

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA PAXTON,

Grievant,

v.

Docket No. 2021-2342-MAPS

**DEPARTMENT OF HOMELAND SECURITY/
DIVISION OF EMERGENCY MANAGEMENT
AND DIVISION OF PERSONNEL,**

Respondent.

DECISION

Grievant, Lisa Paxton, is employed by Respondent, Division of Emergency Management (“DEM”), which is now part of Respondent, Department of Homeland Security (“Homeland”). Respondent Division of Emergency Management (“DEM”) was previously part of the West Virginia Military Authority (Military Authority). As a result of legislation, DEM was removed from the Military Authority and placed under the administration of Homeland. This change took place on May 28, 2020.

In April 2020, Grievant filed a grievance against her then employer, the Military Authority. Employees of the Military Authority are statutorily excluded from participating in the Public Employees Grievance Procedure. W. VA. CODE § 15-1J-4(d)(10). Grievant’s claim was still pending in the Military Affairs grievance procedure when her division was placed under Homeland. Because the Military Affairs grievance procedure was no longer available to Grievant, she was permitted to refile her Grievance

against Homeland pursuant to the Public Employees Grievance Procedure.¹ Ms. Paxton subsequently filed her grievance in the Public Employees Grievance Procedure at level one, by form dated April 6, 2021. Grievant alleges that she has not received a promised promotion because the paperwork has not been filed.² As relief, Grievant seeks her position to be allocated to the Home Security Grant Manager classification or SERC Program Manager/Grant Manager classification. Grievant also seeks an increase in salary to \$69,000 per year,³ plus backpay to February 2019.⁴

Homeland waived level one, without objection by Grievant, on April 22, 2021, alleging a lack of authority to grant the relief requested. Respondent, Division of Personnel (“DOP”) was joined as a party by order dated April 27, 2021, and a mediation was conducted at level two on August 30, 2021.⁵ Grievant appealed to level three on September 7, 2021.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board over two days: April 26, 2022, and May 27, 2022. Grievant personally appeared and was represented by Anthony Brunicardi, Esquire, the

¹ In essence her new filing constituted a transfer from one grievance procedure to another. Director D. L. McCabe instructed Grievant to send her grievance directly to the Grievance Board Chief ALJ. The Chief ALJ had no contact with Grievant. Mr. McCabe told Grievant in an email “legal is advising it is appropriate to transfer this grievance to the state system since it was delayed as a result of an internal investigation”

² Grievant generally alleged retaliation, discrimination, harassment, workplace violence, and hostile workplace violence. It is assumed that this grievance is virtually identical to the one that was pending in the Military Affairs grievance procedure.

³ Grievant alleges that Director Todorovich told her she would receive that salary when she was promoted to Grant Manager.

⁴ Grievant did not specify a day in February but states when she was endorsed by the SERC Commission.

⁵ Respondent DOP preserved the defense of that the grievance was untimely filed on May 6, 2021, prior to the level two mediation.

Employee Law Center, PLLC. Respondent DEM appeared in the person of DEM Director, G.E. McCabe, and was represented by Jodi Tyler, Assistant Attorney General. Respondent DOP appeared in the person of Wendy Mays, Assistant Director of the DOP Classification and Compensation section, and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature on July 5, 2022, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleges that she was offered and accepted a significant promotion both by the State Emergency Response Commission and her supervisors in the Division of Emergency Management. When she did not receive the raise, she filed a grievance arguing, among other things, that she had a binding contract to receive the promotion to a different classification with a higher salary. She also argues that she had relied to her detriment upon the promises of her supervisors that she was getting this promotion by taking on more numerous and complex duties than she had been performing, while she waited for the raise to be processed.

The DEM was transferred from the Military Authority to Homeland Security which required the DOP to place Grievant's position in the state classification system. The DOP determined that the predominate duties of Grievant's position did not fit into the position Grievant thought she was performing. Homeland declined to exercise its discretion to pay Grievant a salary approximately \$20,000 more per year than the paygrade for the classification which DOP concluded was the best fit for her position. Grievant did not prove that DOP's classification allocation decision was arbitrary and capricious. Nor did

she prove that Homeland's decision regarding granting her a discretionary raise was arbitrary or capricious.

Any promises or assurances made by the SERC or Grievant's supervisors regarding a promotion did not create a binding obligation of the Military Authority or Homeland because neither of these groups had authority to grant the promotion or raises. Grievant did not prove that there was sufficient inequity in this situation to force Respondent's to honor the assertions of Grievant's supervisors.

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 was initially employed by the West Virginia Emergency Response Commission which was part of the West Virginia Military Authority.

2. The West Virginia Military Authority is established by statute to administer national security and other military-related or sponsored programs. The Military Authority is administered by the Adjutant General of the West Virginia National Guard. W. VA. CODE § 15-1J-4.

3. Employees of the Military Authority are at-will and exempt from the "classified" and "classified-exempt" services categories administered by the DOP.⁶ Military Authority employees may not participate in the Public Employees Grievance System.⁷

⁶ W. VA. CODE § 15-1J-5(a)(1)

⁷ W. VA. CODE § 15-1J-4(d)(11)

4. The Military Authority announced a vacancy for an Administrative /Operations Manager 3 position with the working title of SERC⁸ Program Manager/grant Manager. The announcement was signed by Major General James A. Hoyer, Adjutant General.⁹

5. At a meeting of the State Emergency Response Commission (“SERC”) held on February 26, 2019, a motion was made to offer the position of SERC Commission Program/Coordinator to Grievant, Lisa Paxton. The motion passed and Grievant accepted the position.¹⁰

6. Grievant immediately began performing increased duties related to the position of SERC Commission Program Coordinator while working with her supervisor, David Hoge, and Emergency Services Director Michael Todorovich, on figuring out a position that would cover all the increased duties and responsibilities of SERC Program Coordinator.

7. There is no evidence of a change in Grievant’s salary or pay grade at that time.

8. In early February 2019 Grievant was offered by Director Michael Todorovich a position in the MA Administration/Operations Manager 2 classification with the working title of Grant Manager.

⁸ State Emergency Response Commission.

⁹ The position document which was entered as an exhibit had no date.

¹⁰ Grievant Exhibit 1, SERC Meeting Minutes.

9. On February 18 and 19, 2019, Director Todorovich exchanged emails with the Chief of Preparedness Grants, Hoge concerning how Grievant's proposed new salary of \$69,000 as a Grants Manager would be funded. (Grievant Exhibit 4)¹¹

10. An Employee Personnel Action Request (form WVMA-11) was prepared and signed on February 24, 2020, by Director Todorovich and Chief Hoge. The form was to facilitate formal placement of Grievant on the payroll in the position of Military Affairs Administration/Operations Manager 2 with the working title of Grant Manager. The annual salary listed on the form was \$62,900. The form required the approval and signatures of at least two other officials to be effective: The Director of the Military Authority, and the Adjutant General. Neither of these officials signed the form. (Grievant Exhibit 5)¹²

11. In April 2020, Grievant filed a grievance against the Military Authority alleging *inter alia* that she had been performing the duties of the position SERC Commission Program/Coordinator since February 2019 and was promised the position of MA Administration/Operations Manager 2 with the working title of Grant Manager and an annual salary of \$69,000 in February 2020, but she never received the raise in salary. She sought a raise to \$69,000 per year effective February 2019.

12. As the result of legislation in 2020, effective May 28, 2020, the DEM section moved from the Military Authority's administration and became affiliated with Homeland. Unlike the Military Authority, employees of Homeland are covered under the DOP civil

¹¹ Grievant was copied on this email exchange.

¹² There is no evidence that the form was processed.

service system.¹³ This action caused the classification status of all DEM positions (including Grievant's) to change from being "exempt" to being "classified-exempt."¹⁴

13. The DOP defines "Classified-Exempt Service":

Those positions which satisfy the definitions of "class" and "classify" but which are not covered under the Division of Personnel merit system standards or employment standards of the higher education systems.

"Classified Service" is defined as:

Those positions which satisfy the definitions for "class" and "classify" and which are covered under the Division of Personnel merit system standards".

"Exempt" positions do not fall under the purview of the DOP.¹⁵

14. When a position is classified-exempt, the DOP is required to make the classification determination from positions in the DOP classifications, Thereafter, the DOP has no further involvement with the position. Notwithstanding the DOP classification allocation, the salaries are set at the discretion of the employing agency and an individual does not have to meet minimum qualifications for the position. The agency where the position is located may also give the position a working title that differs from the DOP classification title reported by DOP to The OASIS Human Resources System.¹⁶

15. As a result of the DEM being moved under the control of Homeland, the DEM positions became classified-exempt and needed to be placed in the classification

¹³ Homeland employees may also utilize the Public Employees Grievance Procedure. Grievant refiled her grievance in that procedure on April 6, 2021. The allegations and relief remained virtually the same.

¹⁴ Grievant Exhibit 9 and Testimony Assistant Director Mays.

¹⁵ DOP Exhibit 1 and Testimony Assistant Director Mays.

¹⁶ DOP Exhibit 1 and Testimony of Assistant Director Mays; *See generally*, W. VA. CODE ST. R. §§143-1-1 *et seq.*

system by DOP. As part of that process Position Description Forms (“PDF”) were completed for all DEM positions and submitted to DOP so they could be allocated to appropriate classification in the DOP classification plan.¹⁷

16. Grievant submitted her PDF which was reviewed for accuracy and approved by her supervisor. Grievant agreed that the PDF provided a fair and accurate description of the duties and responsibilities assigned to her position. Since the submission of the PDF, Grievant’s position went from supervising two employees to one.

17. DOP utilizes the job content methodology to allocate the position to the classification within the classification plan that is the “best fit” for the duties and responsibilities as set out in the PDF and any other appropriate documentation.¹⁸ The classification of SERC Program Manager/Grant Manager was not available because it is unique to the Military Authority and not included in the DOP classification plan.

18. Based upon the data provided to DOP, the DOP determined the Emergency Services Specialist classification was the best fit for Grievant’s position. DEM appealed the DOP’s classification determination. The DOP rereviewed the position and concluded that the original classification determination of Emergency Services Specialist was appropriate.

19. DOP conducted a job audit¹⁹ of the position to be completely certain about the allocation. The job audit was performed on April 18, 2022. However, the DOP had not

¹⁷ The PDF is identified in W. Va. Code R. § 143-1-4.5, as the official document detailing the duties and responsibilities of a position and it is used by DOP to properly allocate positions within the classified service.

¹⁸ Such as present and past posting for the position.

¹⁹ A “job audit is “[a] detailed examination/review of the duties and responsibilities assigned to a position to include reviewing current and previous position description forms, organizational charts, reporting relationships and organizational setting.”

officially notified Grievant or DEM of the results before the second day of the hearing. Assistant Director Mays testified that the audit reaffirmed the determination that Grievant's position best fit in the Emergency Services Specialist classification.

20. Grievant was concerned with the allocation of her position because she did not believe it reflected her actual duties and because the pay grade was below what she had discussed with her supervisors when they submitted the WVMA-11 form for a promotion. The Emergency Services Specialist classification is in paygrade 10 with the annual salary range of \$27,662 to \$51,173. The Homeland Security Grant Manager classification is in paygrade 20 with the annual salary range of \$47,287 to \$87,480. Grievant's annual salary is \$48,030. (Respondent Homeland Exhibit 1)

21. The DOP *Administrative Rule* defines Classification Specifications (Class Specs) as follows:

Class Specification. -- The official description of a class of positions for the purpose of describing the nature of work, providing examples of work performed, and identifying the knowledge, skills, and abilities required while stating the generally accepted minimum qualifications required for employment.

W. Va. Code St. R. § 143-1-3.19

22. The Class Specifications for the Homeland Security Grant Manager states the "Nature of Work as follows:"

Under administrative direction, *performs complex administrative, managerial, and supervisory work with responsibility for the federal homeland security grant program within the Division of Homeland Security and Emergency Management.* Responsible for overseeing the development and implementation of methods related to the grant program. Advises and consults with management on grant related

program matters; provides regular and special reports for decision making purposes. *Supervises the work of professional, technical and support personnel.* Coordinates the implementation and administration of the federal homeland security grant program. Interacts with federal and state agencies on program administration, funding levels, and interpretation of regulations and policies. Interacts with federal, state, and local government officials and community leaders relative to program guidelines. Approves and oversees the approval of the disbursement of funds to sub-grant agencies. Oversees the monitoring of sub-grant projects. Performs related work as required. (Emphasis added)

23. The Class Specifications for the Emergency Services Specialist states the “Nature of Work as follows:”

Under general supervision, performs full-performance level work in an assigned program area of the Office of Emergency Services by coordinating emergency preparedness policy, regulations and methodology with local entities. Performs related work as required.

Work at this level in the series is distinguished by the assigned responsibility for development of policy and procedures related to specific program areas.

24. The DOP defines “Manager” as:

Manager/Managerial. - Oversees a formally designated organization unit or program that requires extensive planning, organizing and monitoring of work activities of subordinate staff, controlling resources including staff, budget, equipment, and all the means used to accomplish work within the assigned area of responsibility. Employee is held accountable for establishing and meeting the objectives and goals of the unit or program.

And “Supervisor” is defined as:

Supervisor. - Formally delegated responsibility for planning, assigning, reviewing and approving the work of two (2) or more full-time employees or three (3) or more .83 full-time equivalent Seasonal employees which includes initiating disciplinary actions, approving leave requests, conducting

performance evaluations and recommending salary increases.

DOP Exhibit 1.

25. Grievant's position does not formally oversee a designated organizational program. At the time of the hearing Grievant only supervised one employee. Consequently, she is not performing managerial or supervisory work as those terms are defined in DOP policy and rules. The specific nature of work for the Homeland Security Grant Manager classification states that the incumbent "*performs complex administrative, managerial, and supervisory work*. with responsibility for the federal homeland security grant program within the Division of Homeland Security and Emergency Management." (FOF 23, *supra*.)

26. In addition to some work with grants, Grievant works with the Local Emergency Planning Counsel to ensure their contacts are up to date, monitor payments from grants to the fire department, and runs down unfiled reports from the departments after their annual due date of March 1. Grievant also works with the State Emergency Response Commission and the Tier II Hazardous Material Database.²⁰

27. While the position performs some work with grants, the predominant duties of the position focus on emergency preparedness services. Consequently, the best fit for the position is the Emergency Services Specialist.²¹

²⁰ Testimony of Grievant's supervisor, James Domingo

²¹ Grievant Exhibits 10, 11 & 12 and Testimony of Assistant Director Mays.

28 Grievant's supervisor, James Domingo, occupies a position assigned to the classification of Emergency Services Specialist, Sr. This classification is in the same class series as Grievant's position classification, only one level higher.²²

29 Homeland cannot change the classification DOP has submitted for the position to OASIS Human Resources System. However, the agency has the discretion to give the position a different working title and a salary outside the paygrade range for the DOP allocated classification.

30. The DEM created a document listing seven employees who are now classified as Emergency Services Specialists. Those employees, positions have similar duties and levels of responsibilities as Grievant's position. Three of the positions, including Grievant's, supervise one subordinate. The annual salaries in this group of similarly classified employees range from \$41,346 to \$52,569. Grievant's annual salary is \$48,030, which is above the group's average salary of roughly \$47,500. The position with the highest salary in the Group supervised eight subordinates.²³

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 ST. R. §156-1-3. "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 and Human Res.*, Docket

²² Testimony of James Domingo.

²³ Respondent Homeland Exhibit 1 and testimony of DEM Director, G. E. McCabe.

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.*

This grievance has an unusual procedural history because when it was placed within the Military Authority, Grievant could not avail herself of the Public Employees Grievance Procedure. Rather, she filed her complaint in the process made available for the Military Authority's exempt employees. Before the grievance was resolved in the Military Authority process, the DEM was transferred to Homeland and the grievance had to be transferred to Public Employees Grievance Procedure. No evidence was presented about the timelines applicable to the Military Authority grievance procedure, so it is not proven that the grievance was untimely filed. Even though the Grievant's initial filing in the Public Employees Grievance Procedure was long after the events giving rise to this matter, that filing was a transfer, so the timeline for filing level one grievances pursuant to WEST VIRGINIA CODE § 6C-2-4 is not applicable.

No one contests that DOP was required to allocate Grievant's position into a classification within the DOP classification system once her department was transferred to Homeland, and her position became classified-exempt. While Grievant does not agree that the classification Emergency Services Specialist is the best fit for her position, that is not her main contention.

Grievant argues that the Military Authority entered into a binding contract with her when she was offered the position of SERC Commission Program/Coordinator at a meeting of the State Emergency Response Commission ("SERC") and she immediately accepted. Grievant alleges she was performing the duties for that classification at that time. Grievant also notes that she accepted the offer for the position of Military Affairs

Administration/Operations Manager 2 with the working title of Grant Manager by Emergency Management Director Todorovich and Chief Hoge. She contends that this was just a new title for the position she was currently performing. In support of the offer these supervisors submitted an Employee Personnel Action Request (form WVMA-11) to effectuate the contract with an annual salary of \$62,900.²⁴

Grievant argues that subsequently placing her position in the Emergency Services Specialist classification and continuing her annual salary of \$48,030 violates the prior contract of employment at the higher classification. In the alternative, Grievant argues that Respondent must place her in the Military Affairs Administration/Operations Manager 2 classification under the doctrine of promissory estoppel because her supervisors lead her to believe that she had been promoted. Based upon her supervisor's representations, she took on significantly more duties which were also more complex. Yet to her detriment, she was never properly compensated for performing those duties.

The allocation of Grievant's position by the DOP was virtually uncontested in Grievant's post-hearing brief. However, she alleges in her grievance that her position should be allocated to the Home Security Grant Manager classification, so DOP's allocation decision will be addressed.

To prevail upon a claim of misclassification or misallocation, a Grievant must prove by a preponderance of the evidence that her duties more closely match those of another cited class specification than the classification to which he is currently assigned. See *generally, Hayes v. W. Va. Department of Natural Resources*, Docket No. NR-88-038

²⁴ Grievant claims that her supervisors promised her a higher salary of \$69,000 per year, which she accepted.

(Mar. 28, 1989). The key to the analysis of allocation cases is to ascertain whether Grievant's current classification constitutes the "best fit" for their required duties. *Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991); *Propst v. Dep't of Health and Human Resources and Div. of Personnel*, Docket No. 93-HHR-351 (Dec. 3, 1993). In ascertaining which classification constitutes the best fit, DOP looks at the predominant duties of the position in question. These predominant duties are deemed to be "class-controlling." *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004), citing *Broadbuss v. W. Va. Div. of Human Services*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Barrett et al v. Dep't of Health & Human Res. & Div. of Personnel*, Docket No. 04-HHR389 (Dec. 6, 2007).

The DOP is the agency charged with administering the state classification system. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

The specific nature of work for the Homeland Security Grant Manager classification states that the incumbent “*performs complex administrative, managerial, and supervisory work*, with responsibility for the federal homeland security grant program within the Division of Homeland Security and Emergency Management.” (FOF 23, *supra*.) Grievant’s position does not formally oversee a designated organizational program and Grievant only supervised one employee. Consequently, she is not performing managerial or supervisory work as those terms are defined in DOP policy and rules. Grievant’s position does not fit within the Homeland Security Grant Manager classification.

While Grievant performs some work with grants, Grievant’s predominate duties include working with the Local Emergency Planning Counsel to ensure their contacts are up to date, monitoring payments from grants to the fire department, and running down unfiled reports from the departments after their annual due date of March 1. Grievant also works with the State Emergency Response Commission, and the Tier II Hazardous Material Database. The best fit for the position is the Emergency Services Specialist classification due to the predominant duties of the position being focused on emergency preparedness services. Grievant did not prove by a preponderance of the evidence that the DOP’s allegation of her position was improper or arbitrary and capricious.

Grievant correctly asserts that because she is a classified-exempt employee, Homeland is not constrained by the paygrade established for the classification of Emergency Services Specialist, or even the minimum qualifications. The agency has the discretion to give the position a different working title and a salary outside the paygrade range for the DOP allocated classification.

Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 51 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995). Respondent Homeland recognizes its discretion to increase Grievant's salary, but has chosen not to exercise that discretion.

Homeland points to DOP's allocation decision that Grievant's predominate duties are not in grant management. The DEM identified seven employees who are now classified as Emergency Services Specialists. Those employees have similar levels of responsibilities as Grievant's position. Like Grievant's position, these positions generally supervise one employee although some supervise more. The annual salaries in this group of similarly classified employees range from \$41,346 to \$52,569. Grievant's annual salary is \$48,030, which is above the group's average salary of roughly \$47,500. Respondent Homeland argues that Grievant's present salary is appropriate for her duties and consistent with the salaries paid to others in similar positions. Grievant did not present evidence to counter these assertions. Grievant did not prove by a preponderance of the evidence that Homeland's determination that Grievant's position was appropriately compensated was arbitrary and capricious.

Grievant next argues that she had a valid and binding contract with Military Affairs prior to the department being transferred to Homeland, when she was offered and accepted the position of SERC Commission Program/Coordinator in February 2019. She also points to the efforts made by Emergency Management Director Todorovich and Chief Hoge to place her in the position of Military Affairs Administration/Operations Manager 2

with an annual salary of \$69,000 as evidenced by their preparation of a WVMA-11 form for that position.

The fatal flaw with Grievant's contract argument is that none of the parties who made these representations to Grievant had the authority to carry them out. The Military Authority is created by statute to administer national security, homeland security, and other military-related or sponsored programs. The authority is administered by the Adjutant General of the West Virginia National Guard. W. VA. CODE § 15-1J-4. As the administrative authority, the Adjutant General must approve all hiring and promotions within the Military Authority. Anyone in the Military Authority making promises of hiring or promotions without the approval of the Adjutant General would be committing invalid *ultra vires* acts.

The Grievance Board has discussed the issue of *ultra vires* acts at some length. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to perform such violative acts. *Guthrie v. Dep't of Health and 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 and Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). The rule is clear. Neither the state nor one of its political subdivisions may be 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-224 (January 31, 2007). "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)).

In this case, there was no evidence presented concerning the role or authority of the State Emergency Response Commission (SERC). That commission is part of the Military Authority and without any evidence to the contrary, it is more likely than not, that their offer of promotion for Grievant was subject to the approval of the Adjutant General. There is no evidence that such approval was sought or given. Additionally, Employee Personnel Action Request (form WVMA-11) prepared and signed on February 24, 2020, by Director Todorovich and Chief Hoge required the approval and signatures of the Director of the Military Authority and the Adjutant General. Neither of these officials signed the form. (Grievant Exhibit 5.) Neither the SERC, Mr. Todorovich, nor Mr. Hoge had the authority to promote Grievant or give her a raise on their own. Their *ultra vires* acts did not create a contractual obligation for Grievant to receive the promotion.

Grievant argues in the alternative that Respondent should be bound by the acts of their agents (Grievant’s supervisors) because they made specific promises to Grievant that she would be getting a significant salary increase by performing certain duties and responsibilities. Grievant asserts that she relied upon these promises to perform the more complex and important duties to her detriment. Grievant claims that Respondent is required to honor the promises of their agent under the doctrine of promissory estoppel. To establish a claim under promissory estoppel, an individual must prove “that [he] suffered damages as a result of [his] reasonable reliance upon the promise of the

defendant." *Koerber v. Wheeling Island Gaming, Inc.*, No. 5:12CV97, 2013 U.S. Dist. LEXIS 5923, 2013 WL 162669, at *4 (N.D. W. Va. Jan. 15, 2013) *Williams v. Rigg*, No. 3:19-cv-00423, 2021 U.S. Dist. LEXIS 207362, at *22 (S.D. W. Va. Oct. 27, 2021).

It has been noted herein that ordinarily, unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity. 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), and *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007) (*per curiam*).

In *Hudkins v. Public Retirement Bd.*, 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 her eligibility for retirement benefits and those assertions were contrary to the Retirement System's rule. These statements misled the beneficiary to resign her employment before she was eligible to retire. She would not have made that decision if not for the incorrect information she was provided. In their analysis of the doctrine of estoppel the Supreme Court noted:

“‘[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). *Wise v. Div. of Highways*, Docket No. 2015-1263-DOT(R), (Mar. 13, 2017).

In this case, there is no evidence of a false representation or concealment of material facts. Grievant’s supervisors were discussing through email the way to effectuate Grievant’s promotion and the salary she would receive. They processed the proper forms, but there is no evidence that they told Grievant they had final authority to make the promotion happen. In fact, the act of submitting an Employee Personnel Action *Request* form implies that additional approval for the action must take place. Additionally, there is no compelling equitable reason for estoppel in this matter. In *Hudkins*, an employee quit her job in reliance upon the employee of the retirement board’s assurance that she was eligible to receive retirement benefits. When it was determined that she was not eligible to retire, she was left with no job and no retirement benefits.

In this case, Grievant kept performing the duties she had been performing while she waited for her promotion. There was virtually no change in those duties when the DEM was transferred to Homeland. At that point, both DOP and Homeland determined that she was being paid appropriately for her position's duties and responsibilities. Therefore, she has suffered little or no harm by her supervisors' inability to carry through with their attempts to give Grievant a significant raise beyond the disappointment of missing out on a windfall.

Grievant did not prove by a preponderance of the evidence that the doctrine of promissory estoppel should apply to force Respondents to honor the representations of Grievant's supervisors. Accordingly, the grievance is DENIED.

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 ST. R. §156-1-3. "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 and Human 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.*

2. The DOP is the agency charged with administering the state classification system. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v.*

State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983).

3. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

4. Grievant did not prove by a preponderance of the evidence that DOP's allocation of her position was improper or arbitrary and capricious.

5. Because Grievant is a classified-exempt employee, Homeland has the discretion to provide Grievant with salary higher than the paygrade for the classification assigned by the DOP. Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 51 S E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995).

6. Grievant did not prove by a preponderance of the evidence that Homeland's determination that Grievant's position was appropriately classified and compensated was arbitrary and capricious.

7. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to perform such violative acts. *Guthrie v. Dep't of Health and 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 and Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998).

8. Neither the state nor one of its political subdivisions may be 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-224 (January 31, 2007). “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)).

9. Grievant’s supervisors did not have legal authority to promote Grievant to a higher classification nor increase her salary. Any actions by the supervisors to do so without approval of the Adjutant General constituted *ultra vires* acts and not binding on the Respondent agencies. Grievant did not prove by a preponderance of the evidence that she had a binding contract with the Military Authority to employ her in a grant manager position at an annual salary in \$69,000 per year.

10. Ordinarily unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity. 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), and *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007) (*per curiam*).

11. “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).” Syl. Pt. 3, *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711. 1

12. “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.* at Syl Pt. 4.

13. Upon analyzing the elements, the Court balance[s] “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). *Wise v. Div. of Highways*, Docket No. 2015-1263-DOT(R), (Mar. 13, 2017).

14. Grievant did not prove by a preponderance of the evidence that the doctrine of promissory estoppel should apply to force Respondents to honor the representations of Grievant’s supervisors.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.²⁵ 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: August 16, 2022

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE

²⁵ 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.