

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**GARY FOSTER, et al.,
Grievants,**

v.

Docket No. 2018-1112-CONS

**DIVISION OF NATURAL RESOURCES
and DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievants, Gary Foster, Keith Krantz and Jerry Westfall, Jr., filed grievances on April 9, April 5 and April 10, 2018, respectively. Grievants are seeking the same discretionary pay increase through the Pay Plan Implementation policy that was provided to several other employees of the Division of Natural Resources. The grievances were waived at Level One and consolidated at Level Two of the grievance process. The Division of Personnel was joined as an indispensable party by the Grievance Board on July 31, 2018. A Level Two mediation session was conducted on August 15, 2018.

Grievants perfected their appeal to Level Three, and a Level Three hearing was conducted before the undersigned at the Randolph County Development Authority, Elkins, West Virginia, on January 18, 2019. Grievants appeared *pro se*. Respondent Division of Natural Resources appeared by Jane Charnock, Assistant Attorney General. Respondent Division of Personnel appeared by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on March 15, 2019.

Synopsis

Grievants are employed by the Division of Natural Resources, and all have earned the Certified Wildlife Biologist certification prior to May of 2002. Their certification dates precede the date on which discretionary increases for Professional Skills/Competency Development under the Division of Personnel's Pay Plan policy existed. Respondent demonstrated that Grievants were not similarly situated to the employees who received their certifications after the prohibition on discretionary pay increases was lifted. The record also established an unauthorized approval of the certification to be eligible for a discretionary raise by a former Assistant Director of the Division of Personnel. It is well established that Grievants cannot rely upon an *ultra vires* action to confer entitlement to the relief they are seeking. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievants seek a discretionary pay increase for Professional Skills/Competency Development under the Division of Personnel's Pay Plan policy.

2. The Professional Skills/Competency Development section of the Pay Plan policy in place at the time the grievances were filed provides, in part:

Under the following conditions, an appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to an employee who acquires certain formal training/education, certification, or licensure, not required to meet the minimum qualifications of the job classification.

3. The request for the in-range salary adjustment shall be submitted within one (1) year of the employee obtaining the formal training, education, certification, or licensure. This requirement was added in the policy revision which took effect on July 1,

2016. However, the one-year rule has been consistently applied as a standard practice by the Division of Personnel to all discretionary pay increase requests for some time.

4. Any professional skills/competency development must have been received subsequent to appointment of the employee to their current position and assigned job classification.

5. Pursuant to the Pay Plan policy, by letter to then Director of the Division of Personnel, Sara P. Walker, the former Director of the Division of Natural Resources, Robert A. Fala, sought approval for several certifications, including the Certified Wildlife Biologist certification, to be considered for eligibility for a Professional Skills/Competency Development discretionary pay increase.

6. Bruce Cottrill, former Assistant Director of the Classification and Compensation section of the Division of Personnel responded to Scott Warner, Environmental Resources Program Manager with the Division of Natural Resources accepting the certifications under the Professional Skills/Competency Development.

7. It is undisputed that Mr. Cottrill circumvented applicable Division of Personnel processes and policy. Mr. Cottrill did not have authority to approve the Division of Natural Resources request for certain certifications, including the Certified Wildlife Biologist certification. The decision to be eligible for receipt of a discretionary pay increase under the Professional Skills/Competency Development section is reserved for the Director of the Division of Personnel.

8. By letter dated September 1, 2015, Director Fala established a March 1, 2011, date after which receipt of the Certified Wildlife Biologist certification would allow

an employee to receive a discretionary pay increase under the policy.¹ A group of Pay Plan policy discretionary pay increase requests for Professional Skills/Competency Development were submitted by the Division of Natural Resources to the Division of Personnel on April 5, 2016.

9. After the Division of Personnel discovered that Mr. Cottrill had acted beyond the scope of his authority, the Division of Personnel and the Division of Natural Resources worked together to determine how to handle the situation. A decision was made that all those employees who, in reliance on Director Fala, had obtained their Certified Wildlife Biologist certification after the March 29, 2011, date, would be approved for the discretionary pay increase.

10. Shortly after the Division of Personnel began discussions with the Division of Natural Resources about the issue that had been created by Mr. Cottrill, under the new Assistant Director, Wendy Campbell, the Division of Personnel began an official review of the Wildlife Biologist certifications. This review was requested because the certifications had not gone through an official vetting process. Based upon Ms. Campbell's cursory review, she was concerned that the certifications required a degree which is established as a minimum qualification for any of the classifications in the Wildlife Biologist class series. In addition to the degree, the certifications essentially just required "time in seat," which would be nothing more than fulfilling the requirements of the job.

¹This date was likely meant to be March 29, 2011, the date upon which the Governor's office partially lifted the prohibition on discretionary pay increases.

11. After the vetting process, a determination was made by the Organization and Human Resources Development section of the Division of Personnel that this type of certification should not be eligible for a discretionary pay increase. This recommendation was adopted by the Director and the certification is not included on the list of eligible certifications for a discretionary pay increase.

12. Mr. Foster obtained his Certified Wildlife Biologist certification from The Wildlife Society on September 22, 1997. Mr. Foster was employed by the Division of Natural Resources on January 1, 1986, and was first placed in a Wildlife Biologist position on July 1, 1988.

13. At the time Mr. Foster received his Certified Wildlife Biologist certification the Pay Plan policy did not contain provisions that permitted discretionary pay increases for Professional Skills/Competency Development.

14. Mr. Krantz obtained his Certified Wildlife Biologist certification from The Wildlife Society on March 23, 1991. Mr. Krantz was employed by the Division of Natural Resources on August 23, 1993, and was first placed in a Wildlife Biologist position on July 1, 2000.

15. Mr. Krantz was not employed by the Division of Natural Resources or the State when he obtained his certification. At the time Mr. Krantz received his certification the Pay Plan policy did not contain provisions that permitted discretionary pay increases for Professional Skills/Competency Development.

16. Mr. Westfall obtained his Certified Wildlife Biologist certification from The Wildlife Society on April 5, 2002. Mr. Westfall was employed by the Division of Natural

Resources on February 17, 2004, and was first placed in a Wildlife Biologist position on December 1, 2010.

17. Mr. Westfall was not employed by the Division of Natural Resources or the State when he obtained his certification. At the time Mr. Westfall received his certification the Pay Plan policy did not contain provisions that permitted discretionary pay increases for Professional Skills/Competency Development.

18. The Professional Skills/Competency Development section of the Pay Plan policy did not exist until implementation of the Pilot Strategic Compensation policy on July 1, 2004.

19. The Division of Natural Resources employees who received discretionary pay increases for obtaining their Certified Wildlife Biologist certification, earned their certifications after the Governor's office memo lifting the prohibition on discretionary pay increases.

20. At the request of Andrea Fout Tinsley, Human Resources Director, Division of Natural Resources, on February 12, 2018, Division of Personnel Director Sheryl Webb sent letters to Ms. Tinsley, with copies to each of the Grievants, informing them that they would not be eligible for the discretionary pay increase.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, [t]he 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).

Grievants assert that they are the victims of discrimination and that they should have received a discretionary pay increase for their receipt of the Certified Wildlife Biologist certifications. For the purpose of the grievance procedure, discrimination is defined as "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). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The record demonstrated that Grievants are not similarly situated to the employees whom they compare themselves. Contrary to their assertion that they are similarly situated simply because they have all received the Certified Wildlife Biologist certification, Grievants occupy positions that are assigned to three different classifications which require different levels of experience, training and qualifications, as well as, the performance of different job duties. In addition, Mr. Foster obtained his certification on September 22, 1997, Mr. Krantz obtained his certification on March 23, 1991, and Mr. Westfall obtained his certification on April 5, 2002. In contrast, all the Division of Natural Resources employees who received the discretionary pay increase received their certifications in 2015 and 2016 in reliance on the Fala memo.

Mr. Krantz and Mr. Westfall both obtained their certifications prior to employment with the Division of Natural Resources. One of the requirements of the Pay Plan policy is that certification must be received subsequent to appointment to the classification. Mr. Krantz and Mr. Westfall do not meet this element required of the Pay Plan policy, and, accordingly, there would be no circumstance under which they could be eligible for the discretionary pay increase. Mr. Foster occupies a position in the Division of Natural Resources classified as an Environmental Resources Program Manager 1. None of the Division of Natural Resources employees who received the discretionary pay increases occupied such classified positions. Accordingly, Mr. Foster did not meet the first element of demonstrating that he is similarly situated to the other employees.

Finally, 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 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).

Similar to *Ollar*, Mr. Cottrill approved the Certified Wildlife Biologist certification for eligibility under the Professional Skills/Competency Development section without going through a formal vetting process and without the approval of the Division of Personnel Director. Mr. Cottrill did not have the authority to approve the certifications for eligibility under the policy. Once the Division of Personnel discovered what had occurred, steps were taken to correct the situation. The unauthorized actions of Mr. Cottrill did not create an entitlement to a discretionary pay increase for the Grievants.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievants failed to prove that they were similarly situated to the Division of Natural Resources who received the discretionary pay increases and have failed to demonstrate that they have been in any way the victims of discrimination.

4. 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).

5. The actions of Mr. Cottrill can be viewed as *ultra vires* and cannot be relied upon to confer entitlement to the relief that Grievants are seeking.

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 (2018).

Date: March 22, 2019

Ronald L. Reece
Administrative Law Judge