THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DARREN PATRICK WISE,
Grievant,

v. **DOCKET NO. 2015-1263-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant, Darren Patrick Wise, filed a grievance against his employer, the Division of Highways, on May 11, 2015, alleging his starting salary was supposed to be 20% above the minimum for the pay grade, but due to a clerical error, his starting salary was only 10% above the minimum. As relief, Grievant is seeking, "[i]nitial compensation level corrected to the intended 20% above base line. Nunc Pro Tunc, February 18, 2014. A monetary judgement against the Division of Highways and/or Division of Personnel for lost wages earned thus far plus prejudgement and post-judgement interest accruing at the applicable sta[t]utory rate until paid in full. "

Telephonic contact was made with Grievant by the level one grievance evaluator, and a decision denying the grievance was issued at level one on June 24, 2015. Grievant appealed to level two on June 27, 2015, and a mediation session was held on October 26, 2015. Grievant appealed to level three on November 6, 2015. Grievant then filed a default claim on January 25, 2016, and an Order Denying Default Judgment was issued by the undersigned on February 9, 2016. A level three hearing was held before the undersigned Administrative Law Judge on July 12, 2016, at the Grievance Board's Office in Westover,

West Virginia. Grievant was represented by Adam E. Barney, Esquire, Berry, Kessler, Crutchfield, Taylor & Gordon, and the Division of Highways was represented by Ashley D. Wright, Esquire, Division of Highways Legal Division. This matter became mature for decision on August 17, 2016, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant became aware shortly after he began his employment that his starting salary was not what he had expected. Grievant first filed a grievance challenging his starting salary over a year after he became aware of this issue. While Grievant's delay in filing until the end of his probationary period can be excused, based on his supervisor's representations, Grievant offered no excuse for the additional delay of nine months after the end of his probationary period. The grievance was not timely filed.

The following Findings of Fact are made based on the record developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Highway Engineer Trainee in District 6.

2. Respondent posted a vacancy on September 9, 2013, for a Highway Engineer Trainee in District 6. The posting stated that the salary was a pay grade 19, $39,372.00 - $72,840.00. The posting noted that "appointment above the entry level may be made at the rate of five percent for each three months of co-op experience with the West Virginia Division of Highways, co-op experience with another transportation

organization or related work experience with a company such as an engineering consulting firm."

3. Grievant applied for the posted Highway Engineer Trainee vacancy, and was interviewed for the position on October 22, 2013. Grievant had four summers of co-op experience working for Respondent at the time of the interview, making him eligible for appointment at 20% above the entry level salary. Grievant told the interviewers, Paul Hicks, District 6 Maintenance Engineer, and Dan Sikora, that he would not accept less than 20% above the entry level salary.

4. In February 2014, Julie McCartney, an employee in DOH's District 6 office, telephoned Grievant and offered him the Highway Engineer Trainee position. Grievant did not ask Ms. McCartney what the starting salary would be, and she did not tell him what the salary would be. Grievant assumed he would not be offered the position if the starting salary was less than 20% above the entry level. Grievant accepted the position.

5. Grievant began his employment with DOH on February 18, 2014. His starting salary was $3,610.00 per month, which was 10% above the entry level salary. Grievant did not ask what his starting salary would be on his first day of work, but was provided with documents when he began his employment, which he signed, which listed his starting salary. Grievant first realized that his starting salary was only 10% above the entry level when he received his third paycheck, in approximately mid-April, 2014.

6. When Grievant discovered that his salary was not what he thought it would be, he discussed the issue with his supervisor, Mr. Hicks, and Shelly Gorby in District 6 Human Resources. Mr. Hicks advised Grievant that he had intended for him to be paid 20% above the entry-level salary, not 10%, and that the salary was a mistake.

7. The initial request by Mr. Hicks to hire Grievant asked that he be hired at 10% above the entry level, and this request was approved. Mr. Hicks intended to request that Grievant be hired at 20% above the entry level, but when he copied another submission, he neglected to change the 10% request on that submission to 20%.

8. Mr. Hicks had no authority to approve a particular salary for Grievant, did not represent to Grievant that he had such authority, and Grievant was aware that Mr. Hicks had no such authority. Starting salaries over $40,000.00, at the time Grievant was hired, had to be approved by the Assistant Commissioner of the Department of Transportation, the Cabinet Secretary, the Division of Personnel, and the Governor's Office.

9. At the time Grievant was hired Cabinet Secretary Paul Maddox had made the decision that no one would be hired by DOH at more than 10% above the entry level. Had Mr. Hicks requested that Grievant be hired at 20% above the entry level, this request would have been rejected. Grievant was hired at the correct, approved salary.

10. Mr. Hicks submitted paperwork to correct what he perceived as an error, requesting that Grievant's salary be increased to 20% above the entry-level, but his request was denied.

11. Mr. Hicks advised Grievant that he would resubmit the paperwork to correct the error at the end of Grievant's probationary period, which was August 18, 2014, and he attempted to do so by submitting a Form GL-5 that had Grievant's salary and the salary Mr. Hicks was requesting of $3,971.00 per month. Amanda Crow, an employee in the District 6 Office who was helping cover the Human Resources office at that time, advised Mr. Hicks that he could not submit the GL-5 with this salary on it, and the Form GL-5 was not

submitted as a request to increase Grievant's salary. Grievant's salary was not increased at the end of his probationary period.

12. No representative of DOH advised Grievant not to file a grievance.

13. This grievance was not filed until May 11, 2015. Grievant offered no excuse for his failure to file a grievance following the end of his probationary period.

14. Respondent raised a timeliness defense at level one.

Discussion

Respondent asserted this grievance should be dismissed as untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule

of *W. Va. Code* § 18-29-4, stating "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

However, a continuing practice may be grieved with each new occurrence. Misclassification, for example, is a continuing practice; however, it is well-settled that, where the employer raises the defense of timeliness in such a case, the right to back pay is limited to ten days preceding the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Craig v. W. Va. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999). In addition, the "'Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e.[,] the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.,* Docket No. 95-20-567 (May 30, 1996).' *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999)." *See v. Dep't of Educ.*, Docket No. 03-DOE-047 (June 25, 2003).

However, "when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to CODE §29-6A-4(a). *See, Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).' *Nutter v. W. Va. Dep't of Health and Human*

Resources, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases)." *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001). This is a case of continuing damage from a salary determination made in the past, and does not fall within the continuing practice exception.

Grievant waited more than one year to file his grievance after he became aware that he was not being paid the salary he thought he should be receiving. No one told Grievant to delay filing his grievance while Mr. Hicks attempted to obtain a higher salary for Grievant. However, Mr. Hicks did indicate to Grievant that he would try to correct what he perceived as a mistake in Grievant's salary.

> In *Steele v. Wayne County Bd. of Educ.*, Docket No. 50-87-062-1 (Sept. 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to *W.Va. Code §*18-29-1, *et seq.*, upon denial thereof." The West Virginia Supreme Court of Appeals, in *Naylor v. W.Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

Davisson v. Lewis County Bd. of Educ., Docket No. 05-21-112 (July 27, 2005). In this case, Mr. Hicks' representations to Grievant reasonably had the effect of causing him to delay filing a grievance. However, the last representation made to Grievant by Mr. Hicks was that he would resubmit paperwork to increase Grievant's pay at the end of Grievant's probationary period. Grievant's probationary period ended on August 18, 2014, with no

salary increase forthcoming for Grievant. This grievance was not filed until nine months later. Grievant offered no explanation for this additional delay in filing. This grievance was not timely filed.

Even were the grievance timely filed, Grievant did not demonstrate that he was entitled to a higher salary. Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

Grievant pointed to no law, rule, regulation, policy or practice which required Respondent to provide him with a starting salary of 20% above entry level. To the contrary, it is clear that Respondent was required to pay Grievant at the entry level of the pay grade to which his classification was assigned, and anything above that level was within the agency's discretion to recommend for approval by the Division of Personnel and the Governor's Office. Respondent chose not to recommend more than 10% above entry level. An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008).

Grievant asserted, however, that under the doctrine of detrimental reliance he was entitled to be paid at the rate of 20% above entry level. Respondent pointed out that Mr.

Hicks had no authority to promise Grievant any particular salary, which Grievant does not dispute, and that "*Ultra vires* promises are not enforceable against a state entity."

"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. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.,* 179 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). "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." *Chapman v. Dept. of Transp./Div. of Highways,* Docket No. 97-DOH-261 (Nov. 24, 1997), citing *Ollar v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel,* Docket No. 92-HHR-186 (Jan. 22, 1993).

> 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 clear precedent set by this Board and the Courts of this State.

Chapman, supra. This case seems to be clearly on point; however, even were Grievant's theory of detrimental reliance to be addressed, Grievant would fall short.

"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-277 (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. *Underwood v. Dep't of Health & Human Res*., Docket No. 2008-1254-DHHR (May 5, 2009). *(*Citing*, Herland v. Dep't of Health & Human Res.*, Docket No. 92-HHR-416 (Aug. 9, 1993); *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(*per curiam*).

> In *Hudkins v. Public Retirement Bd., supra*, the West Virginia Supreme Court of Appeals applied the doctrine of equitable estoppel to a state agency where the agency's employee made assertions to a beneficiary regarding benefits and those assertions were contrary to DOP rules. These statements misled the beneficiary to take certain actions related to retirement that she would not have made if not for the incorrect information she was provided. In their analysis of the doctrine of estoppel the Supreme Court noted:
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> > "'[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.

The Court then set forth the elements that must exist in a particular case for the doctrine of equitable estoppel to apply by noting the following:

> "'[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.

Upon analyzing the elements, the Court balanced "injury and injustice" caused to the beneficiary against "public interest" of the state agency in protecting state funds. *Hudkins, supra.*

Nuzum v. Div. of Nat. Res., Docket No. 2010-1354-DOC (Mar. 23, 2011). In this case, Grievant did not rely on a false representation or concealment of material facts, rather, Grievant assumed he would not be offered the job unless the salary was at a particular level simply because he had indicated he would not accept less. Grievant never bothered to confirm the salary before he accepted the offer of employment, on the date he began his employment, or for more than a month after he began receiving a pay check. Using the reasonable man standard, the reasonable man would have confirmed the salary being offered before accepting a job offer. In this scenario, protecting state funds tips the scales.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale*

and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

2. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of *W. Va. Code* § 18-29-4, stating "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

3. A continuing practice may be grieved with each new occurrence. Misclassification, for example, is a continuing practice; however, it is well-settled that, where the employer raises the defense of timeliness in such a case, the right to back pay is limited to ten days preceding the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Craig v. W. Va. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999). In addition, the "'Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay

disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e.[,] the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.,* Docket No. 95-20-567 (May 30, 1996).' *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999)." *See v. Dep't of Educ.*, Docket No. 03-DOE-047 (June 25, 2003).

4. However, "when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to CODE §29-6A-4(a). *See, Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).' *Nutter v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases)." *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001).

> 5. In *Steele v. Wayne County Bd. of Educ.*, Docket No. 50-87-062-1 (Sept. 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to *W.Va. Code §*18-29-1, *et seq.*, upon denial thereof." The West Virginia Supreme Court of Appeals, in *Naylor v. W.Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of

> untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

Davisson v. Lewis County Bd. of Educ., Docket No. 05-21-112 (July 27, 2005).

6. Mr. Hicks' representations caused Grievant to delay filing his grievance until after the end of his probationary period.

7. The delay in filing the grievance after the end of Grievant's probationary period was not caused by Respondent. The grievance was not timely filed.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: September 15, 2016

BRENDA L. GOULD
Deputy Chief Administrative Law Judge