MARVIN STEWART,

Grievant,

v.

DOCKET NO. 01-HE-079

HIGHER EDUCATION INTERIM GOVERNING BOARD/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Marvin Stewart, filed this grievance against his employer, the Higher Education Interim Governing Board/Marshall University ("Marshall"), on October 23, 2000, alleging as follows:

> Mercer salary schedule/below 15 years as of 8/1/00.
>
> Relief sought: I would like to be fully funded as of 8/1/00. I would like back pay from this date and interest if it drags out.

A level one conference was held with Tony Crislip, Grievant's immediate supervisor, on November 7, 2000, at which time the grievance was denied. A level two hearing was held on January 25, 2001, and a decision denying the grievance was issued on January 30, 2001, by Linda P. Rowe, recommending the grievance be denied. By letter dated January 31, 2000, F. Layton Cottrill, Jr., designated representative of Marshall, informed Grievant that he concurred with Ms. Rowe's findings, and denied the grievance. Grievant appealed to level four on March 7, 2001, and a level four hearing was held on May 5, 2001. This matter became mature for decision on May 25, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1) Grievant appeared pro se, and Marshall was represented at level two by Jim Stephens, Director of Human Resources, and at level four by Beth Ann Rauer, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LII Grievant's Exhibits

Ex. 1 -

August 31, 2000 letter from Dan Angel, President, to Marvin Stewart.

LII Marshall Exhibits

Ex. 1 -

Board of Trustee's Policy 62, pp. 12-14.

Ex. 2 -

Higher Education Classified Employee Annual Salary Schedule, effective January 1, 1994.

LIV Grievant's Exhibits

None.

LIV Marshall Exhibits

Ex. 1 -

September 13, 1996 memorandum from Charles Manning, Chancellor, and Clifford M. Trump, Chancellor, to State College and University System Presidents re: Series 62 Provisions.

Ex. 2 -

August 11, 2000 memorandum from Margaret V. Buttrick to Human Resources Administrators re: Promotion Policy in Series 62.

Ex. 3 -

Salary History of Marvin Stewart.

Ex. 4 -

W. Va. Code § 18B-9-3. Higher education classified employee annual salary

schedule.

Testimony

Grievant testified in his own behalf, and presented the testimony of Marty Newman, and Tony Crislip. Marshall presented the testimony of Jim Stephens.

FINDINGS OF FACT

The following findings of fact have been derived from a review of the testimony and evidence in its entirety.

1. Grievant is currently employed by Marshall as a Lead Plumber in the Physical Plant Department ("PPD").

2. Grievant has been employed by Marshall for more than 20 years.

3. Grievant was employed as a Plumber at Pay Grade 12 as of July 1, 2000, and his salary at $28,464.00, was fully funded under the Mercer Salary Schedule.

4. Grievant was promoted to Lead Plumber I on August 1, 2000, at Pay Grade 14, and his salary was increased to $31,310.00.

5. Senate Bill 547, codified as W. Va. Code §§ 18B-1-1, et seq. (1995), provided legislative instructions to institutions of higher learning to migrate classified employees to their proper place on the classified staff salary schedule as a function of their years of service. The statute provides that institutions will fully fund employees on the classified salary schedule within five successive fiscal year cycles, and the final adjustments became effective on July 1, 2000.

6. Marshall met all the funding requirements of the Mercer funding schedule as required by Senate Bill 547 by July 1, 2000.

7. The five-year period for fully funding classified employees expired as of July 1, 2000, and the salary schedule in the latest legislation did not become effective until July 1, 2001. Therefore, Marshall had to rely upon Policy Bulletin No. 62 to determine salaries of individuals who entered a position after July 1, 2000. LII Marshall Ex. 2. 8. Grievant's assigned salary at Pay Grade 14 was determined according to the guidelines for Promotion in Section 13.2 of Board of Trustees Policy Bulletin No. 62. LII Marshall Ex. 2.

9. The chancellors of the former Board of Directors and Board of Trustees issued a directive clarifying the policy regarding promotions and upgrades in September 1996. The memorandum removed the rounding factor present in Series 62 and established a policy for determining salaries for upgrades and promotions in Series 62 after passage of the 1994 longevity salary schedule. LIV Marshall Ex. 1.

10. The promotion policy was reiterated by Margaret Buttrick, Human Resources Administrator for Higher Education Policy Commission, in a memorandum dated August 11, 2000. LIV Marshall Ex. 2.

11. There are employees in similar positions at Pay Grade 14 with less seniority than Grievant who are fully funded, but they were in their positions prior to July 1, 2000.

12. Tony Crislip, Director of Grievant's department, advised Grievant in his level one decision dated November 15, 2000, that he could not grant Grievant the relief sought, and that his salary would be fully funded on July 1, 2001.

13. The newest legislation for Higher Education that became effective July 1, 2001, states that an employee will be deemed equitably compensated in relation to other classified employees in the same pay grade if certain conditions exist including “his or her annual salary is at least the minimum salary that was required for his or her paygrade and years of service on the first day of July two thousand, on the salary schedule included in this section immediately prior to the effective date.” LIV Marshall Ex. No. 4. 14. Grievant was subsequently reclassified to Pay Grade 15 in January 2001 due to a decision in an unrelated grievance. LIV Marshall Ex. No. 4.

DISCUSSION

Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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). See W. Va. Code § 18-29-6. Grievant contends the salary assigned upon his promotion to Pay Grade 14 in August 2000, is arbitrary and capricious, and is not fully funded under the Mercer salary schedule for an employee with 15-years plus experience, relying specifically upon representations from Mr. Crislip that he would be fully funded as of July 1, 2001. Marshall contends it has complied with all pertinent directives

regarding the Mercer salary schedule for classified employees, and that any representations made by Mr. Crislip in this regard were unenforceable, or ultra vires.

An action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. Brozik v. Board of Trustees/Marshall Univ., Docket No. 99-BOT- 357 (Jan. 28, 2000) citing Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and anadministrative law judge may not simply substitute her judgment for that of the employer. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). See also Laney v. Board of Trustees/Marshall Univ., Docket No. 98-BOT-153 (Sept. 1998), citing Booth v. Board of Trustees/Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994).

While Grievant's frustration over this “quirk” in the Mercer salary schedule is understandable, he has not proven that Marshall was required to meet Mercer salary schedule funding levels for employees assigned or promoted to positions after July 1, 2000. Marshall demonstrated it had met its obligations under Senate Bill 547 (§§ 18B-1-1, et seq.) by fully funding its employees as of July 1, 2000. The five year window for fully funding employees expired on July 1, 2000, and the salary schedule contained in the successor legislation did not become effective until July 1, 2001. Grievant was fully funded as of July 1, 2000, in his previous position. He was not promoted until August 1, 2000, after the expiration of the five-year window; therefore there was no requirement that Grievant be fully funded in his new position acquired after July 1, 2000.

Grievant also relies on representations made by his supervisor, Tony Crislip, that Grievant would be fully funded on July 1, 2001, and that his salary would be $32,604.00 on that date. Jim Stephens, Director of Human Resources, testified that Mr. Crislip had no authority to make those statements regarding Grievant's pay as of July 1, 2001, or whether he would be fully funded on July 1, 2001. Mr. Stephens is cloaked with the authority to determine Grievant's salary according to the policies of the Board of Trustees, and Mr. Crislip has no such authority. Ultra vires promises are not enforceable against a state entity. See Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985). The Supreme Court of Appeals has “recognized that unlawful or ultra vires promises are non-binding when made

by public officials, their predecessors, or subordinates, when functioning in their governmental capacity." See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991), citing Freeman, supra.

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).

As in Ollar, Mr. Crislip lacked the authority to make the determination regarding what Grievant's salary would be on July 1, 2001, and whether or not Grievant's salary would be fully funded by that date.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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). See W. Va. Code § 18-29-6.

2. An action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. Brozik v. Board of Trustees/Marshall University, Docket No. 99-Board of Trustees-357 (Jan. 28,

2000) citing Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996).

3. While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). See also Laney v. Board of Trustees/Marshall University, Docket No. 98-BOT-153 (Oct. 5, 1998), citing Booth v. Board of Trustees/Marshall University, Docket No. 94-BOT-066 (July 25, 1994).

4. Grievant has failed to prove by a preponderance of the evidence that the determination of his salary after his promotion to Lead Plumber, Pay Grade 14, was arbitrary and capricious. There is no evidence that Marshall deviated from its statedposition that salaries for positions and upgrades are determined by relying on Board of Trustees Policy Bulletin No. 62 and the chancellors' directive regarding the 5% step per pay grade.

5. Ultra vires promises are not enforceable against a state entity. See Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985). The Supreme Court of Appeals has “recognized that unlawful or ultra vires promises are non-binding when made by public officials, their predecessors, or subordinates, when functioning in their governmental capacity.” See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991), citing Freeman, supra.

6. 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. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993).

7. Grievant has failed to prove that Tony Crislip had the authority to make a determination regarding his salary and pay grade as of July 1, 2001.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State 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 record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 13, 2001

Footnote: 1

Grievant elected not to file written proposals; Marshall's proposals were received on June 1, 2001.