

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW SEAN HILL,

Grievant,

v.

Docket No. 2022-0071-DHS

**DEPARTMENT OF HOMELAND SECURITY/PAROLE SERVICES
AND DIVISION OF PERSONNEL,**

Respondent.

DECISION

Grievant, Matthew Sean Hill, is employed by Respondent, Department of Homeland Security ("DHS")¹ within the Parole Services Division. On July 23, 2021, Grievant filed this grievance against Respondent stating,

On July 13, 2021 the grieving party was advised the 5% pay raise granted to those employees whom fall under SPB #2697 would not be granted in its entirety due to the grieving party was only going to receive an amount to which in total would place them at the highest range for salary of their given position. This directly violates SPB #2697 which as sought as an exception to the rule and was to be utilized for retention and recruitment for Parole Services.

For relief, Grievant sought:

[T]he original 5 % increase in salary be implemented in its entirety as originally designed and that such relief also be carried forward to any future increase the grieving party and all of those employees whom qualify SPB #2697. Grieving Party also seeking back pay plus interest and all attorney fees.

Level one proceedings were waived by *Notice of Level 1 Waiver* entered August

¹ The Department of Homeland Security was created by legislative action in 2020 when the legislature reorganized and renamed the Department of Military Affairs and Public Safety. To avoid confusion, the agency will be referred to only as the Department of Homeland Security, or DHS, throughout this decision.

2, 2021. The Division of Personnel (“DOP”) was joined as a necessary party by order entered August 9, 2021. Following mediation, Grievant appealed to level three of the grievance process on December 23, 2021. A level three hearing was held on August 1, 2022, before the undersigned at the Grievance Board’s Charleston, West Virginia office. Grievant appeared *pro se*². Respondent DHS appeared by Anne Thomas, Assistant Commissioner for Bureau of Community Corrections, and was represented by counsel, Jodi B. Tyler, Assistant Attorney General. Respondent DOP appeared by Wendy Mays, Assistant Director, and was represented by counsel, Karen O’Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on September 1, 2022, upon final receipt of the parties’³ written Proposed Findings of Fact and Conclusions of Law (“PFFCL”).

Synopsis

Grievant is employed by Respondent within the Parole Services Division as a Probation and Parole Officer. Grievant protests his employer’s refusal to pay him above the maximum salary of the pay range for his classification to fulfill incentive increases granted by the State Personnel Board. Grievant failed to prove he was entitled to receive pay above the maximum of the pay range for his job classification. Grievant further alleges discrimination as other employees received pay above the maximum salary of the pay range for their classifications. Grievant failed to prove discrimination. In addition, the payments to the compared employees were an *ultra vires* act, for which the employer may not be bound, as the increases were granted in error in violation of the Division of Personnel’s administrative rule. Grievant failed to prove he detrimentally

² For one’s own behalf. BLACK’S LAW DICTIONARY 1221 (6th ed. 1990).

³ Grievant elected not to file PFFCL.

relied on a promise of payment that would have entitled him to equitable estoppel and any such promise would also have constituted an *ultra vires* act for which his employer could not be bound. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent within the Parole Services Division as a Probation and Parole Officer ("PPO").

2. Grievant had previously been employed as a Correctional Officer V and took a voluntary demotion into the PPO position on June 23, 2018.

3. Positions within the classified service are compensated according to assigned pay grades, which include a pay range setting both a minimum and maximum amount of pay.

4. An employee may receive compensation over the maximum of their position's pay range only in limited circumstances.

5. The PPO 1 classification is compensated at pay grade 11, which had a compensation range of \$26,406 to \$48,851 at the time the grievance was filed.

6. In 2015, several years prior to Grievant's hire, Respondent DHS submitted a proposal to the State Personnel Board requesting additional pay for PPOs to address recruitment and retention issues.

7. The State Personnel Board approved Respondent's proposal to allow a five percent retention incentive in pay for PPOs upon completion of two years of service, another five percent incentive at three years of service, and a final incentive of seven

percent at five years of service.

8. Respondent did not request, nor did the State Personnel Board grant, the allowance of pay above the maximum pay range of the classification.

9. When Grievant applied for the job in 2018, he discussed with the hiring manager, Kaitlin Watson, that accepting the job would be a demotion in pay. They discussed the incentive payments and what Grievant's pay would be after receiving the incentives.

10. Prior to Grievant's hire, due to mistaken understanding within Respondent's human resources department, three PPO's had incorrectly received the full incentive increase although that raised their rate of pay over the maximum of the pay range.

11. In 2018, Respondent pursued legislation to provide its employees additional pay increases. The Legislature enacted legislation that provided a two thousand dollar pay increase each year for three years.

12. The incentive increase combined with the legislative increase placed many of Respondent DHS' employees near, at, or above the maximums of the pay ranges.

13. Respondent DOP's administrative rule allows employees to receive compensation above the maximum of the pay range for legislative mandated pay increases. Some of Respondent DHS' employees are being paid more than the pay range maximum because of these legislative increases.

14. On June 23, 2021, Grievant received his second retention incentive, but did not receive the full five percent increase because that would exceed the maximum

of the pay range for his classification.

15. Grievant is currently paid at the maximum of his pay range.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues he is entitled to a salary increase above the maximum of his pay grade pursuant to a retention incentive that was previously approved by the State Personnel Board. Grievant asserts other employees were permitted to receive a salary increase above the maximum of their pay grade. Grievant also appears to argue that he is entitled to the same because of promises made during the interview process. Respondents assert that to pay Grievant above the maximum of his pay range in this circumstance would violate Respondent DOP’s administrative rule. Respondents assert that the salary increases other employees received above the maximum were erroneous *ultra vires* acts by which they cannot be bound. Respondents further assert, as to any alleged promises made during the hiring process, that any such promise would have also been an *ultra vires* act.

Respondent DOP has the duty and authority to administer the state’s pay plan for classified state employees, including setting minimum and maximum rates of pay. W.

VA. CODE ST. R. § 143-1-5 (2016). Employees must be paid within the pay ranges for their classifications except that “[e]mployees may receive compensation above the maximum of the compensation range of their job class as a result of legislative mandates or other exceptions approved by the Board.” W. VA. CODE ST. R. § 143-1-5.5.b.3. The controverted incentive pay would increase Grievant’s pay beyond the maximum of his pay range. It is undisputed that the SPB approval of Respondent DHS’s incentive pay plan did not include the allowance of pay above the maximum range of the pay scales. Therefore, pursuant to the administrative rule, Respondent DHS was clearly correct in refusing to pay Grievant the remainder of the incentive pay that would raise his pay beyond the maximum for his classifications pay range.

Grievant appears to argue he is nevertheless entitled to the remainder of the incentive pay because three other employees received their full incentive pay beyond the maximum of their pay ranges. Essentially, this is an allegation of discrimination. For purposes of the grievance procedure, “[d]iscrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

Grievant also appears to argue that he is entitled to the full amount of incentive pay because he was promised the same during the interview process and accepted the job despite lower pay because he would later receive the incentive pay. This is an equitable estoppel argument. "To raise an equitable estoppel there must be conduct, acts, language or silence amounting to a representation or a concealment of material facts." *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 61, 174 S.E.2d 318, 327 (1970)

(citations omitted). "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." *Id.* at Syl. Pt. 7. "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." *Hudkins v. State Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 276, 647 S.E.2d 711, 712 (2007).

For both issues, it is Grievant's burden to prove the facts to support his arguments. Grievant chose not to testify on his own behalf, despite being given the opportunity to do so. Grievant only submitted the brief testimony of two witnesses and a few documents. The limited evidence Grievant submitted was not sufficient to prove the elements of either discrimination or equitable estoppel. Grievant did not prove he was similarly situated to the employees who received pay above the maximum of their pay ranges. Although Grievant provided some limited testimony of the hiring manager that the reduction in pay and incentives were discussed, Grievant did not prove that he was specifically promised a certain amount of pay or that he would be permitted to receive pay above the maximum of his classification's pay range. Regardless, both arguments would also fail because the alleged actions would constitute *ultra vires* acts.

"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. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964).” Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985). “Any 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.” *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)). Further, “[a]n error made in regard to one employee does not entitle another employee to the benefits of the same mistake. *Woolridge v. McDowell County Bd. of Educ.*, Docket No. 04-33-004 (July 9, 2004); *Walker v. Dep’t of Transp./Div. of Highways*, Docket No. 01-DOH-450 (Sept. 19, 2001)” *Kiger v. Monongalia County Bd. of Educ.*, Docket No. 05-30-062 (May 31, 2005), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 05-AA-86 (Dec. 1, 2005). Respondent’s employees did not have the authority to pay employees beyond the pay grade maximum in violation of Respondent DOP’s administrative rule. The erroneous payment to the compared employees and any statements of the hiring manager regarding the incentive pay were *ultra vires* acts for which Respondent DHS cannot be bound.

The following Conclusions of Law support the decision reached.

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. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The Division of Personnel has the duty and authority to administer the state’s pay plan for classified state employees, including setting minimum and maximum rates of pay. W. VA. CODE ST. R. § 143-1-5 (2016).

3. Employees must be paid within the pay ranges for their classifications except that “[e]mployees may receive compensation above the maximum of the compensation range of their job class as a result of legislative mandates or other exceptions approved by the Board.” W. VA. CODE ST. R. § 143-1-5.5.b.3.

4. Grievant failed to prove he was entitled to receive pay above the maximum of the pay range of his job classification.

5. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

6. Grievant failed to prove he was discriminated against when other employees received pay above the maximum of the pay range of their job classification in error.

7. “To raise an equitable estoppel there must be conduct, acts, language or silence amounting to a representation or a concealment of material facts.” *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 61, 174 S.E.2d 318, 327 (1970) (citations omitted).

8. "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." *Id.* at Syl. Pt. 7.

9. "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." *Hudkins v. State Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 276, 647 S.E.2d 711, 712 (2007).

10. "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. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985).

11. "Any 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." *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (*citing Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

12. Grievant failed to prove he was entitled to equitable estoppel.

13. “An error made in regard to one employee does not entitle another employee to the benefits of the same mistake. *Woolridge v. McDowell County Bd. of Educ.*, Docket No. 04-33-004 (July 9, 2004); *Walker v. Dep’t of Transp./Div. of Highways*, Docket No. 01-DOH-450 (Sept. 19, 2001)” *Kiger v. Monongalia County Bd. of Educ.*, Docket No. 05-30-062 (May 31, 2005), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 05-AA-86 (Dec. 1, 2005).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.⁴ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: October 17, 2022

Billie Thacker Catlett
Chief Administrative Law Judge

⁴ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.