WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DARRELL BROWN,

Grievant,

v. **Docket No. 07-DOH-384**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Darrell Brown, filed this grievance against the Department of Transportation, Division of Highways, on February 22, 2007, protesting that he did not receive an increase in pay after six months of employment. His statement of grievance reads:

> When I had my job interview on 11/1/05, I was told by Margie Stover, if hired, I would get a .35 cent pay raise after six months. Now, she denies saying that. She also said there would be merit and cross the board raises.

Relief sought:

I want my .35 cent raise, and back pay

Grievant's immediate supervisor was unable to resolve this matter at Level I, and a Level II decision dated March 5, 2007, denied the grievance. Grievant appealed. A Level III decision issued August 14, 2007, by Hearing Examiner, Brenda Craig Ellis, denied the

grievance following a hearing held on June 4, 2007. (See footnote 1) A Level IV hearing was convened in the Board's Charleston office on February 22, 2008. Grievant was pro se, and Respondent was represented by Barbara Baxter, Esquire. This case became mature for decision at the conclusion of the hearing as the parties elected not to submit proposed findings of fact and conclusions of law.

Synopsis

Grievant maintains he was promised, but did not receive, a pay raise after six months of employment. Respondent asserts the grievance is not timely, that Grievant was not guaranteed a pay increase, and further that the agency is not obligated to grant such increase upon satisfactory completion of the initial six-month probation period of employment. For reasons more fully set forth below, the undersigned finds that the defense of timeliness was untimely raised. Neither the alleged *ultra vires* statements nor past abandoned practices of Respondent entitle Grievant to a salary increase.

Grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1 1. Grievant is employed by the West Virginia Division of Highways, as a Transportation Worker 2 Equipment Operator.

2 2. In 2005, Grievant applied and interviewed for an open position which was posted by Respondent.

3 3. On November 1, 2005, Grievant was interviewed by a three-person panel, consisting of mid-level DOH management personnel, Hamilton Ross Roush, Margie Stover, and Bev Smith.

4 4. During the interview process, information regarding eligibility for merit, across- the-board raises, and past practice of the agency was discussed.

5 5. Grievant was selected for the DOH position and commenced employment with Respondent on or about January 30, 2006.

6 6. At the time Grievant filed the instant grievance on February 22, 2007, he had been employed with Respondent for over a year.

7 7. For a period of time, prior to the mid or late 1990's, Respondent granted employees a 5% pay increase upon satisfactory completion of their initial six-month probationary period of employment. (See footnote 2)

8 8. The practice of routinely granting employees a 5% pay increase upon satisfactory completion of their six-month probationary period of employment has been discontinued by Respondent. This so-called policy has not been in effect or routinely practiced by Respondent for approximately nine or ten years.

9 9. A state agency's ability to grant pay increases to its employees is not an unfettered exercise of authority, expenditure of funds, and discretion.

10 10. In early 2005, Respondent's ability to grant pay increases to employees was specifically restricted by executive decree. All state agencies under the purview of the Governor's Office, which includes DOH, were forbidden to grant discretionary pay increases. Respondent's Exhibit 2, April 29, 2005, Memorandum signed by Larry Puccio, Chief of Staff, Governor's Office (hereinafter referenced as Puccio Memorandum).

11 11. The Governor's Office via the Puccio Memorandum, directed state agencies not to grant merit or salary advancements or any other discretionary pay increase until further notice. There is no evidence of record that indicate the provisions of the Puccio Memorandum have been rescinded or have expired. 12 12. Grievant did not receive a pay increase after the end of his six months probationary period, on or about August 1, 2006.

Affirmative Defense

Respondent by counsel raised the defense of timeliness for the first time at the level four Grievance Board Hearing. An employer is required to raise a timeliness defense at or before the level two hearing, or it is deemed waived. *W. Va. Code* § 29-6A-3(2). (See footnote 3) In the instant matter, Respondent did not raise the defense prior to level four; accordingly, the affirmative defense of timeliness was not properly raised and thus is denied.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6. *See also 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). "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). Grievant avers he was informed during his initial interview for the position, that he would receive a pay increase after six months of employment and the successful completion of his probationary period. Grievant has never received the salary increase. Respondent disputes the contention, noting that Mr. Roush and Ms. Stover testified that no such representation was made to Grievant. The undersigned finds that no promise was made to Grievant. It is more likely, than not, that Grievant misinterpreted statements and subject matters discussed at his job interview.

Grievant was provided with agency information, during a November 2005 interview, such information, i.e., past practice of the agency, was interpreted by Grievant as an increase in salary certain, a promise. (See footnote 4) Nevertheless, such promise

(perceived or fact) is not enforceable. The individuals who comprised the interview panel had no authority to carry out the deed being contested. While Margie Stover is a mid-level managerial employee of Respondent, a superior of Grievant, she does not posses the authority to grant Grievant a discretionary pay raise. It is well settled that a supervisor's promises cannot be binding against an agency when the supervisor does not possess the authority to actually make the determination. *Dickson v. Dep't of Env. Protection Div. of Personnel, Docket No. 03-DEP-381* (Apr. 14,2004); *Rush v. Kanawha County Bd. of Educ.*, Docket No. 02-20-362 (Feb. 28, 2003); *Ollar v. W. Va. Dep't. of Health and Human Serv.*, Docket No. 92-HHR-186 (Jan. 22, 1993); *Sealing v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 01-PEDTA-507 (Mar. 21, 2002). To the extent anything a mid-management employee said at the interview could be construed by Grievant as a promise of a salary increase, it was unauthorized and of no legal effect. Unauthorized or *ultra vires* promises to an employee do not confer any enforceable rights on that employee. *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Freeman v. Poling*, 175 W. Va. 814, 338 S.E.2d 415 (1985). Respondent's ability to grant pay increases to employees was specifically restricted via the Puccio Memorandum, which directed state agencies not to grant merit or salary advancements or any other discretionary pay increase until further notice. This restriction had been in effect seven months when Grievant was interviewed and ten months when Grievant began employment.

Lastly, while Respondent readily acknowledged that for a period of time, prior to the mid or late 1990's, it routinely granted employees a 5% pay increase upon satisfactory completion of their six-month probation period; it also highlights, this so-called policy has not been in effect or routinely practiced by Respondent for approximately nine or ten years.

Respondent maintains it is not obligated to grant Grievant a salary increase as a result of a practice which has long been eliminated and further such act is forbidden at this

time. Accordingly, the undersigned is unaware of a legal requirement which mandates Respondent grant the relief Grievant seeks. Respondent's abandoned practice of eight to nine years ago did not create an entitlement for Grievant or require Respondent grant him a discretionary salary increase. Further to do so, at the time in question, would be in direct violation of the Puccio Memorandum (an *ultra vires* act). Respondent was not obligated to grant Grievant a pay increase upon the successful completion of his probationary period on or about August 2006.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1 1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6. *See also 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). "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, a party has not met its burden of proof.

2 2. As a rule, a grievance must be initiated within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the Grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. *W. Va. Code* . 29-6A-49(a). Further, the running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *See Rose*

v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

3 3. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. *W. Va. Code* §29-6A-3(2) provides, in pertinent part,that "[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." The affirmative defense of timeliness was not raised in this grievance until Level IV, and thus is denied.

4 4. *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*.

5 5. 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. *Dickson v. Dep't of Env. Protection Div. of Personnel, Docket No. 03-DEP-381* (Apr. 14, 2004); *Rush v. Kanawha County Bd. of Educ.*, Docket No. 02-20-362 (Feb. 28, 2003); *Ollar v. W. Va. Dep't. of Health and Human Serv.*, Docket No. 92-HHR-186 (Jan. 22, 1993); *Sealing v. W. Va Parkways Economic Dev. and Tourism Auth.*, Docket No. 01-PEDTA-507 (Mar. 21, 2002).

6 6. Respondent was not obligated to grant Grievant a pay increase upon the successful completion of his probationary period on or about August 2006.

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

filedwithin thirty (30) days of receipt of this decision. See W. Va. Code § 29-6A-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). 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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Landon R. Brown

Administrative Law Judge

Date:___March 26, 2008

Footnote: 1

At the Level III Grievance Hearing, Grievant appeared in person and with Representative David Reed. Respondent was represented by Agency Counsel.

Footnote: 2

This practice was readily acknowledged by the Respondent; however the practice was never adopted as formal agency policy. The practice, while generally referenced as policy by many individuals, is best characterized as a discretionary pay increase.

Footnote: 3

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 4

Ms. Stover was identified as an interviewer, who made statements, which led Grievant to believe that at the conclusion of his six month probationary period he would receive an increase in salary. Ms. Stover acknowledges a discussion of eligibility for merit and across-the-board raises, but denies that Grievant was promised a specific raise.