January 18. In any event, since the grievant was reinstated January 31, it is not necessary to determine the precise date on which they signed.

Footnote: 5Notice is taken that the Legislature, in awarding the increases, stated in its 1994 Digest of the Enrolled Budget Bill, at VI, that,

> *"All other full-time public employees of the state will receive a salary increase of $1,000 effective July 1, 1994. It is the intent of the Legislature that all full-time employees of the state participate in salary increases although it is recognized that the Division of Personnel will fulfill its obligations under general law and construct reasonable guidelines for eligibility which may involve minor restrictions."*

After a cursory review of this language, Personnel's April 14, 1994 guidelines, and the law applicable to regulations adopted by agencies pursuant to legislative directive, it appears to the undersigned that the January 4, 1994 cutoff date was a reasonable exercise of Personnel's "obligations under general law." See Crowder v. W.Va. Dept. of Tax and Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995).