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Director

WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD

GASTON CAPERTON
Governor

OFFICES:
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone: 558-3361

CECILE A. OLLAR

v. Docket No. 92-HHR-186

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WEST VIRGINIA DIVISION OF PERSONNEL

DECISION

Grievant Cecile A. Ollar filed this grievance against the Department of Health and Human Resources (HHR) seeking a salary increase consistent with representations made to her during an interview before she was hired.[1] The grievance filed on February 11, 1992, states:

> On Sept. 27, 1990 I was interviewed by Denny Pentony and Sallye Heffle for the Child Protective Service Worker Position - I was informed that the starting salary was $16,266 with a $600 raise after 6 months then after one year my salary would increase to $19,092. I received my January 31, 1992 paycheck that should have reflected a salary of $19,092 - the check reflected a salary of $18,264. I

[1] After adverse rulings at levels one and two, the case was appealed to level three and a hearing was held on April 16, 1992. A level three decision denying the grievance on the merits was issued on May 15, 1992. Following an appeal to level four, the West Virginia Division of Personnel was joined as an indispensable party by Order of September 8, 1992. The case was set for hearing but the parties eventually agreed to submit the case for decision on the record developed below, and the case became mature for decision on January 5, 1993. Grievant's brief was filed on December 14, 1992; Respondents' brief was filed on January 6, 1993.

> was told during my interview what my salary would be and I accepted this position based upon that information. I believe that I am entitled to $19,092.

HHR concedes that the salary representations were made but contends Grievant is not entitled to the salary increase. This is one of several cases filed against HHR involving the same or a similar factual situation.

FINDINGS OF FACT

Based upon all matters of record, the undersigned makes the following findings of fact:

1. Grievant was interviewed on September 27, 1990. She was told by HHR officials that the starting salary for a Child Protective Service Worker position was $16,202, that upon successful completion of a six-month probationary period the salary would be enhanced by $600, and that upon promotion after one year of service the salary would be raised to $19,092. This salary is at step 1A of paygrade 15.

2. The HHR officials who interviewed and made salary representations to Grievant in September 1990 had no authority to appoint or to hire Grievant.

3. In October 1990, Grievant notified HHR that she would accept a position.

4. Grievant was employed by HHR as a probationary Child Protective Service Worker Trainee effective January 9, 1991.

5. On July 9, 1991, Grievant was certified as a permanent classified employee and received a $600 salary adjustment to

paygrade 13, step 1P, consistent with what she had been previously told. However, upon her promotion to Protective Service Worker in January 1992, Grievant was placed in paygrade 15, step 1P, at a salary of $18,264.

6. In January 1992, local HHR supervisors became aware that a salary problem existed and contacted the Office of Personnel Services within HHR. About a week later, the local supervisors received a memo advising that the salary guidelines upon promotion had been changed. The previous practice had been that when a Protective Service Worker Trainee was promoted after a year of service to a Protective Service Worker, the employee would go from paygrade 13, step P to paygrade 15, step A, at a salary of $19,092. Under the revised salary guideline, the employee only goes to paygrade 15, step P, and receives an annual salary of $18,264.

7. By memorandum of January 3, 1992, Michael T. Smith, Director, West Virginia Division of Personnel (Personnel), informed agency heads about revisions to the Salary Increase Guidelines of August 1, 1990. In pertinent part this memorandum states:

> At its meeting in December, 1990, the Personnel Board approved the Division of Personnel proposal to amend the August 1, 1990, Salary Increase Guidelines by adding an item covering promotions of employees on 'P' steps in the pay plan. From the time 'E' and 'P' steps were added to the pay plan (July 1, 1986), employees at 'P' steps receiving promotions had to be moved to an 'A' or 'B' step in the pay plan. The revision effective January 1, 1991, provided that employees on 'P' steps receiving promotions would move to the next higher 'P' step.
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> Most recently (December 19, 1991), the Board amended that revision to apply

prospectively from January 1, 1991. That is, the revision applies only to employees hired on or after January 1, 1991.

8. By memorandum dated January 24, 1992, the Director of Personnel informed agency heads that:

> There appears to be some confusion regarding implementation of the amendment to the salary increase guidelines made by the State Personnel Board at its December meeting. I hope the following information will clarify the conditions under which the 'grace period' for promotional increases from the 'P' step applies.
>
> The 'grace period' for making promotions from a 'P' step to the next higher 'A' step applies only under the following conditions:
> - the employee was hired prior to January 1, 1991; and,
> - the employee promoted was at a 'P' step prior to his/her promotion; and
> -the employee was promoted during the 'grace period' of January 1, 1991 through December 31, 1991.
>
> This 'grace period' does not apply to individuals hired after January 1, 1991, even if they were promoted during calendar year 1991, nor does it apply to promotions made on or after January 1, 1992. Agencies, however, are still permitted to promote above the minimum promotional increase contingent on the employee being promoted having qualifications above the minimum for the promotional position.

9. By memorandum of June 24, 1992, however, the Director of Personnel rescinded the January 24 memorandum, stating in relevant part:

> The [State Personnel] Board action was in response to a situation that was unique to four employees of the Department of Health and

> Human Resources relative to the movement of their salaries from the 'P' to the 'A' steps upon their promotion from Health Service Worker Trainee to Health Service Worker. The January 24 memorandum miscommunicated that the intent of the [State Personnel] Board action was to include all employees who were subsequently promoted during the period of January 1, 1991 through December 31, 1991.
>
> After further review of the minutes and the tapes of the December 20, 1991 Board meeting, I have determined that the intent of the Board action must be restricted to the above referenced employees only. Therefore, I am rescinding the memorandum of January 24, 1992 relative to this issue.

DISCUSSION

Grievant first contends the change in the Salary Increase Guidelines was not in effect when she was "hired," pointing out that the relevant memoranda state the pay-upon-promotion change does not apply to persons hired before January 1, 1991. Grievant argues that she was hired in October 1990, when she was offered and accepted the position. She further argues that the relevant memorandum from the Director of Personnel does not refer to starting date but rather date of hire. Respondents argue that when the position was offered and accepted is immaterial, because the effective date of hire is the date the person starts work and is placed on the payroll. Since Grievant was placed on the payroll after January 1, 1991, Respondents contend she is subject to the amended salary guidelines.

The fatal flaw in Grievant's argument is that the evidence does not establish that she was hired by HHR prior to January 1, 1991. Although the record is not well-developed on this point, one

of the local HHR supervisors, Denny Pentony, stated that before an employee is hired HHR must submit certain paperwork for approval as part of the normal hiring process. In this regard, he stated that the Commissioner must give final approval for the hiring (Level Three Tr. at p. 17-18, 21). He also testified that he was probably notified of the final approval in early January 1991 and that it had always been his understanding that the date a new employee starts work is the date of hire (Level Three Tr. at p. 21-22)[2].

Administrative notice is taken that a standardized Personnel Action form (WV-11)(Revised July 1989) is completed in connection with the appointment or hiring of all, or at least most, State employees. This form, under a subsection entitled "Approvals," contains signature lines for the hiring agency, the Department of Administration and the Governor's/Secretary's Approval. No WV-11 form was introduced into the record in this case but all the evidence, particularly the dates in which her probationary status ended and the date she was promoted, indicates that Grievant was not officially hired until January 9, 1991.[3] In any event, since Grievant bears the burden of establishing her claim by a preponderance of the evidence any failure of proof falls on her.

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[2] It is noted that Mr. Pentony and other HHR officials expressed some support for the grievance or for taking the necessary steps to raise Grievant's salary and that of similarly situated employees (Level Three tr. at p. 23 and a January 30, 1992, memo, HHR's Exhibit 3).

[3] Personnel's Administrative Rules and Regulations do not appear to address the hiring date issue. The term "appointment" is defined in Section 3 as "[t]he act of hiring an applicant for employment."

Since the undersigned finds that Grievant was hired after January 1, 1991, the December 1990 change in the Salary Increase Guidelines applied to her case and precluded her from automatically receiving a salary increase to the 'A' step level.

No authority has been cited by the parties on the issue of when an appointment to a position in State government becomes effective and research has not revealed any precedent in this jurisdiction on the issue. There has been considerable litigation, however, concerning the appointment of federal employees. The basic rule on the federal level is summarized in Furneyhough v. Department of the Army, 9 M.S.P.R. 132 (1981): "It is well settled that an appointment to the federal service is effected only when the last act required of the person or body vested with the appointing authority has been performed. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1801); National Treasury Employees Union v. Reagan, 663 F.2d 239, 245 (D.C. Cir., 1981)." The federal cases do not place total reliance on whether or when standard federal personnel forms had been completed in determining whether or when an appointment had been made. In other words, execution of standard personnel forms is not considered a prerequisite to a valid appointment. Instead, the Courts and the Merit Systems Protection Board will examine the totality of the circumstances surrounding the appointment to determine whether the required "last act" has taken place. National Treasury Employees Union; Scott v. Department of Navy, 8 M.S.P.R. 282 (1981)(citing numerous cases).

Applying these principles to the present case, Grievant has

not established that the last act required by an official with appointment or hiring authority took place prior to January 1, 1991. Consequently, Grievant has not established that she was appointed or hired prior to that date.

Grievant next contends that HHR breached an oral contract to pay her an annual salary of $19,092 upon her promotion to a Protective Service Worker. She argues that HHR's local hiring officials had apparent and actual authority to make binding employment decisions, that these officials made an offer on specific terms which is binding on both HHR and the Division of Personnel, that the salary representations made to her were a prime consideration in her decision to accept the position, and that she relied to her detriment on the salary representations by refusing other employment opportunities.

Grievant cannot prevail on an oral contract theory for the same reasons discussed above.[4] Grievant did not dispute or introduce evidence to contradict the testimony of the local HHR supervisor that he did not possess the authority to hire Grievant and that normal hiring procedure required final approval of a higher ranking official(s). Viewed in this light, the representations of local HHR supervisors cannot be equated with an unequivocal and definite offer of employment, the acceptance of which, assuming the valid consideration, would create a binding and

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[4] HHR did not raise a statute of frauds defense in this case. See W.Va. Code, 55-1-1 and the very recent decision by the Supreme Court of Appeals in Sayers v. Bauman, (Docket No. 20864, filed Dec. 18, 1992).

enforceable contract. See Chang v. First Colonial Savings Bank, 410 S.E.2d 928 (Va. 1991)(what constitutes an offer capable of acceptance).

Furthermore, Grievant cannot successfully rely on the apparent authority of local HHR officials to create a valid, oral contract. As the Court stated in syllabus point 4 of Samsell v. State Line Development Co., 154 W.Va. 48, 174 S.E.2d 318 (1970), quoting, syllabus point 4 of State v. Chilton, 49 W.Va. 453: "Acts of a private agent may bind the principal where they are within the apparent scope of his authority; but not so with a public officer, as the State is bound only by authority actually vested in the officer ... ." In short, the evidence in the present case does not establish that a valid oral contract was ever formed.

The estoppel[5] arguments made on Grievant's behalf are not supported by the evidence; Grievant did not testify that she turned down other employment opportunities or that the salary representations were a critical factor in her decision to accept employment with HHR. Furthermore, it is well established that governmental entities are not bound by the representations of their agents, where such representations are contrary to law. The Supreme Court of Appeals of West Virginia has "recognized that unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." Parker v. Summers County Bd. of

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[5] Detrimental reliance is an essential element of estoppel. Ara v. Erie Ins. Co., 182 W.Va. 266, 387 S.E.2d 320 (1989).

Educ., 406 S.E.2d 744, 748 (1991), citing, Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985). In Parker, the Court, in affirming the hearing examiner's decision, ruled that the board of education had no authority to grant sick leave credit to an employee for the time she had previously worked for a federally-funded Adult Basic Education Program without being under contract with the board of education. As the Court stated in Cunningham v. Wood County Court, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964), "[a] governmental unit is not estopped to deny the validity of ultra vires acts of its officers. [citations omitted] A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers; and all persons must take note of the legal limitations upon their power and authority [numerous citations omitted]."[6] See also Martin v. Pugh, 334 S.E.2d 633 (W.Va. 1985).

The legal principle on which those cases were decided is applicable to this dispute. Although it is true that the representations by HHR officials concerning Grievant's salary prospects were correct when they were made, the salary guidelines were changed prior to the time she was legally hired and she is

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[6] Estoppel is applied with much greater reluctance against the State or other public entities than it is against individuals or private corporations, Samsell v. State Line Development Co., 154 W.Va. 48, 174 S.E.2d 318 (1970), and it has been held that equitable estoppel against the government requires a showing of affirmative misconduct on the part of government. Joyner v. Garrett, 751 F.Supp. 555 (E.D.Va. 1990). No affirmative misconduct by government agents is present in this case. Under the affirmative misconduct rule, there is no basis for a ruling in this case that HHR and Personnel are estopped from asserting that the amended salary guidelines preclude payment of a higher salary to Grievant.

therefore subject to the amended guidelines. Local HHR supervisors had no authority to bind HHR to a salary in excess of that provided for in the Salary Increase Guidelines approved by the State Personnel Board.[7]

Grievant's final contention is that the apparent decision by Personnel to retroactively modify salaries[8] is inappropriate where entitlements are involved and constitutes an unequal application of law. She notes that pension benefits are calculated by use of a formula that includes years of service and base salaries. The January 3, 1992, memorandum states that the salary guideline change was made at a meeting in December 1990, prior to grievant's hiring as a probationary employee on January 9, 1991. Hence, there was nothing retroactive about the change, as it applied to Grievant. Furthermore, none of the memoranda issued by Personnel states that the new rules do not apply to employees, such as Grievant, hired after January 1, 1991.

Although what happened in this case was unfortunate, it must be concluded that there is no legal basis upon which relief can granted.

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[7] There is no contention or evidence in this case that the Amended Salary Increase Guidelines were not properly adopted or were otherwise not binding on HHR.

[8] In addition, public employment does not confer upon an employee a contractual right that cannot be altered; in other words, the terms and conditions of public employment can generally be changed by statute or by lawfully enacted policies. Baker v. Civil Serv. Comm., 245 S.E.2d 908 (W.Va. 1978); Sowa v. W.Va. Dept. of Health and Human Resources, Docket No. 92-HHR-159 (Sept. 14, 1992).

CONCLUSIONS OF LAW

1. In non-disciplinary matters, a grievant bears the burden of proof.

2. Grievant has not established that the last act required by an official with appointment or hiring authority took place prior to January 1, 1991. Consequently, Grievant has not established that she was appointed or hired prior to that date.

3. Grievant has not established that the amendment to the Salary Increase Guidelines, approved by the State Personnel Board in December 1990, was not in effect at the time of her hiring as a Protective Service Worker Trainee on January 9, 1991.

4. HHR is not legally bound, on either an oral contract or estoppel theory, by the oral representations of its agents about what the Grievant's annual salary would be upon promotion to a Protective Service Worker.

5. Grievant has not established that her annual salary as a Protective Service Worker was reduced retroactively or that she is legally entitled to a higher annual salary.

6. Grievant has failed to prove Respondents violated any statute, policy, rule, regulation or written agreement relating to the terms and conditions of her employment.

Accordingly, this grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which

the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code, 29-6A-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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

C. Ronald Wright

C. RONALD WRIGHT
Administrative Law Judge

DATED: 1/26/1993