MICHAEL ADKINS,

Grievant,

v. DOCKET NO. 02-DOH-020

W. VA. DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

W. VA. DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Michael Adkins filed his grievance at Level I on June 15, 2001, stating: "Misclassification. I would like to have Class IV pay that was promised to me. Or Crew Operator." As relief, he seeks "anything to increase [his] pay 5%."

His grievance as denied at Levels I, II and III, and was timely appealed to Level IV on January 25, 2002. Administrative Law Judge Janis Reynolds issued an order of joinder joining the W. Va. Division of Personnel (DOP) as a respondent before the case was reassigned to the undersigned Administrative Law Judge. A Level IV hearing was held on March 26, 2002, at the Grievance Board's Charleston Office. Grievant appeared *pro se*, Barb Baxter, Esq. represented Respondent Department of Transportation (DOT) and Robert Williams, Esq. represented Respondent DOP. The parties elected not to file proposed findings of fact and conclusions of law, so the matter became mature for decision at the close of the hearing. The lower level record comprised the decisions from Levels I through III, the Level III hearing transcript, and Level III Grievant's Exhibits 1 and 2. At the Level III hearing, Grievant presented the testimony of Mr. Mark Terry and testified in his own behalf. Respondent DOT presented the testimony of Mr. Wilson Braley and Mr. Larry Pauley. An additional exhibit was admitted at Level IV and marked Level IV Grievant's Exhibit 1. Testifying at Level IV were Grievant and Respondent DOT's witness Mr. Wilson Braley. Based on the lower-level record and the evidence adduced at the Level IV hearing, I make the following factual findings:

FINDINGS OF FACT

1. Grievant is currently working as a Transportation Worker III (TW-III) - Equipment Operator assigned to the Yawkey garage in Lincoln County.

2. In September, 2000, Grievant was assigned to operate a track-hoe, with the identifying number 310-002. Before that, he operated a grader.

3. The different pieces of equipment used by the various transportation workers are classified according to the skill required of the worker who operates them, such that if a TW-III is required to operate the equipment, it is considered Class III equipment, but if it may be operated by a Transportation Worker II (TW-II) - Equipment Operator, it is Class II equipment. Both graders and track-hoes are considered Class III equipment.

4. Mr. Adkins operated track-hoe No. 310-002 until the end of February, 2001 when the equipment was severely damaged after it fell off a truck. In this time period, Mr. Adkins logged hundreds of hours operating the track-hoe. At all times, he was paid at a TW-III rate. 5. The destroyed track-hoe was repaired, but was sent to Wayne County. It has not been replaced in Lincoln County, and Grievant has since been operating other equipment. Currently, he operates a Class II dump truck but is still paid at the TW-III rate. 6. At the time he was assigned to the track-hoe, Grievant had a discussion with his supervisor, Larry Pauley, and his understanding was that the track-hoe was Class III equipment, but that it would in the future be made Class IV equipment. Grievant believed that when that happened, he would be reclassified to Transportation Worker IV (TW-IV) - Equipment Operator. Based on this conversation, Grievant mistakenly believed that Mr. Pauley was promising that if he operated the track-hoe long enough, he would be promoted to TW-IV - Equipment Operator.

7. There is not at this time, and there has never been, any Class IV equipment. The only TW-IV - Equipment Operators employed by DOT are either certain mechanics or certified welders. Grievant is not a mechanic or certified welder.

8. Mr. Pauley did not promise Grievant that he would be promoted to TW-IV- Equipment Operator if he operated the track-hoe.

DISCUSSION

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides

equally, then Grievant has not met his burden. Id. Although the statement of grievance characterizes the dispute as a misclassification claim, what it is really about is whether Grievant was promised a classification and pay increase that he never got. In a misclassification grievance, the grievant must prove that the work he is doing is a better fit in a different classification than the one his is currently in. *See* Hayes v. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989); Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-361 (Apr. 5, 2001). However, in this case, Grievant admits that the work he is currently doing is not TW-IV work. His argument is that he was promised TW-IV work, but that he never got it. He is not saying that the work he is doing now should entitle him to a TW-IV classification.

Therefore, Grievant must show that there is some other reason he should given duties that would allow Respondent to promote him to TW-IV. The reason given by Grievant is that Mr. Pauley promised him that, if he operated the track-hoe, he would eventually be made a TW-IV. Three people testified about the conversation in which Mr. Pauley supposedly made this statement: Grievant, Mr. Pauley, and Mr. Terry. Mr. Terry does not remember any discussion of the TW-IV classification, so his testimony is not helpful one way or the other. It is evident, though, that the subject was discussed, because both Grievant and Mr. Pauley testified they talked about it.

The testimony of Mr. Pauley and Grievant is almost the same, but it reveals there was simply a misunderstanding of what was going to happen. Mr. Pauley testified that he said, “If that piece of equipment is ever made to be an Operator IV, I'm sure you'll get to be an Operator IV.” At the time, Grievant knew the track-hoe was Class III equipment, and it is easy to see why he would think Mr. Pauley thought it was going to be made Class IVand that he would then move up to TW-IV. When Mr. Pauley thought he was explaining what *could* happen, Grievant thought he was explaining what *would* happen.

The problem with Grievant's belief is that, even if he was correct, he would still have to be classified (and paid) as a TW-III because the track-hoe never has been made Class IV equipment. Respondent stated that the track-hoe was and still is Class III equipment, and Grievant agrees that this is true. Mr. Braley testified that after the track-hoe was repaired, it was sent to Wayne county because Mr. Pauley said it wasn't needed in Lincoln County at that time. Grievant argues that if the track-hoe had come back to Lincoln County, he would still be operating it, allowing him to work his way into the TW-IV classification. But, even if he were still operating the track-hoe, he would not

operating Class IV equipment. Respondent would not be able to reclassify Grievant to TW-IV if he were only doing TW-III work. Respondent may only put Grievant in the classification that is the "best fit" for the work he is doing. Simmons v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-433 (Mar. 28, 1991). Everyone agrees that if Grievant is operating Class III equipment, the best fit is TW-III (See footnote 1) .

Another problem is that, even if Mr. Pauley promised Grievant he would be made a TW-IV, he does not have the power to change the track-hoe to Class IV equipment nor to reclassify Grievant to TW-IV without giving him TW-IV duties. Since Grievant is not a mechanic or certified welder, he does not perform TW-IV duties. Mr. Pauley was probably correct when he told Grievant that if he operated the track-hoe and if the track-hoe wasmade Class IV equipment, then Grievant would likely be bumped up to TW-IV. But, that was a lot of "ifs" and they were all out of Mr. Pauley's control.

Grievant also stated that he could be made a Transportation Crew Leader, which would allow him to get the 5% salary increase he seeks. His reasoning is that he was promised that he would get a promotion if he operated the track-hoe, and Mr. Pauley did not keep the promise. But he argues Respondent could still keep the promise to upgrade his classification by making him a crew leader, even if it cannot make him a TW-IV- Equipment Operator. However, since Mr. Pauley did not make a promise, this is not a good reason to make Grievant a Crew Leader.

Even if Mr. Pauley did make a promise, Grievant would not be able to make DOT or DOP keep Mr. Pauley's promise. That would be similar to cases where a supervisor made a promise of a certain salary to someone before he was hired, but the person did not get that salary. In the past, the Grievance Board has said that "a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay. Ollar v. W. Va. Dep't of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993)" Chapman v. Dep't of Transportation/Division of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997).

Also, if he did make a promise, it would be what the law calls an *ultra vires* (See footnote 2) promise, which means that it is not binding because the person who made it was not allowed to make it. "'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violationof a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts.' Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998). See

Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991)." Roncaglione v. W. Va. Bureau of Employment Programs /Fiscal and Administrative Management Division, Docket No. 99-BEP-498 (Apr. 28, 2000). So even if Mr. Pauley did make the promise, the Grievance Board cannot force an agency to keep a promise made by one of its supervisors when that supervisor did not have the authority to make the promise.

Grievant also suggested that the reason the track-hoe was sent to Wayne County was political. However, he offered no evidence at all on this point, so I cannot agree that it was proven. But again, even if it had been, it would still not entitle Grievant to TW-IV pay because the track-hoe is not Class IV equipment.

The following conclusions of law are appropriate to this discussion:

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, Grievant must prove all of his claims by a preponderance of the evidence. A preponderance of the evidence is enough evidence for the undersigned Administrative Law Judge to decide that Grievant's claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id.

2. In a misclassification grievance, the Grievant must prove that the work he is doing is a better fit in a different classification than the one his is currently in. *See* Hayesv. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989); Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-361 (Apr. 5, 2001). Although the Statement of Grievance characterizes this as a misclassification grievance, it is not.

3. Respondent may only put Grievant in the classification that is the "best fit" for the work he is doing. Simmons v. W. Va. Dep't of Health & Human Resources, Docket No. 90-H-433 (Mar. 28, 1991). The track-hoe Grievant was operating is not Class IV equipment, so Respondent may not put Grievant in a TW-IV - Equipment Operator classification.

4. "[A] supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993)" Chapman v. Dep't of Transp. /Div. of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997).

5. "'*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 follow such acts.' Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991)." Roncaglione v. W. Va. Bureau of Employment Programs /Fiscal and Administrative Management Division, Docket No. 99-BEP-498 (Apr. 28, 2000).

6. Even if Mr. Pauley promised Grievant he would be reclassified to TW-IV - Equipment Operator, that would have been an *ultra vires* promise beyond the power of a supervisor and it would not be binding on Respondents. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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.

DATED: April 1, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Normally, it would be appropriate to list the duties of a Transportation Worker III - Equipment Operator and compare them to the grievant's duties, but since there is no real dispute over what Grievant is actually doing, it is not deemed necessary to do so in this case.

Footnote: 2

"Ultra vires" is a Latin phrase that means "beyond the powers." Black's Law Dictionary, 5th ed., West Publishing Co., St. Paul 1979. In plain English, it refers to something that a person does not have the power to do.