

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PATRICK BRENNAN,  
Grievant,**

**v.**

**Docket No. 2019-0250-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

## **DECISION**

Grievant, Patrick Brennan, is employed by Respondent, Division of Highways, (“DOH”) in the Highway Engineer Associate classification. Mr. Brennan filed a level one grievance form dated August 15, 2018, alleging:

Became acting unit leader Nov. 1, 2017, which was posted as HW ENG position with a 7% raise. No salary adjustment was made, and the job was posted on May 28, 2018. By that time, I knew I was going to move on, so I didn’t apply, but continued in the role.<sup>1</sup>

As relief, Grievant seeks back pay of seven percent of his salary from November 1, 2017, through September 1, 2018, plus interest. The matter was initially placed in abeyance at level one while the parties worked toward a settlement. On December 11, 2018, level one was waived to level two by the parties. A mediation was conducted on February 7, 2019, and Grievant filed a level three appeal the next day.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on April 12, 2019. Respondent appeared through Natasha White, DOH Assistant Director of Human Resources and was represented by Jason

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<sup>1</sup> The statement of grievance is written herein as it appeared on the level one form.

Workman, Esquire, DOH Legal Division. Grievant appeared *pro se*.<sup>2</sup> The parties waived their right to file Proposed Findings of Fact and Conclusions of Law making this action mature for decision on that date.

### **Synopsis**

The parties agree that Grievant was temporarily upgraded into an advanced job classification for a specific time period. Grievant argues that he should have been paid an additional seven percent while he was serving in the advanced classification, which is the amount of increase he would have received if he applied for and was selected for the position. Respondent believes it is limited to pay Grievant an additional five percent while serving in the advanced classification by the Division of Personal rules. Grievant did not prove that he was entitled to a seven percent increase. The grievance is **GRANTED** in part and **DENIED** in part.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, Patrick Brennan, is employed by the DOH in the classification of Highway Engineer Associate at pay grade 22.
2. In October 2017, Grievant was serving in the Highway Engineer Associate classification in the DOH Planning Division, in the Project Development section.

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<sup>2</sup> “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

3. The position of Unit Leader became vacant. The classification for that position is Highways Engineer which is one classification above the Associate classification and in pay grade 23.

4. Grievant was given the opportunity to temporarily serve in the Unit Leader position while the process for filling the position was conducted. Grievant accepted the offer and assumed the Unit Leader position on November 7, 2017.<sup>3</sup>

5. At some point in November 2017, Elwood Penn, DOH Planning Division Director had a conversation with Grievant about the Unit Leader position. Director Penn told Grievant that the position would pay about 17% more than Grievant's Engineer Associate position. That figure was based upon an anticipated ten percent increase of DOH employees proposed by the Governor, and a seven percent based upon the step up in pay grade if Grievant was the successful applicant.<sup>4</sup>

6. Grievant told Director Penn and others that he was planning to transfer from the Planning Division. He did not apply for the Unit Leader position when it was posted.

7. Grievant continued to serve in the Unit Leader position until September 1, 2018, when he transferred to another DOH division. Upon his transfer, Grievant returned to the Highway Engineer Associate classification at pay grade 22. Grievant was not given any additional pay during the approximately ten months he served as the Unit Leader in the Highway Engineer classification.

8. Respondent concedes that Grievant was temporarily upgraded to the Unit Leader and should have received a salary upgrade while serving in that position.

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<sup>3</sup> Grievant Exhibit 1. DOH Planning Division Organization Chart.

<sup>4</sup> Grievant Exhibit 2. The anticipated ten percent increase ended up being just under seven percent when it came to fruition.

9. The Division of Personnel (“DOP”) *Pay Plan Policy* provides in part:

B. PROMOTION/REALLOCATION/DEMOTION. Except for the provisions of subsection III.A. of this policy pertaining to transfer, when an employee is promoted, reallocated, or demoted his or her pay shall be adjusted as follows:

1. Upon promotion or reallocation, salaries shall be increased 7% the first pay increment, . . .

10. The DOP *Temporary Classification Upgrades Policy* allows agencies to place employees in a higher classification as fulltime employees for a limited time to address certain situations where the higher position becomes vacant. The DOP outlined those situations as follows:

The assignment must be to a position in an acting capacity as a result of the separation or extended leave of absence of a higher-classified employee, for a short-term project, or for an emergency situation.<sup>5</sup>

The policy sets compensation for the temporarily upgraded employee as follows:

An employee assigned to a temporary upgrade by proper authority shall receive a salary adjustment of 5% differential per pay grade up to a maximum of 15% beyond the current salary, . . .

*Id.*

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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*

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<sup>5</sup> *Id.* Temporary upgrades are limited to six months but may be extended upon application to the DOP.

*Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

There was ample evidence that Grievant was temporarily upgraded to a position that held a classification one pay grade higher than his normal position. Respondent also concedes this, and that Respondent has an obligation to pay Grievant additional compensation for the period in which he served in the upgrade. The period was established to be roughly ten months from November 7, 2017, through August 31, 2018. The only remaining issue is the amount of additional pay Grievant should have received.

Grievant argues that he should have been paid 7% above his regular salary. He generally bases that amount on two facts: 1) that is the amount he would have received had he been promoted to the position and 2) Director Penn told him the person taking the position would likely receive a 17% increase, 7% of which he based upon a promotion of one pay grade. (Grievant Exhibit 2).

Respondent counters that Grievant never applied for or received a promotion to the Unit Leader position. Consequently, the DOP *Pay Plan Policy* which would authorize Grievant to receive a 7% increase does not apply to this situation. Respondent asserts that the agency is limited a 5% increase due to the specific language of the DOP *Temporary Classification Upgrade Policy*.

The facts demonstrate that the employment action in this case was a temporary upgrade. Grievant did not apply for and receive a promotion to the Unit Leader position. Grievant was temporarily placed in that position due to the separation from employment

by the person holding the job.<sup>6</sup> Respondent needed someone to serve in the position temporarily while it went through the hiring process. These facts fit the provision of the DOP *Temporary Classification Upgrade Policy* which states:

The assignment must be to a position in an acting capacity as a result of the separation or extended leave of absence of a higher-classified employee, for a short-term project, or for an emergency situation.

*Id.* Since the action was a temporary upgrade, Respondent is bound by that policy's limitation that the salary advancement can not exceed 5% per pay grade.<sup>7</sup> The temporary position was only one pay grade higher than Grievant's original position so 5% was the upper limit for a temporary pay advancement.

Grievant notes that the DOP policies notwithstanding, he was told by Director Penn that he was entitled to a 7% increase. Grievant infers that Respondent is bound by the statement of its management agent even if it is counter to the DOP policy.

The appointing authority, or their designee, is the only person authorized by an agency to grant promotions or salary increases.<sup>8</sup> Director Penn is not the appointing authority for DOH and there is no evidence that he was designated that authority. Consequently, Director Penn was unauthorized to grant Grievant a pay increase of any kind. The doctrine of *ultra vires* is applicable to this situation. The rule requires that neither

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<sup>6</sup> No specific testimony was offered regarding the reason the incumbent left the Unit Leader position. It seemed however that the separation was not entirely expected and may have been abrupt.

<sup>7</sup> See FOF 10 for the specific policy provision.

<sup>8</sup> Appointing Authority. – The executive or head of a department or agency who is authorized by statute to appoint employees in the classified or classified-exempt service. By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by this rule to persons who satisfy the definition of employee. DOP *Pay Plan Policy*.

the State nor any of its political subdivisions is bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-242 (January 31, 2007). Even if Director Penn promised Grievant a 7% upgrade in their discussion, which is not supported by the testimony, Respondent would not be bound by that promise because Mr. Penn was unauthorized to make it and it violated clear DOP policy.

Grievant proved by a preponderance of the evidence that he was temporarily upgraded to a position one pay grade above his regular job for the period from November 7, 2017, through August 31, 2018, inclusively. Grievant also proved that he was entitled to receive a salary upgrade while serving in that position which he was not paid. Grievant did not prove that he was entitled to a 7% salary upgrade during the temporary assignment, but he was entitled to a 5% increase. Accordingly, the grievance is **GRANTED** in part and **DENIED** in part.

### **Conclusions of law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*.

2. Grievant's temporary placement into the Unit Leader position amounted to a temporary upgrade subject to the procedures and limitations of the DOP *Temporary Classification Upgrade Policy*.

3. The position Grievant was temporarily assigned to, carried a pay grade one grade higher than Grievant's regular job entitling him to a 5% pay upgrade for the period he was serving in that position. *DOP Temporary Classification Upgrade Policy*.

4. The doctrine of *ultra vires* requires that neither the State nor any 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. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-242 (January 31, 2007). Respondent was not bound by any statement regarding salaries made to Grievant by Director Penn.

5. Grievant proved by a preponderance of the evidence that he was temporarily upgraded to a position one pay grade above his regular job for the period from November 7, 2017, through August 31, 2018, inclusively. Grievant also proved that he was entitled to receive a salary upgrade while serving in that position which he was not paid.

6. Grievant did not prove that he was entitled to a 7% salary upgrade during the temporary assignment, but he was entitled to a 5% increase.

Accordingly, the grievance is **GRANTED** in part and **DENIED** in part. Respondent is **ORDERED** to pay back pay to Grievant in the amount of five percent of his salary as it was at that time, for the period of November 7, 2017 through August 31, 2018, plus statutory interest from November 7, 2017, until the date the payment is made.

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 (2018).

**DATE: April 26, 2019.**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**