THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRENDA CIRCOSTA and
REBECCA L. GOULD,
Grievants,

v. **Docket No. 2009-0257-CONS**

DIVISION OF VETERANS AFFAIRS, and
DIVISION OF PERSONNEL,
Respondents.

DECISION

Brenda Circosta and Rebecca L. Gould, Grievants, are employed by the Division of Veterans Affairs at the West Virginia Veterans Nursing Facility located in Clarksburg, West Virginia. Grievants filed this grievance on February 7, 2008 asserting that "[o]n January 25, 2008 we were told we were not getting back pay for the $1.00 per hour shift differential retroactive to October 1, 2007 when we actually began working the afternoon shift." Grievants seek relief in the form of being "paid the 1.00 per shift differential from October 1, 2007 to January 31, 2008."

Both grievances were denied at level one following an informal conference conducted on March 21, 2008. The level two mediation session conducted on October 16, 2008 was unsuccessful. The Order entered on October 17, 2008 reflecting this unsuccessful mediation also joins the Division of Personnel as a party respondent. A level three hearing was conducted before the undersigned Administrative Law Judge on April 24, 2009 at the Board's Office located in Westover, West Virginia. Grievants appeared by representative Gerald Somazze. Respondent Division of Veterans Affairs appeared by counsel, Christie S. Utt, Deputy Attorney General. Division of Personnel appeared by counsel, Karen Thornton, Assistant Attorney General. The case became mature for

consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on May 26, 2009.

Synopsis

Grievants filed this grievance requesting back pay for a shift differential from October 1, 2007 to January 31, 2008 that was not approved by the State Personnel Board until February 1, 2008. Grievants claim that sometime prior to October 1, 2007, when they began working the evening shift, their former supervisor promised them that they would get a one dollar per hour shift differential when they started the evening shift. Grievants argue that equity requires they receive the shift differential back pay for the hours already worked. Division of Personnel Administrative Rules provide a mechanism by which agencies can submit requests to the State Personnel Board to establish shift differential pay for their employees. Shift differentials are not mandated by law. The supervisor who made the promise to Grievants was not authorized to do so and the Division of Veterans Affairs is not bound by it. Grievants failed to prove that they are entitled to back pay.

The undersigned makes the following findings of fact based upon the record developed at level three.

Findings of Fact

1. Grievants are employed by the West Virginia Nursing Facility as housekeepers. Grievant Circosta was employed on March 1, 2007, and Grievant Gould was employed in August 2007. Both Grievants worked the day shift until October 1, 2007 when they began working the afternoon/evening shift.

2. Grievants indicate that sometime prior to October 1, 2007 their former supervisor, Chuck Strickland, promised them that they would get a one dollar per hour shift differential when they started the evening shift. Mr. Strickland did not have the authority to set the pay of Grievants and he did not have the authority to grant shift differential pay.

3. On October 18, 2007 Katherine Hess, Director of Administrative Services, informed Mr. Strickland that shift differential pay had not yet been approved and that it could not be paid until approval was received in writing. Ms. Hess instructed Mr. Strickland to inform his staff of the status of the matter.

4. Shift differentials are not mandated. Division of Personnel Administrative Rules provide a mechanism by which agencies can submit requests to the State Personnel Board to establish shift differential pay for their employees. State agencies have the discretion to make requests to the State Personnel Board for shift differentials.

5. On January 4, 2008 the Division of Veterans Affairs, by Sonia Bailey-Gibson, Interim Executive Director, the West Virginia Veterans Nursing Facility, made an official request to the State Personnel Board to establish a shift differential pay program for its employees. Respondent's Level Three Exhibit 1.

6. The State Personnel Board considered the request of the Division of Veterans Affairs at its January 17, 2008 meeting. The Board voted to approve the request with an effective date of February 1, 2008. Respondent's Level Three Exhibit 1.

7. Beginning February 1, 2008 eligible employees at the Nursing Facility began being paid a one dollar per hour shift differential for their work.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievants acknowledge that the shift differential cannot be paid before approval; however, they argue that the principles of equity operate to entitle them to the payment of back pay for hours already worked. Respondents counter that the applicable Division of Personnel Administrative Rule does not provide for shift differential to be paid to employees without first being approved by the West Virginia State Personnel Board. In addition, Respondents argue that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination.

Grievants claim to back pay in this matter must be denied by the undersigned because the WEST VIRGINIA CODE OF STATE RULES specifically provides that pay differentials are approved by the State Personnel Board, and in light of the specific facts presented, the doctrine of equitable estoppel is inapplicable. WEST VIRGINIA CODE § 29-6-10 authorizes the West Virginia Division of Personnel to establish and maintain a position classification and compensation plan for all positions in the classified services. State agencies which utilize these positions, such as the Division of Veterans Affairs, must adhere to that plan when compensating employees. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994). Division of Personnel Administrative Rule, W. VA. CODE R. § 143-1-5.4 (f) (4) provides as follows:

> Pay Differentials - The Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay disparities, shift differentials for specified work periods, and temporary upgrade programs. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work locations, etc.), not individual employees.

The State Personnel Board is the sole State entity empowered to review and approve pay differentials for State agencies. Director Hess indicated that shift differential was neither included in Grievants' job descriptions nor authorized when Grievants started working the evening shift. In fact, Grievants indicated that they knew when they changed from the day shift to the evening that differential pay had not yet been approved. Grievant Gould acknowledged that she knew the job description she signed when she started working at the Nursing Home did not provide for differential pay. She also admitted that

Mr. Strickland told her after she started working the evening shift that the differential pay had not been approved.

Grievants rely on the principles of equity to establish their right to differential pay prior to approval on February 1, 2008. The Respondents argue that the statement made by Grievants' supervisor constitutes *ultra vires* acts that cannot be attributable to the State. "Ordinarily, unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." Syl. Pt. 1, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). *See Brown v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-384 (Mar. 26, 2008); *Guthrie v. Dep't of Health & Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health & Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). However, where the act is not in violation of rule or statute, *or* where justice so requires, the doctrine of equitable estoppel may apply. *See Herland v. Dep't of Health & Human Res.*, Docket No. 92-HHR-416 (Aug. 9, 1993)(recognizing that estoppel may apply where the statement is not in violation of statute); *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam).

The West Virginia Supreme Court of Appeals has recently applied the doctrine of equitable estoppel to a State agency where an agency's agent made averments, seemingly contrary to Division of Personnel Rules, that misled a State employee. In *Hudkins v. Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711, the plaintiff was informed by both an employee of the Public Retirement Board and an agent of the employing agency that she

could freeze her sick leave and use it toward retirement, even though she was not set to retire immediately upon resignation. She received a written recognition that her sick leave was frozen until she began retirement. The written recognition was seemingly in direct contravention of Division of Personnel Rules at the time it was made.

Analyzing this issue under the doctrine of equitable estoppel, the Court recognized that "'[t]he doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state.' Syllabus Point 7, *Samsell v. State Line Development Company*, 154 W.Va. 48, 174 S.E.2d 318 (1970)." Syl. Pt. 3, *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711. Thereafter, the Court applied the basic elements of estoppel to the facts of the case and stated that "'[t]he general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.' Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956)." *Id.* at Syl Pt. 4. *See also Underwood v. Dep't of Health & Human Res.*, Docket No. 2008-1254-DHHR (May 5, 2009).

When considering the case at hand, the doctrine of equitable estoppel is not applicable. The specific facts of this grievance present no basis that would warrant

departure from the doctrine of *ultra vires* act. Mr. Strickland acknowledged that he did not have the authority to promise Grievants differential pay. Grievants knew when they changed from the day shift to the evening shift that differential pay had not yet been approved. Grievants claim that Mr. Strickland made a promise of pay differential is not plausible because Mr. Strickland admitted he did not have authority to make such promise, and Mrs. Hess instructed Mr. Strickland to inform the staff in October 2007 that the pay differential had not been approved. The Nursing Facility did not have authority to provide differential pay until it was approved by the State Personnel Board. Until it was approved, the Nursing Facility, or any of its representatives, lacked authority to promise or provide differential pay for shift work. It is unfortunate and regrettable that Grievants were somewhat mislead; however, the statement made by Grievants' supervisor constitutes an *ultra vires* act and this scenario does not present a situation where justice requires the application of equitable estoppel. This grievance must be denied.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. "Ordinarily, unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental

capacity." Syl. Pt. 1, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). *See Brown v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-384 (Mar. 26, 2008); *Guthrie v. Dep't of Health & Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health & Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998).

3. The statement concerning a pay differential by Grievants' supervisor constitutes an *ultra vires* act.

4. "'The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state.' Syllabus Point 7, *Samsell v. State Line Development Company*, 154 W.Va. 48, 174 S.E.2d 318 (1970)." Syl. Pt. 3, *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711. "'The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.' Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956)." *Id.* at Syl Pt. 4. *See also Underwood v. Dep't of Health & Human Res.*, Docket No. 2008-1254-DHHR (May 5, 2009).

5. When considering the case at hand, the doctrine of equitable estoppel is not applicable. The specific facts of this grievance present no basis that would warrant departure from the doctrine of *ultra vires* act.

6. Grievants have not established a violation of law, rule or policy.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 17, 2009

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Ronald L. Reece
Administrative Law Judge