



SETTLEMENT AGREEMENTS / BACK WAGES

I. PURPOSE:

To establish a clear and uniform policy for the review and certification by the West Virginia Division of Personnel (DOP) of any proposed agreement between an agency and an individual who is a current or former employee regarding the terms and/or conditions of the individual's employment, pursuant to the DOP *Administrative Rule*, W. Va. Code R. § 143-1-21.1., and to establish time frames for the payment of back wages. The DOP must certify settlement agreements, or distribution of back wages, in compliance with DOP's *Administrative Rule*, an order rendered by an Administrative Law Judge, or order of a court before it can become effective. Agencies should have well-established processes and procedures to avoid the necessity for back wages. This Policy should be utilized as an exception to rather than a routine part of the agency's daily operations.

II. DEFINITIONS

- A. Classified Employee. – An employee who occupies a position allocated to a class in the classified service.
- B. Court Order. – A directive issued by a court or judge requiring a specific action to be taken.
- C. Director. – The Director of the DOP, as provided in W. Va. Code § 29-6-7 and § 29-6-9, who serves as the executive head of the DOP, or his or her designee.
- D. Discretionary Increase. – An increase in an employee's pay through a salary advancement or pay differential salary adjustment requested at the discretion of the appointing authority.
- E. Grievance Mediation or Hearing. – A level one hearing, level two mediation or arbitration, or level three hearing, or any combination thereof, in which the parties seek resolution.
- F. Level 3 Grievance Decision. – A written decision rendered by an administrative law judge of the Public Employees Grievance Board setting forth findings of fact and conclusions of law on the issues submitted.
- G. Party. – The employee or grievant, intervenor, agency, or the Director.
- H. Pay Differential. – A type of salary adjustment specifically approved by the State Personnel Board to address circumstances including, but not limited to, class-wide recruitment and/or retention problems, regionally specific geographic pay disparities, apprenticeship program requirements, shift differentials for specified work periods, and temporary upgrade programs.
- I. Reallocation. – Reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties.

- J. Salary Adjustment. – A salary change resulting from a revision of the pay plan, the reassignment of a class to a different compensation range, a State Personnel Board approved pay differential, a temporary classification upgrade, a general wage increase mandated by the Legislature or the Governor, or the correction of payroll errors.
- K. Salary Advancement. – A discretionary increase in compensation granted in recognition of the quality of job performance.
- L. Settlement Agreement. – A document which sets out the terms and conditions agreed upon by the parties involved when they voluntarily, through discussion and negotiation, agree to resolve a disputed employment related matter.
- M. Temporary Classification Upgrade. – A pay differential for employees who, during a specified limited period of time, perform work on a full-time basis that is determined by the DOP to be in a job class of a higher rank as measured by salary range and an increased level of duties and/or responsibilities.

III. POLICY

- A. REVIEW AND CERTIFICATION. -- Unless otherwise exempted by statute, agencies entering into settlement agreements or processing back wages with current or former classified employees regarding the terms and/or conditions of the individual's employment, including those that do not involve the processing of a personnel transaction, may only do so after the review and certification of the DOP. This includes settlement agreements and back wage calculations prepared by the agency, agency counsel, agency Attorney General counsel, or outside counsel.
 - 1. All such agreements and proposed back wages must be forwarded to the DOP for review to certify that the terms of the settlement agreement and/or back wages comply with DOP law, rules, and policies. Agencies are encouraged to submit electronic draft versions of settlement agreements and back wage calculations to the DOP for review prior to obtaining signatures on the document to avoid delays in processing.
 - 2. Any settlement agreement considered at a grievance mediation or hearing should include language stating that the settlement agreement is a preliminary document and require the review and certification of the DOP.
 - 3. The DOP must review and certify the settlement agreement and/or back wages for compliance before either can be returned to the agency for completion of processing.
 - a. No settlement agreement will be certified by the DOP without an original document -.
 - b. Once the Director reviews and certifies the settlement agreement and back wage calculations, if applicable, the settlement agreement and DOP back wage report shall be forwarded to the agency for completion of processing.
 - 4. A settlement agreement is not required if a court order or Level 3 grievance decision with clear directives for resolution has been issued and no appeal is filed. However, the DOP must provide a certified back wage report for any back wages awarded through court order or Level 3 grievance decision.
- B. COMPENSATION/BACK WAGES. -- All settlement agreements, court orders, or Level 3 grievance decisions which include back wages must have a DOP certified back wage report for processing.

All changes to an employee's salary require changes to the expenditure schedule and final approval of the Employee Status Maintenance (ESMT) personnel transaction by the State Budget Office prior to the effective date of the change.

1. Discretionary Increases. - Back wages will not be authorized by the DOP for any discretionary increase unless there is a court order or Level 3 grievance decision directing such.
2. Reallocations.
 - a. A settlement agreement for back wages shall only be authorized when delays occur at any phase(s) of the established process set forth below, unless otherwise determined by a Level 3 grievance decision or court order:
 - 1) The appointing authority provides a completed Position Description Form (PDF) to the DOP for a classification determination within forty-five (45) calendar days after the dated signature by the Supervisor.
 - 2) The DOP communicates a classification determination to the appointing authority within sixty (60) calendar days of receipt of a signed PDF.
 - 3) The appointing authority processes the corresponding personnel transaction within thirty (30) calendar days of receipt of the classification determination from the DOP.

EXAMPLE:

The DOP receives a completed PDF from the appointing authority on June 1, 2020 for a classification determination for the position the employee occupies as an Office Assistant 1. The Supervisor's dated signature on the received PDF is April 13, 2020. The DOP determines the proper classification for the position the employee occupies is an Office Assistant 2 and communicates its decision to the appointing authority on June 15, 2020. The agency processes a personnel transaction reallocating the position the employee occupies from an Office Assistant 1 classification to an Office Assistant 2 classification with an effective date of July 20, 2020.

Phase 1

Actual days DOP receives the PDF after the Supervisor's dated signature:	49 Days (June 01, 2020)
Total days established in the Policy to receive a PDF from the Supervisor's dated signature:	- <u>45 Days (April 13, 2020)</u>
Days back wages are owed for Phase 1	4 days

Phase 2

Actual days it took DOP to complete the classification determination:	14 Days (June 15, 2020)
Total days established for DOP to make a classification determination:	- <u>60 Days (June 01, 2020)</u>
Days back wages are owed for Phase 2	0 Days

Phase 3

Actual days it took the agency to process the personnel transaction after receipt of decision of the classification determination from the DOP:	35 Days (July 20, 2020)
Total days established for the agency to process the personnel transaction:	- <u>30 Days (June 15, 2020)</u>
Days back wages are owed for Phase 3	5 Days

TOTAL DAYS BACK WAGES ARE OWED BASED UPON DELAYS IN PROCESSING PHASES = 9 DAYS

3. Appeals. - When an employee successfully appeals the initial classification determination, the employee may receive back wages for the period of time between the first day after the initial determination is communicated to the appointing authority and the 30-day processing period through the effective date of the personnel transaction. Back wages may also cover any period of time the process was delayed as provided in subsection 2.a. of this Policy.

4. Temporary Classification Upgrades. - The DOP may certify a settlement agreement for back wages if an agency fails to process the necessary personnel transaction within thirty (30) calendar days of when an employee was assigned duties qualifying him or her for a temporary upgrade position as provided in the *DOP Temporary Classification Upgrades* policy (DOP-P13). The employee may receive back wages for the period of time between the end of the 30-day processing period and the effective date of the personnel transaction.
 5. Appointments. - Appointing authorities may not permit a newly hired employee to report to work until all necessary approvals are received. If it is discovered that a newly hired employee has worked prior to all approvals being received, appointing authorities must immediately cease the employee's work until the effective date of the approved hiring personnel transaction. However, the federal Fair Labor Standards Act requires all work suffered or permitted to be compensated. A settlement agreement for back wages will be certified but appropriate authorities will be notified of the unlawful actions.
 6. Promotions. - Absent a court order or Level 3 grievance decision, a settlement agreement for back wages will not be certified when an appointing authority permits an individual to perform work prior to receipt of all necessary approvals required to promote the individual into the position.
 7. Salary Adjustments. - When submitting personnel transactions to effectuate salary adjustments, agencies should submit the necessary personnel transaction well in advance to avoid the necessity for a settlement agreement to provide back wages. If an agency fails to process the personnel transaction as required or a pay error occurs, the DOP will authorize wages back to the date the pay increase was to be effective or the pay error commenced. Provided that, back wages pertaining to salary adjustments for a temporary upgrade shall be administered in accordance with subsection III.B.3 of this policy.
 8. Unemployment Compensation. - Pursuant to W. Va. Code § 21A-7-1 *et seq.*, whenever a covered agency is required to make a payment of back wages to an individual who has received unemployment compensation benefits during the same period covered by the back wage award, the employer shall withhold an amount equal to the unemployment compensation benefits and shall repay the amount withheld to the Unemployment Compensation Trust Fund. Any such amounts shall be addressed in the settlement agreement.
- C. SEPARATIONS/SUSPENSIONS/DEMOTIONS/REINSTATEMENT.
1. Resignation in Lieu of Dismissal. - When parties enter into a settlement agreement to rescind a former employee's dismissal and allow the employee to resign, the former employee is ineligible for reinstatement and may be disqualified from employment in the classified service as provided in the *DOP Administrative Rule*. The following shall apply and must be addressed in the settlement agreement:
 - a. the action shall be considered a resignation in lieu of dismissal; and,
 - b. the former employee is obligated to repay severance pay received upon separation, if applicable.

2. Reinstatement after Separation. - When parties enter into a settlement agreement, which rescinds a former employee's dismissal or other separation and reinstates the former employee, the following shall apply and must be addressed in the settlement agreement:
 - a. all sick leave hours cancelled upon the employee's separation shall be restored to the employee's sick leave balance;
 - b. the employee shall reimburse the agency for any annual leave hours paid out at separation and the balance shall be restored subject to the restrictions on maximum carry forward of annual leave as provided in the *DOP Administrative Rule*;
 - c. the employee is obligated to repay severance pay received upon separation, if applicable;
 - d. any mitigation of back wages based on other employment or unemployment compensation; and,
 - e. any lesser discipline imposed, including corresponding reduction to back wages.

3. Non-disciplinary Suspension. - When an employee is suspended pending investigation or outcome of criminal proceedings, the following shall apply and must be addressed in the settlement agreement:
 - a. restoration of annual leave used and accrued during the period of non-disciplinary suspension subject to the restrictions on maximum carry forward of annual leave as provided in the *DOP Administrative Rule*. Provided, if the employee chooses to use accrued annual leave during the suspension and has sufficient annual leave to remain on the payroll, a settlement agreement is not required to simply restore the annual leave;
 - b. if the employee chooses not to use annual leave, or has insufficient leave to cover the period of suspension, and back wages are awarded based upon the outcome of the investigation or criminal proceeding, such back wages may be mitigated by other earnings received during the period of suspension;
 - c. back wages may include any overtime the employee missed during the suspension if the overtime was scheduled prior to the suspension;
 - d. if a holiday occurs during the period of suspension and the employee receives back wages and/or has annual leave restored, the employee is entitled to compensation for the holiday at the regular rate of pay and any annual leave charged for the holiday during the suspension shall be restored accordingly. Further, an employee otherwise eligible for the holiday who was scheduled to work on the holiday prior to suspension, will not only receive pay for the holiday without charge to leave but is also entitled to observe the holiday on an alternate date as provided in the *DOP Administrative Rule*; and,
 - e. any discipline imposed as a result of the findings of the investigation or outcome of the criminal proceeding and any resulting reduction to back wages.

4. Personnel Transactions. - When a court order, grievance decision, or settlement agreement modifies an individual's employment history, the appointing authority shall process the personnel transactions necessary to amend the individual's employment records accordingly.

IV. REFERENCES:

- A. W. Va. Code § 29-6-1 *et seq.*
- B. DOP *Administrative Rule*, W. Va. Code R. § 143-1-1 *et seq.*
- C. DOP Policy DOP-P13, *Temporary Classification Upgrades.*
- D. DOP Policy DOP-P12, *Pay Plan Policy.*

V. EFFECTIVE DATE: July 1, 2018

VI. REVISION: May 30, 2020

VII. POLICY NUMBER: DOP-P24

Approved and Issued By:



Sheryl R. Webb, Director of Personnel

Date Signed: 5/28/2020