THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RYAN UNDERWOOD,

Grievant,

v. **DOCKET NO. 2008-1254-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES
AND DIVISION OF PERSONNEL,

Respondents.

DECISION

Ryan Underwood ("Grievant") challenges the decision of Respondent Department of Health & Human Resources/Bureau for Children and Families ("DHHR") and Respondent Division of Personnel ("DOP"), denying credit for probationary time spent in a different position. The May 22, 2008, "Statement of Grievance" provides that "one year tenure as CPS trainee achieved was denied raise to CPS worker [*sic*]." As relief, Grievant seeks a "raise with backpay-request to be made whole."

This grievance was denied at Level One.[1] After Level One, the DOP was joined as an indispensable party. A Level Two mediation was unsuccessful. A Level Three hearing was held before the undersigned Administrative Law Judge ("ALJ") in Charleston, West Virginia, on February 24, 2009. Grievant appeared by and through his representative Gordon Simmons, Steward, UE Local 170. Respondent DHHR appeared by and through

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[1] The Level One hearing covered a two-day period. The transcript from the second day of the hearing was not available due to a recording equipment malfunction. As a result, all parties agreed at the Level Three hearing that it was appropriate for the Level One Hearing Examiner's notes, for the second day of the hearing, to be considered as evidence.

its counsel, B. Allen Campbell, Senior Assistant Attorney General. Respondent DOP appeared by and through its counsel, Karen O'Sullivan Thornton, Assistant Attorney General.

This matter became mature for decision on March 17, 2009, the deadline for submitting proposed findings of fact and conclusions of law. Both the Grievant and the Respondents have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant was hired as a Child Protective Service Worker Trainee in Clay County from a competitive, geographically-limited register/certification. Before completing his probationary period for this position, Grievant resigned and accepted a similar trainee position in Calhoun County. Grievant was required to retake the civil service exam and required to start his probationary period anew when accepting the Calhoun County position. Grievant argues that equity requires he be given probationary credit for the probationary time he spent in the Clay County position.

DOP rules specifically forbid an employee from transferring during his or her probationary period where the employee is hired from a competitive, geographically-limited register/certification. The interest of justice does not demand that equitable estoppel be applied in this particular circumstance and any unclear or misleading averments made to the Grievant constitute *ultra vires* acts. This grievance is **DENIED**.

Based upon a detailed review of the entire record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was hired as an original appointment[2] from a posting and competitive register/certification[3] for the counties of Braxton and Clay *only*,[4] on February 2, 2007. He was hired in a position classified as a Child Protective Service Worker Trainee in the Clay County DHHR office.

2. When entering State employment as an original appointment "Child Protective Worker Trainee," there is a 12-month probationary period[5] before permanent status is obtained within the civil service system. *See* Level Three, DOP Exhibit 1, Testimony of Lynn Schillings. Upon completion of the 12-month probationary period, a Child Protective Worker Trainee is advanced to the classification of Child Protective Service Worker, which is two pay grades higher.

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[2] W. VA. CODE R. §143-1-3.59 defines "original appointment" as "initial employment of an individual into the classified service as a result of selection from a certification of names from a register established by open competitive examination or from a preference register."

[3] W. VA. CODE R. §143-1-3.77 defines "register" as "[a]n official list of currently available eligible applicants for a job class ranked in the order of the final score as a result of the Division of Personnel examination for the class of position for competitive appointment or in seniority order for preference hiring of laid-off permanent classified employees." W. VA. CODE R. §143-1-3.14 defines "certification" as "[t]he official list of eligible applicants given to an appointing authority for filling vacancies in the classified services."

[4] An employee can be hired from a statewide register or from a register for a particular geographic location such as a single county or a group of counties. *See* Level Three, Testimony of Lynn Schillings. Grievant was hired from a register that limited his counties to Braxton and Clay. *Id.* *See* Level Three, DOP Exhibit 1.

[5] W. VA. CODE R. §143-1-3.72 defines "probationary period" as "[a] specified trial work period prescribed by the State Personnel Board designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received."

3. The Calhoun County DHHR office was closer to Grievant's home, and Grievant was interested in applying for a DHHR position in Calhoun County due to the high cost of transportation. In order to be considered for the Calhoun County position, Grievant was required to take the civil service exam for a second time. Further, he was required to be placed within the DOP's applicant register.

4. Grievant interviewed for the Calhoun County position.[6] During the interview, Grievant and the interviewers, Crystal Kendall and William Wince, discussed probation and tenure. During their conversation, the parties misused personnel language: specifically, they misused the terms probation and tenure.

5. At the interview, Grievant asked questions related to his "raise." Crystal Kendall, Child Protective Services Supervisor, told Grievant the change from one job to the other would not affect his tenure[7] and "should not" affect his raise. *See* Level One, Testimony of Crystal Kendall, notes.

6. At the interview, Mr. William Wince, Child Support Manager, told Grievant that the new appointment to Calhoun County would be treated as a lateral transfer. Level One, Testimony of Ryan Underwood, 25.

7. Based upon the statements made by William Wince and Crystal Kendall during the interview, Grievant believed the position change was going to be a lateral transfer. He believed that he would receive probationary-time credit for the probationary time he spent

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[6] The precise date of the interview is unclear from the record.

[7] Generally, "tenure" concerns an employee's time-in-service as an employee with the State. It is unclear what the witness meant by use of this term and she was not called at Level Three for this ALJ to clear up her testimony.

in the Clay County position. Grievant would not have accepted the Calhoun County position if he was not treated as a lateral transfer. *See* Level One, Testimony of Ryan Underwood, 25.

8. Grievant resigned from his position in the Clay County DHHR office on October 16, 2007, to accept employment in the Calhoun County DHHR office in a position classified as a Child Protective Service Worker Trainee. *See* Level Three, DOP Exhibit 3.

9. Grievant was hired for the Calhoun County position as an original appointment from a posting and competitive register/certification for the counties of Gilmer, Calhoun and Wirt, effective October 16, 2007. Annual leave, sick leave and tenure balances were all transferred with Grievant to his new employment as there was no break in his employment with the State of West Virginia. *See* Level Three, DOP Exhibits 3 & 5.

10. Had Grievant been hired from a statewide register/certification (every applicant in the entire State is ranked and scored in order) he could have been transferred, within the probationary period, to a position in the same classification elsewhere in the State. However, the register/certification Grievant was initially hired from was geographically limited to Braxton County and Clay County. *See* Level Three, Testimony of Lynn Schillings.

11. Effective October 16, 2008, Grievant's position was reallocated to the classification of Child Protective Service Worker after one year's training as a Child Protective Service Worker Trainee in the Calhoun County position. *See* Level Three, DOP Exhibit 2. On this same date, Grievant was certified as a permanent employee of the State

after having served his 12-month probationary period under an original appointment.[8] *See* Level Three, DOP Exhibit 4.

Discussion

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

The Grievant's claim for back pay based upon a failure to transfer Grievant's probationary time must be denied because the WEST VIRGINIA CODE OF STATE RULES specifically prohibits transfer during probationary period in this scenario, 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

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[8] W. VA. CODE R. §143-1-3.66 defines "Permanent employee" as:

> any classified employee who was hired from a register and who has completed the probationary period prescribed by the State Personnel Board for the job class, or any classified-exempt employee who was hired to fill a position for an unlimited period of time, notwithstanding the appointing authority's right to terminate the employee for cause or at his or her will.

services. State agencies which utilize these positions, such as the DHHR, must adhere to that plan when assigning its employees. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR- 460 (June 17, 1994). DOP Administrative Rule, W. VA. CODE R. § 143-1-10.4, provides as follows:

> Transfers during Probation - An appointing authority shall not transfer an employee during his or her probationary period to a position in another class. An appointing authority *shall not* transfer an employee, certified to a vacancy on a geographic selective certification in accordance with the provisions of subsection 8.3 of this rule, from that geographic area to any other geographic area or class.

(Emphasis added). Hence, a probationary employee "shall" not be transferred to another area where the employee was selected to the original position pursuant to a geographically-selective certification/register.[9] Where a rule is plain and unambiguous, it should be applied and not construed. *See* Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). In the absence of language in the rule showing a contrary intent, the term "shall" should be afforded a mandatory connotation. *See* Syl. Pt. 1, *Nelson v. Public Employees Insurance Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982).

Grievant's initial hire in Clay county was from a geographically-selective register/certification. As indicated by the language of the above Rule, a probationary employee hired from a geographically-selective certification under Rule 8.3 may not transfer to another geographic area during his probationary period. W. VA. CODE R. §143-1-8.3 permits an agency to limit applicant consideration to individuals who possess the

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[9] W. VA. CODE R. §143-1-11.5 discusses lateral class change and states that "[a]n appointing authority may move a *permanent* employee from a position in one class to a vacant position in another class in the same pay grade if the employee is found by the Director to qualify for the vacant position." (Emphasis added). Grievant was not a permanent employee when he took the position in the Calhoun county office.

necessary geographical availability qualification, and this was the precise mechanism used to fill the Clay County position previously held by Grievant.[10] *See* Level Three, Testimony of Lynn Schillings. Grievant resigned his position in Clay County and thereafter assumed a different position in a different county. He was not transferred and, pursuant to rule, could not be transferred. The Respondents did not violate any rule or law. Grievant has provided no evidence or analysis to rebut the DOP's application of the rules or facts. The Grievant has not met his burden of proving this claim by a preponderance of the evidence.

Grievant argues that the doctrine of equitable estoppel or *estoppel in pais* applies, and the Respondents are estopped from refusing to grant Grievant back pay based upon

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[10] Specifically, this rule provides, in part, that:

> Selective Certification - Any certification may limit consideration to only those individuals who possess specific qualifications determined to be essential for performance of the duties of a specific position. Selective certification must be approved by the Director.
> (a) If a specific position requires special qualifications that are not common to all positions in that class, the appointing authority may request that certification be limited to candidates possessing those qualifications. Eligibles shall have adequate opportunity for special qualification consideration. The specific criteria for the restriction of certification shall be based on the duties of the position as verified by job analysis or by an official position description and written justification.
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> (c) The Director of Personnel may limit certification to candidates available to work at the location of the job. The Director of Personnel may further limit certification geographically when the duties of the position require rapid response to unscheduled emergencies during off duty hours. The appointing authority shall provide written justification of any request for geographic selective certification based on essential duties of the position. The Director shall establish the boundaries of the acceptable geographic areas based on the specific location and demands of the job. The appointing authority shall consider candidates living outside the boundary if they are willing to relocate to the area.

misleading statements made by DHHR agents during the Grievant's interview. The Respondents argue that the statements of the DHHR interviewers constitute *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)(discussed *infra* pp. 10-11).[11]

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[11] *See also Webb v. Dep't of Tax Rev.*, 18 Or. Tax 381, 388, fn 6 (OR. 2005)(generally recognizing that where the relied upon statement is within the scope of the agency's authority, estoppel may lie even though the laws and rules are published)(citations omitted); *Sellers v. Bd. of Trustrees of the Police and Firemen's Retirement Sys.*, 2008-NJ-R0320.002 (N.J. Sup. Ct. App. Div. 2008)(applying equitable estoppel and distinguishing between "actions that are beyond the powers of the municipality, which are ultra vires in the primary sense and void, and those actions that represent an irregular exercise of powers granted by the legislature, which are only ultra vires in the secondary sense and subject to ratification by application of estoppel") (internal citations omitted); *State ex rel. Nebraska Health Care Ass'n v. HHS Fin. & Support*, 255 Neb. 784, 796 (Neb. 1998)(recognizing that equitable estoppel may apply against a state to prevent manifest injustice); *Wisconsin Dep't of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213 (1979).

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 DOP 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 towards 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 DOP rules at the time it was made.[12]

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

[12] The decision also suggests that the Retirement Board was not handling similar scenarios in a like manner. The Board promulgated a rule to address this issue two years after the plaintiff resigned.

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. Upon analyzing the elements, the Court balanced "injury and injustice" against "public interest" and ruled the Retirement Board was estopped from denying the plaintiff certain retirement benefits based upon the averments of its agent and the averments of the agent of the plaintiff's employing agency. *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 281-282, 647 S.E.2d 711, 711-718.

When considering the grievance *sub judice*, the doctrine of equitable estoppel is inapplicable. Unlike *Hudkins*, there is no compelling interest that would warrant departure from the doctrine of *ultra vires* act and this ALJ need not consider the elements of equitable estoppel. This is not a scenario where the Grievant will receive a diminished retirement income for the rest of his life because of misstatements by DHHR's agents. Nor is there evidence to suggest the statements of Mrs. Kendall and Mr. Wince somehow diminished Grievant's earning capacity.[13] This individual interest is balanced against the public's interest in operating and regulating classification and compensation of State employees

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[13] It is noted that in *Hudkins*, the plaintiff received assurance from the agency with responsibility for the retirement system. Unlike *Hudkins*, it is clear that DHHR has no direct authority over civil service employee matters, and statements made during Grievant's interview were beyond the scope of DHHR's authority. *Cf. Sellers v. Bd. of Trustees of the Police and Firemen's Retirement Sys.*, 2008-NJ-R0320.002 (quotation *supra* at Footnote 9). The actual and apparent authority of the relied upon agent and agency is an element that should be considered when analyzing whether estoppel is applicable. *See generally Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985)(recognizing that the public policy behind the *ultra vires* act doctrine is to ensure that the will of the legislature is not thwarted by the executive branch). For a discussion of the various elements courts have considered when applying equitable estoppel against a governmental entity see 28 Am.Jur.2d *Estoppel and Waiver* §140.

through the operation of its civil service system. *See generally* W.VA. CODE § 29-6-10. Recognizing the cautionary principle articulated in *Samsell, supra*, the statements made by Mrs. Kendall and Mr. Wince constitute *ultra vires* acts and are not attributable to the State.

In summation, the WEST VIRGINIA CODE OF STATE RULES provides that the Grievant may not be transferred during his probationary employment where he was hired from a geographically-selective register/certification. The statements made by DHHR agents constitute *ultra vires* acts 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 are appropriate.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd., W. VA. CODE R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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 appointing authority shall not transfer an [probationary] employee, certified to a vacancy on a geographic selective certification in accordance with the provisions of subsection 8.3 of this rule, from that geographic area to any other geographic area or class." W.VA. CODE R. §143-1-10.4.

3. "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).

4. The statements of the DHHR interviewers constitute *ultra vires* acts.

5. "'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)." *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam). "'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*.

6. When balancing the interests at stake, the facts of this grievance do not warrant the application of equitable estoppel against the State of West Virginia.

7. Grievant has 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* W. VA. CODE R. §156-1-6.20 (2008).

Date: May 5, 2009

Mark Barney
Administrative Law Judge