THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN EVERETT NUZUM,
Grievant,

v. **Docket No. 2010-1354-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant Brian Nuzum is employed by the West Virginia Division of Natural Resources (DNR) as a DNR Police Officer. Mr. Nuzum filed a level one grievance form dated April 7, 2010. Grievant alleges that while he was deployed in Afghanistan with the Army Reserves he was given information indicating that he could take annual leave at the end of 2008 that would make him eligible for sixty days of military leave in January 2009. Grievant relied upon that information and used the sixty days of military leave. He was subsequently informed that the information he had received was erroneous and that he would be required to pay back the salary he received for the sixty days of leave that he was paid by mistake. As relief Grievant requests:

> Not to be penalized/punished monitarily [sic] or otherwise for a mistake by the professional knowledge of the DOP personnel.

A level one conference was held on April 30, 2010, and a level one decision was issued on May 5, 2010, denying the grievance. A level two mediation was held on June 18, 2010 and an Order related to the mediation was issued on June 22, 2010. Grievant appealed to level three and a level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on September 13, 2010. Grievant appeared at the level three hearing *pro se*, and DNR was represented by William R.

Valentino, Assistant Attorney General. At the close of the hearing, it was agreed that the parties would submit proposed findings of fact and conclusions of law by October 12, 2010, if either party chose to do so.[1] The grievance became mature for decision on that date. The parties also agreed that the Respondent DNR would provide specific information related to Grievant's use of leave following the hearing to become part of the factual record.

Synopsis

Grievant seeks to prohibit Respondent from recovering sixty days of military leave pay that was mistakenly paid to Grievant for calendar year 2009. Grievant also utilized 180 hours of annual leave that he would not have used but for the mistaken information given to him by the Respondent's agents. The doctrine of equitable estoppel cannot be applied to allow Grievant to keep the sixty days of military leave he was mistakenly paid because to do so would violate the clear legislative intent set out in W. VA. CODE § 15-1F-1. However, Grievant is entitled to recoup the 180 hours of annual leave he took in reasonable reliance upon the false information that he was provided by agents of Respondent. The grievance is Granted in part and Denied in part.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Nuzum has been employed as a DNR Police Officer since September 1995.

---

[1] Grievant Nuzum submitted a post hearing proposal and Respondent decided not to do so.

2. Grievant is a member of the United States Army Reserve. In September 2008, Grievant was deployed to serve in Afghanistan as a member of the Army Reserve. Grievant's deployment lasted approximately seven and one half months.

3. On December 5, 2008, Grievant received an e-mail in Afghanistan from Kim Hannas, the Secretary for the DNR Law Enforcement Section. In that e-mail, Ms. Hannas indicated she had consulted with the DNR Payroll Section concerning his military leave. They stated that if Grievant took 32 hours of annual leave through December 2008, he would be on the DNR payroll at the beginning of 2009. Ms. Hannas told Grievant that being on the payroll at the beginning of the new year would make him eligible for 420 hours of additional military leave pursuant to Division of Personnel (DOP) policy. Grievant Exhibit 1.

4. Grievant responded that he wanted to take advantage of the opportunity for additional military leave described in the December 5, e-mail.

5. Ms. Hannas processed the paperwork necessary for Grievant to take the annual leave necessary to take him through the end of 2008 with Jessica Taylor, the person who keeps track of employee leave in the DNR Personnel Section. Grievant was ultimately charged with forty hours of annual leave for December 2008 and subsequently credited with an additional 420 hours of military leave for calendar year 2009.[2]

---

[2] The 420 hours of leave equaled sixty days of leave. Thirty of the days were considered State military leave and thirty of the days were also paid by the state but were for deployment by the Federal Government. See 143 C.S.R. 1 § 14.9.

6. The DOP policy related to military leave, 143 C.S.R. 1 § 14.9, provides for two types of leave for state employees in the army reserve.[3] In subsection a, such employees are entitled to thirty days of paid leave:

> . . .on all days during which they are engaged in drills or parades, or for examination to determine fitness for duty, inactive duty training, funeral honors duty for the State or federal government, active duty for training or active service for the State all to include reasonable travel time to and from the duty location.

This leave is designated as leave for "State Active Duty and Reserve Military Service." See 143 C.S.R. 1 § 14.9 (a). In subsection b, such employees are entitled to an additional thirty days of paid military leave if they are:

> . . . ordered or called to active duty by properly designated federal authority, . . . [including;] active duty for training, initial active duty for training, or full-time National Guard duty, all to include reasonable travel time to and from the duty location.

See 143 C.S.R. 1 § 14.9 (b).

7. The West Virginia Legislature authorized the military leave discussed in the DOP legislative rule by passing W. VA. CODE § 15-1F-1. That Code provision limits the sixty days of military leave "to a maximum of sixty days for single call to active duty."[4]

8. Grievant had already received sixty days of military leave for the call to active duty he was serving in Afghanistan in 2008, and the sixty days he received in 2009 were in addition to those days. Ms. Hannas and Ms. Taylor mistakenly interpreted the military

---

[3] The legislative rule applies to state employees who are engaged in military service in a number of ways. The discussion in this decision is limited to the army reserve because that is how Grievant was engaged in service.

[4] W. VA. CODE § 15-1F-1 (b).

leave policy to allow sixty days of leave every calendar year regardless of whether the employee was still engaged in the initial deployment.[5]

9. Grievant returned to the United States from his deployment in Afghanistan in June of 2009, and returned to work for the DNR in August of that year. After Grievant returned to work, he attended army reserve ceremonies and training during the 2009 calendar year for which he could have received military leave pursuant to the DOP legislative rule. Because Grievant believed he had utilized all of his military leave for that calendar year he used annual leave to attend those functions. Grievant used twenty days of annual leave during the 2009 calendar year for which he would have been eligible to use military leave if he had known it was available to him.

10. In January of 2010, Kim Hannas noticed that Grievant was not receiving annual leave credit for January, February and March of 2009, the time he was considered to be receiving military leave for calendar year 2009. Grievant called DOP and was told that he was not entitled to receive the sixty days of military leave that he was paid for the 2009 calendar year because he had already received sixty days of military leave for that deployment in 2008.

11. DOP notified the Personnel Section of DNR that Grievant was not entitled to the sixty days of military leave that he was paid for the 2009 calendar year. Upon being

---

[5] It is not surprising that the DNR staff made this mistake. Subsection a of the legislative rule does mention the restriction of a leave to a single deployment but also discusses the leave in terms of thirty days for a calendar year. However, subsection b states that the leave in both subsections is only available to be credited again "for a subsequent call to duty and only after he or she has been discharged from military duty and returned to State employment." Even this language lacks the clarity of W. VA. CODE § 15-1F-1 (b).

informed of their mistake, the DNR sought repayment of the sixty days of leave salary from Grievant, which precipitated the filing of the instant grievance.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

143 C.S.R. 1 § 14.9 (a) allows a state employee to receive up to thirty days of paid leave for participation in a wide variety of military duties. See Finding of Fact 6, *supra*. The subsection specifically provides such leave is available to all state employees engaging in military service "for a maximum period of thirty working days in any one calendar year when ordered or authorized by proper authority." *Id.* This particular subsection does not address the issue regarding whether the leave is limited to a single deployment.

143 C.S.R. 1 § 14.9 (b) provides that if a state employee who is a member of the army reserve is "called to active duty by properly designated federal authority," the employee is entitled to thirty days of paid military leave in addition to the leave provided in subsection a. This provision contains an additional provision relating to the maximum leave available to such employees which states that state employees who are called to active duty, "who have not used all or some portion of the thirty working days of military

leave granted by subdivision (a) of this subsection are eligible to use those unused days in the same calendar year prior to using the thirty days for which they are eligible under this subsection, up to a maximum of sixty days for a single call to active duty." *Id.*

The legislative rule provides in both subsections that the military leave discussed in the rule is provided "[i]n accordance with the provisions of West Virginia Code §15-1F-1 (a) and (b)." 143 C.S.R. 1 § 14.9. That section of the W. VA. CODE also contains a provision limiting the military leave provided to " a maximum of sixty days for a single call to active duty." W. VA. CODE § 15-1F-1 (b). This limitation is established in both the statute and the legislative rule.

Kim Hannas[6] and Jennifer Taylor[7] mistakenly interpreted the legislative rule as authorizing payment of sixty days of military leave to Grievant for each calendar year he was deployed. They did not realize that the leave from each section could only be paid to the employee once per single deployment. In an effort to ensure that Grievant received all of the benefits to which he was entitled, Ms. Hannas communicated with Grievant while he was in Afghanistan and advised him that if he utilized annual leave in December 2009, he would be on the DNR payroll at the beginning of the 2009 calender year and therefore entitled to an additional sixty days of military leave.[8] Grievant authorized the DNR staff to process the paperwork necessary for him to take the forty hours of annual leave[9] in

---

[6] The Secretary for the DNR Law Enforcement Section

[7] The employee who keeps track of employee leave in the DNR Personnel Section.

[8] All parties agree that this mistake was made with the laudable intention of attempting to help Grievant receive the maximum benefits to which he was entitled while he was serving his country on foreign soil.

[9] In the e-mail to Grievant Ms. Hannas suggested that Grievant take 32 hours of annual leave, but the testimony offered at the level three hearing indicated that Grievant

December 2008 and he received pay for the additional sixty days[10] on military leave in the first three months of 2009. Grievant had already received payment for sixty days of military leave during this deployment to Afghanistan during the 2008 calendar year.

Upon Grievant's return to work at the DNR in August of 2009, he was called to perform a number of military duties, including but not limited to, attendance of honors ceremonies and additional training. Because Grievant believed he had exhausted the military leave he could use in calender year 2009, he used twenty days of annual to attend these functions.[11] Subsequently, the mistake related to DNR's interpretation of 143 C.S.R. 1 § 14.9 was discovered by DOP and Grievant was instructed that he would have to repay the sixty days of pay that he was mistakenly provided in the first three months of 2009.[12]

Grievant accurately points out that he was not culpable for the overpayment. Not only was he advised that he was entitled to the leave by DNR employees he had reason to believe, but since he was on active military duty in Afghanistan, his ability to independently confirm or refute their assertions was limited. Grievant does not deny that he was overpaid. Rather, Grievant notes that requiring him to pay back the money by

---

took forty hours of annual leave instead. *See* Grievant Exhibit 1.

[10] The e-mail sent to Grievant by Ms. Hannas indicates that the sixty days of military leave translates into 420 hours.

[11] Grievant stated that he used up to twenty days of annual leave during 2009 for military purposes. The DNR witnesses did not dispute this amount but the record was left open for the DNR officials to verify the specific amount of annual leave used by Grievant for military purposes in 2009. Respondent DNR did not provide additional information in this regard so Grievant's testimony is accepted as undisputed.

[12] The issue of whether Respondent has the authority to unilaterally deduct this overpayment from Grievant's future pay was not raised by the parties and will therefore not be addressed herein. For a discussion on this topic in the education setting *see Stowers v. Lincoln County Bd. of Educ.,* Docket No. 99-22-093 (Oct. 20, 1999) and *Huff v. Marshall County Board of Education*, Docket No. 93-25-490 (May 25, 1994).

deducting it from his future paychecks will create a financial hardship for him and his family. Grievant believes he should not have to suffer that hardship due to mistakes made by others, notwithstanding that those mistakes were made with good intentions.

"Ordinarily, unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." Syl. Pt. 1, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). *See Brown v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-384 (Mar. 26, 2008); *Guthrie v. Dep't of Health & 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 & Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). 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. Dept. 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); *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam).

In *Hudkins v. Public Retirement Bd., supra*, 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 benefits and those assertions were contrary to DOP rules. These statements misled the beneficiary to take certain actions related to retirement that she would not have made 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.*

In the present grievance the Respondent's agents made false representations to Grievant that if he took annual leave at the end of December 2008, he would be entitled to sixty days on military leave for the calendar year 2009. The Respondent's agents who made these mistaken representations to Grievant had constructive knowledge of the true facts due to the fact that at least one of them was the person assigned by the DNR to track, monitor and control employee leave and she had apparent authority to authorize Grievant to take it.[13] Grievant did not have knowledge of the actual wording of the military leave policy and because he was deployed to Afghanistan and engaged in active military

---

[13] "The actual and apparent authority of the relied upon agent and agency is an element that should be considered when analyzing whether estoppel is applicable. *See generally Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985)(recognizing that the public policy behind the *ultra vires* act doctrine is to ensure that the will of the legislature is not thwarted by the executive branch)." *Underwood, supra.*

duty, Grievant did not have adequate means for ascertaining an accurate interpretation of the legislative rule if he suspected the one offered to him was mistaken. Finally, Ms. Hannas contacted Grievant with the intention of informing him of the availability of additional military leave with instructions as to how he could avail himself of that benefit. She intended for Grievant to act upon that information and he did. In reliance upon that information, Grievant received the additional sixty days of pay and is now being required to pay those days back. Additionally, Grievant took forty hours of annual leave in December 2008, to obtain the military leave and twenty days of annual leave in 2009 to attend military duties because he mistakenly believed he had exhausted his military leave for that calendar year.

The basic elements of equitable estoppel are met by the Grievance. However, to prohibit Respondent from recouping the sixty days of improperly paid leave benefits would thwart the clear legislative intent set out in W. VA. CODE § 15-1F-1 (b) that the leaves are limited to sixty days per deployment. Prohibiting DNR from recovering those days of pay would result in a violation of statute and legislative rule. In such cases, the doctrine of estoppel may not be applied. *Underwood V. Dept. 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); *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam).

On the other hand, Grievant took forty hours of annual leave in 2008 and 20 days of annual leave in 2009 that he would not have utilized had he not been misinformed regarding his military leave. Allowing Grievant to recoup that leave is fair and appropriate pursuant to the doctrine of equitable estoppel and the facts in this grievance.

Consequently, Respondent DNR may seek reimbursement from Grievant pay for the 420 hours of military leave he was mistakenly paid in 2009. Grievant must be credited with the 180 hours of annual leave that he would not have used but for the mistaken information he received for the Respondent DNR's agents. The grievance is GRANTED in part and DENIED in part.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "Ordinarily, unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." Syl. Pt. 1, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). *See Brown v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-384 (Mar. 26, 2008); *Guthrie v. Dep't of Health & 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 & Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). 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. Dept. 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); *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam)

3. "'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.

4. 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. *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam), (citing. Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).

5. Grievant proved the elements of equitable estoppel existed in this matter. However, the doctrine cannot be applied to prohibit DNR from recovering the 420 hours of military leave Grievant was paid in 2009 because to do so would violate the clear language and legislative intent of W. VA. CODE § 15-1F-1. *See Underwood v. Dept. 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); *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam).

6. Through the doctrine of equitable estoppel Grievant is entitled to recover the 180 hours of annual leave that he took in reliance upon the incorrect information he received from the agents of the Respondent DNR. *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(per curiam).

Accordingly, the grievance is GRANTED to the extent that Respondent is to credit Grievant for 180 hours of annual leave and DENIED in all other respects. Respondent is Ordered to credit Grievant with 180 hours of annual leave and Respondent may seek reimbursement from Grievant for the overpayment of 420 days of leave he was mistakenly paid. [14]

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 (2008).

DATE: MARCH 23, 2011.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE

---

[14] The undersigned declines to specify how this process should be accomplished due to the fact that Respondent's authority to deduct the overpayment from Grievant's future pay checks was not an issue raised by the parties.