RICKEY CHAPMAN,

Grievant,

v. DOCKET NO. 97-DOH-261

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On September 23, 1996, Grievant Rickey Chapman filed a grievance alleging that his pay had been cut in 1991 without his knowledge or consent. (See footnote 1) The grievance was denied at all lower levels. He appealed to Level IV, where the parties agreed to submit the matter for decision upon the record developed below, supplemented by proposed findings of fact and conclusions of law. The matter became mature for decision on August 19, 1997, the deadline for submission of the written proposals. (See footnote 2)

ISSUES

What was Grievant's rate of pay at the time he was initially employed?

Was Grievant's rate of pay changed, without his knowledge?

Was there a binding agreement to pay Grievant $6.95 per hour?

SUMMARY OF EVIDENCE

Grievant's Exhibits:

#1: Form AW-506 for Rickey Chapman

#2: Employee Time Report from July 16, 1990 to July 31, 1990, for Rickey Chapman

#3: Employee Time Report from August 1, 1990 to August 15, 1990, for Rickey Chapman

#4: Form GL-4 for Rickey Chapman

#5: Form BF-129 for Rickey ChapmanRespondent's Exhibits: None

Testimony:

Grievant presented his own testimony, and that of Roger Setliff, Danny Hanna and Ernie Hanna (all co-workers of Grievant), and Tom Thornburg (Cabell County Supervisor).

Respondent presented the testimony of Tim Pullen (Personnel Director for District II) and Drema Smith.

FINDINGS OF FACT

1 1.

Grievant was told that his starting salary would be $6.95 to $7.25 per hour on July 6, 1990, by someone in the District II Personnel Office.

2 2.

Grievant began working as a Craftsworker II in Division of Highways' District II on July 26, 1990.

3 3.

Grievant's first pay check was for 46 hours worked prior to August 1, 1990, at $6.45 per hour. (Gr. Ex. 2.)

4 4.

Grievant's second pay check was at a rate of pay of $6.94 per hour, for hours worked beginning on August 1, 1990. The increase in rate of pay from the $6.45 per hour he received for his work in July 1990, was due to an across-the-board pay raise given to all DOH employees. (Tr. p. 22, Gr. Ex. 3.)

5 5.

Around the time that Grievant began working, several of Grievant's co-workers were told that he would be making a higher rate of pay than they were making at that time. Linda Dean, Secretary of the District II Maintenance Division in Barboursville, gave this information to the co-workers. Ms. Dean generally handled hiring paperwork, which gave her access to rate of pay information. (Tr. pp. 13-18, 23.)

6 6.

At least one of Grievant's co-workers complained about the rate of pay differential. That person did not file a grievance over the matter, as he was informed Grievant's rate of pay was changed. (Tr. pp. 16-18.)

7 7.

Grievant's pay check stubs have shown the number of hours worked and the gross pay amount since the date of his original hiring. (Tr. p. 21.) The rate of pay can be

calculated from this information.

8 8.

Tim Pullen, Personnel Director of District II, explained that he often “sets the rate of pay”for new hires, based upon information contained in a manual, and based upon the amount of experience the new hire possesses. However, the Charleston office and the Division of Personnel have “final say” on rate of pay; Mr. Pullen merely makes a suggestion. If changes are made to the rate of pay suggested by Mr. Pullen, they are made prior to the individual being hired initially. (Tr. pp. 28-34.)

9 9.

Form GL-4 serves as a recommendation to employ someone at a recommended salary; it is not the official employment approval document. Form WV-11 is the form for obtaining the Secretary's and Assistant Commissioner's approvals.

10 10.

Drema Smith, Senior Personnel Specialist in the Human Resources Division of the Division of Highways, reviews the recommendations made on Form GL-4, ensures that the proposed employee is eligible for the proposed rate of pay (and that other information is correct), and then puts the final information on Form WV-11. (Tr. pp. 35-38.)

11 11.

The Division of Personnel may also change the rate of pay recommended on a Form GL-4. (Tr. p. 39.)

12 12.

On Grievant's Form GL-4, Ms. Smith changed the rate of pay to $6.45 per hour when she reviewed it, although she did not specifically remember why it was changed. Typical reasons for her to change rate of pay are that the new hire does not have sufficient experience above the minimum required to justify additional monies; or that the rate of pay would place the new hire at a higher salary than current, long-time employees. Ms. Smith changed the rate of pay for Grievant prior to his hiring. (Tr. pp. 35-38.)

13 13.

Form RL-534 is a check list of information reviewed with new hires. The Form RL-534 completed at Grievant's hiring did not specifically list his rate of pay. (Tr. pp. 41-42.)

14 14.

Form BF-129 is a payroll form used to relay information to the central office regarding deductions to be taken from pay, marital status, insurance selections, and other information. Form BF-129 is drafted when the Form GL-4 is drafted, and is completed subsequently, when a new employee first reports to work. The Form BF-129 completed at Grievant's hiring shows his rate of pay at $6.95, and is signed by Sam Beverage and Grievant. (Tr. p. 43-47, Gr. Ex. 5.)

15 15.

Grievant's Form AW-506 appears to show that Grievant was initially hired at $6.95 per hour,and that this rate of pay was changed on August 1, 1990 to $6.94 per hour, when the across- the-board raise took effect. (See footnote 3) However, the meaning and purpose of this form, and the source of information thereon, was not explained by any witness. (Gr. Ex. 1.)

16 16.

District personnel are to inform employees of their rate of pay when they make an offer of employment. A formal offer of employment may only be made after the Form WV-11 is approved. (Tr. p. 37.)

17 17.

District office personnel have no authority to hire people, or to set rates of pay. They merely recommend hiring, and recommend a certain rate of pay. (Tr. pp. 39-40.)

DISCUSSION

The burden of proof in this non-disciplinary grievance is on Grievant. See W. Va. Code §29- 6A-6, paragraph 5. Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). Grievant alleged, and must prove, that Respondent was legally obligated to pay him $6.95 per hour, that his initial rate of pay was actually $6.95 per hour, and that on August 1, 1990, Respondent reduced his rate of pay without his knowledge or consent.

There is no dispute that Grievant was promised a rate of pay of at least $6.95 per hour upon his employment, by someone in District II. Several documents justify Grievant's expectation that he would be paid at that rate. Indeed, Form AW-506 appears to indicate that Grievant was paid at that rate for his initial days of employment, prior to an across-the-board raise effective August 1, 1990. However, other official documents show clearly that Grievant was never paid at the rate of $6.95 per hour; his initial pay check was at a rate of pay of $6.45 per hour. Unfortunately for Grievant, the record does not disclose the purpose of Form AW-506, how it is created, and what if any significance is to be given to the information thereon. Consequently, I cannot give that document any substantial weight. It is useful merely to show that Grievant reasonably believed that he had been promised a starting rate of pay of $6.95 per hour.

Several forms show that Grievant was formally employed and paid at $6.45 per hour from the

outset. Grievant does not dispute that this is the information provided on his Employee TimeReport for the end of July, 1990, or on Form GL-4. He agreed that his pay check stubs have contained information from which his rate of pay could be calculated, throughout his employment. The facts show that Grievant was never actually paid at the rate of $6.95 per hour upon his employment. Thus, his most straightforward argument fails, as he did not prove that Respondent altered the rate of pay, after he actually started receiving it. However, Grievant argues that DOH employees created a binding agreement, when they told him he would be making $6.95 per hour and showed him forms, such as the Form BF-129, containing the same information. DOH must now make good on the promise, he asserts.

Grievant here has a better case than most which have been considered by this Grievance Board, in that he has documents in addition to oral representations regarding promised pay. However, Grievant has failed to prove that Respondent violated any statute, rule, regulation or policy in setting his salary at $6.45 per hour. He has not alleged that there is any specific legal requirement which mandates he receive $6.95 per hour; he relies on an implied contract theory. (See footnote 4)

It is well settled that a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993). In describing this case, the authoring judge later stated that,

> HHR was not legally bound on either an oral contract or an estoppel theory by the salary representations of its agents. The evidence in Ollar revealed that local HHR supervisors lacked final hiring authority... therefore... no oral contract had been formed and... any statements by its agents about future salary levels would not be legally binding on HHR...
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> It was also recognized in Ollar that unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744, 748 (1991), citing, Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985). ...Because the salary representation was contrary to the governing salary guidelines, it could not bind HHR. [Footnote omitted.]

Fraley v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993),at 3-4. As in Ollar, the person in District II making salary representations to Grievant lacked final

authority to either hire Grievant or set his salary. Thus, there can be no binding oral contract.

Ollar's holdings regarding unlawful or ultra vires acts are not directly applicable to this case, as the evidence does not indicate that paying Grievant $6.95 per hour at the time he was hired would be outside the pay scale range for Grievant's position or otherwise unlawful. However, the same public policy concerns which negate committing the state to illegal actions (the ultra vires doctrine) also apply to negate creation of an employment contract by persons or documents lacking actual authority to do so. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citation omitted.]" Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Service, Inc., 328 S.E.2d 356 (W. Va. 1985). The important public policy consideration underlying this harsh rule is that "'[a]ny other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.' [Citation omitted.]" Freeman at 421.

The above rationale supports an equally harsh rule here regarding creation of not only oral employment contracts, but indeed creation of any type of employment contract by other than official procedures. Thus, the fact that some forms contained erroneous information about Grievant's rate of pay cannot create a binding contract (even though reviewed with Grievant and signed by a supervisor) , because they were not the single, authorized form which formally approved Grievant's employment. The documents which officially set Grievant's rate of pay, set it at $6.45 per hour from the beginning of his actual employment.

In effect, potential state employees are charged with knowing that the persons who interview and offer them employment are typically not authorized to make final employment decisions. The prospective employee must not rely on statements made by such individuals as to salary or rates of pay. The new hire must not rely even on official-looking documents, unless the document reviewed is the Form WV-11 by which hiring is actually approved. While this rule is unquestionably burdensome in the extreme to prospective employees, any other rule would render the State powerless before the whims of individual supervisors, and would require strained interpretations of clearprecedent set by this Board and the Courts of this State. (See footnote 5)

Absent proof that the Commissioner of the DOH, or the Secretary of the Department of Transportation, or some other such official with final hiring authority had told Grievant what his pay

would be, Grievant cannot prove his case on an oral contract theory. Similarly, absent evidence that Grievant's WV-11 showed his rate of pay at $6.95 per hour, he cannot prove his case by submitting other documents showing that rate of pay, even those reviewed with him when he reported to work. As the facts show that the rate of pay set by DOH upon his employment was not later reduced, he cannot prove his case that the rate was changed without his approval. His acceptance of the job, and continuation therein, constitute his tacit approval as to his rate of pay, even if he was misled by documents, words, and events surrounding his initial months of employment.

CONCLUSIONS OF LAW

1 1.

Grievant bears the burden of proving his case by a preponderance of the evidence in a non- disciplinary grievance. See W. Va. Code §29-6A-3. Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995).

2 2.

A supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not have final hiring authority. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993).

3 3.

"A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citation omitted]." Syl. pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hospital Service, Inc., 328 S.E.2d 356 (W. Va. 1985).

4 4.

Employment contracts and terms of employment, such as rate of pay, cannot be created other than by adhering to official hiring procedures. 5 5.

Grievant failed to prove that a binding representation was made to him, either by his supervisors, or by various employment forms, that he would be paid at a rate of $6.95 per hour.

6 6.

Grievant failed to prove that Respondent reduced his rate of pay sometime after his initial employment without his knowledge or consent.

Accordingly, the grievance is **DENIED.**

Any party or the Division of Personnel may appeal this decision to the circuit court of the county in

which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-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.

Dated: November 24,1997 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

The year should have been written as 1990 in the grievance statement, as made clear from all of the evidence and arguments made by the parties.

Footnote: 2

Although Respondent did not raise the issue of untimeliness, Grievant's complaint is made years after the actual occurrence of the events about which he complains. Grievant implied that the delay resulted from his ignorance about the "reduction" in his rate of pay, as a subsequent increase (resulting from an across-the-board raise which took effect after Grievant had been employed one week) placed Grievant's rate of pay essentially at the level he expected as his initial rate of pay.

Footnote: 3

The net change of $0.01 was due to Respondent correcting Grievant's base rate of pay by "reducing" it to $6.45 per hour, and then increasing that base rate of pay by $1,000.00 per year (an hourly increase of $0.49).

Footnote: 4

Grievant did not state that he would not have accepted the job if he had been informed of the difference in pay. Thus, there was no specific argument made regarding detrimental reliance.

Footnote: 5

This distressing state of affairs is due largely to the fact that State hiring procedures involve forms, most of which are unilaterally created and internally processed without review by the prospective employee. There is apparently no written contract setting forth the terms of employment, signed by both the employee and an authorized signatory for the State. Obviously, some problems could be alleviated through the State's use of a standard employment contract. (See generally, W. Va. Code §§18A-2-2 and 18A-2-5, requiring written contracts for county board of education employees.)