THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DAVID JOHNSON,
Grievant,

v. **Docket No. 2008-0331-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant David Johnson, employed by West Virginia University ("WVU") as a Systems Operator for the Personal Rapid Transit ("PRT") system, filed this grievance on or about February 1, 2001, in which he alleged:

> I was told by Human Resources Representative Mr. Tom Helmick that I would receive back pay (difference between pay grade 12, [and] pay grade 13) if the appeals judge upheld original court decision. The original decision was upheld.

For relief, Grievant seeks "all money owed."

The grievance was denied at level one by Richard Koval, Interim Operations Supervisor, who indicated that he lacked the authority to grant the relief requested. Appeal was made to level two, and on February 13, 2001, Grievant's representative requested the "grievance be held in abeyance pending the initiation of litigation of James Haviland, Esq. on Mr. Johnson's behalf." No further action was taken by either party until July 2007, when the parties requested that the matter be transferred to the grievance procedure set forth in W. VA. CODE §§ 6C-2-1, *et seq.*[1] This grievance was denied at level one on April 11,

---

[1]In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and *W. Va. Code* §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being

2008. An unsuccessful mediation session was held on July 18, 2008. Grievant appealed to level three July 27, 2008. A level three hearing was conducted before the undersigned Administrative Law Judge on November 17, 2008, at the Grievance Board's office location in Westover, West Virginia. Grievant appeared *pro se.* WVU was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision following the receipt of the last of the parties' fact/law proposals on January 12, 2009.

Synopsis

Grievant asserts he is entitled to back pay as the result of a change in pay grade for the job classification of Systems Operator. Grievant argues that he is entitled to back pay for sixteen months he served in the position prior to the time it was upgraded to pay grade 13. Grievant makes this assertion based upon the representations of an employee of the Human Resources Department. WVU counters that Grievant did not grieve his classification or compensation after transferring into the position of Systems Operator; therefore, he is not entitled to back pay. The person who made the promise to Grievant was not authorized to do so and WVU is not bound by it. In addition, Grievant failed to prove that he is entitled to back pay for the period beginning September 1999 through December 2000. This grievance is denied.

---

decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See Executive Order No. 2-07*, May 8, 2007. However, parties were given the option to transfer pending cases to the new process, agreeing to be governed by the statutory changes which went into effect in July of 2007; accordingly, the instant grievance is governed by the provisions of W. Va. Code §§ 6C-2-1, *et seq.*

After a thorough review of the entire record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been employed by WVU since October 1980. Grievant was classified as a PRT Technician 2, pay grade 12, in January 1994, when the Mercer classification system was implemented.

2. The classification of PRT Technician 2 was elevated to pay grade 14 after Grievant and his co-workers prevailed in a level four grievance. *See Liston, et al. v. Bd. of Trustees/W. Va. Univ.*, Docket No. 94-MBOT-845 (Mar. 31, 1997).

3. On September 1, 1999, Grievant voluntarily transferred to the position of PRT Systems Operator and was compensated at pay grade 12.

4. At the time of Grievant's transfer, he was told by Tom Helmick, a former Human Resources employee, that he would receive back pay if the Systems Operators prevailed in a pending grievance which they filed.

5. Grievant was aware that the Systems Operator position was compensated at pay grade 12 when he requested and accepted the transfer. Grievant did not file a grievance challenging his classification or pay grade after transferring to the Systems Operator position.

6. By Order dated March 8, 2000, Kanawha County Circuit Court upheld a level four Grievance Board decision which ruled that the Systems Operator classification should be compensated at pay grade 13. *See Univ. of W. Va. Bd. of Trustees/W. Va. Univ. et al. v. Jeffrey Jessen, et al.*, Civil Action No. 95-AA-290.

7. The West Virginia Supreme Court of Appeals refused to hear Respondent's appeal of the *Jessen* decision on October 5, 2000.

8. Pursuant to the directives given in *Jessen*, the Job Evaluation Committee upgraded the Systems Operator classification to pay grade 13, effective January 1, 2001.

9. The *Jessen* grievants were awarded back pay to January 1, 1994. Grievant did not receive back pay from the date he assumed the position of Systems Operator through December 31, 2000, because he was a non-grieving employee.

10. Grievant was properly upgraded to pay grade 13 effective January 1, 2001, in compliance with the *Jessen* decision.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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). "The 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).

Grievant's claim is that when he transferred into the Systems Operator position he was promised back pay as the result of an anticipated change in pay grade for the job classification. Grievant argues he is entitled to back pay for the sixteen months he served

in the position prior to the time it was upgraded to pay grade 13. At the time of Grievant's transfer, he was informed by Human Resources Representative Tom Helmick that he would receive back pay if the Systems Operators prevailed in their grievance. Mr. Helmick is no longer employed by WVU and was not called as a witness at level one or three; however, Grievant's assertion regarding this representation provided to him by Mr. Helmick was not challenged by WVU. As the findings of fact reflect, the Systems Operators did prevail in their pay grade grievance. Unfortunately for Grievant, while Mr. Helmick was correct when informing Grievant that the Mercer classification system reviews positions and not employees, he was incorrect in representing that Grievant would receive back pay.[2]

It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. In *Ollar v. W. Va. Dept. of Health and Human Serv.*, Docket No. 92-HHR-186 (Jan. 22, 1993), a supervisor made representations during an applicant's interview regarding pay that were inaccurate, and that he did not have the authority to make. The applicant later grieved for the promised salary. In that matter, the Administrative Law Judge stated that

> HHR was not legally bound on either an oral contract or an estoppel theory by the representations of its agents. The evidence in *Ollar* revealed that the

---

[2]The Mercer classification system is largely a "quantitative" system, in which the components of each job are evaluated using a point factor methodology. The focus in Mercer decisions issued by this Grievance Board is upon the point factors the grievant is challenging. *Zara, et al., v. Bd. of Trustees, W. Va. Univ.*, Docket No. 94-MBOT-817 (Dec. 12, 1995). While some "best fit" analysis of the definitions of the degree levels is involved in determining which degree level of a point factor should be assigned, where the position fits in the higher education classified employee hierarchy must also be evaluated. In addition, this system must by statute be uniform across all higher education institutions; therefore, the point factor degree levels are not assigned to the individual, but to the job title. *Burke, et al., v. Bd. of Directors, Fairmont State College*, Docket No. 94-MBOD-349 (Aug. 8, 1995).

> 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.

Fraley v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993), pp. 3-4, *citing Ollar. See also Blevins v. Raleigh County Bd. of Educ.*, Docket No. 97-41-314 (Jan. 29, 1998); *Berry v. Boone County Bd. of Educ.*, Docket No. 97-03-304 (Apr. 20, 1998); *Stewart v. Higher Ed. Interim Governing Bd./Marshall Univ.*, Docket No. 01-HE-079 (July 13, 2001).

As in *Ollar*, Mr. Helmick lacked the authority to make the determination regarding whether Grievant would receive back pay in the event that the Systems Operators' grievance was granted and upheld. Accordingly, Grievant was properly upgraded to pay grade 13 effective January 1, 2001, in compliance with the *Jessen* ruling, but as a non-grieving employee he is not entitled to back pay.

The following conclusions of law support the decision reached:

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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. An employee's promises cannot be binding against an agency where the employee does not possess the authority to actually make that determination. *Stewart v. Higher Ed. Interim Governing Bd./Marshall Univ.*, Docket No. 01-HE-079 (July 13, 2001).

3. Tom Helmick did not have the legal authority to assure Grievant that he would be awarded back pay in the event of a pay grade change for his job classification. Consequently, WVU is not bound by Mr. Helmick's assurances made to Grievant.

4. Grievant failed to prove that he is entitled to back pay for the period beginning September 1999 through December 2000.

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 (2008).

Date: January 27, 2009

_____
RONALD L. REECE
Administrative Law Judge