KEVIN E. FRESHWATER

v. Docket No. 95-RJA-371

REGIONAL JAIL & CORRECTIONAL FACILITY AUTHORITY

and

WEST VIRGINIA DIVISION OF CORRECTIONS

D E C I S I O N

Sometime before the closure of the aged West Virginia Penitentiary (WVP), Grievant resigned from his position with the West Virginia Division of Corrections (CORR) as a WVP correc tional officer (CO) and accepted a similar position with the Regional Jail and Correctional Facility Authority (RJA) at a newly-opened facility. Later, Grievant filed a grievance and claimed CORR forced him and other staff to resign from CORR rather than "transfer" them to the RJA positions. He addition ally claimed that CORR violated W.Va. Code §25-1-21 by not maintaining a list of former CORR employees who were displaced when WVP closed down and recalling them for vacant positions. A level four hearing was conducted on October 12, 1995; however, the parties merely supplemented the record adduced at the August 2, 1995, level three hearing. Thereafter, the parties declined to submit post-hearing fact/law proposals.

The parties do not dispute the underlying facts giving rise to this grievance. Based on all matters of record, the follow ing findings of fact are made.

Findings of Fact

1. CORR and RJA are separate and distinct state agencies. CORR, an agency whose employees are in the classified service, is managed by a commissioner. RJA's employees, on the other hand, are classified exempt, and the agency is managed by an

executive director.

2. CORR administrators began planning for the closure of the old West Virginia Penitentiary (WVP), located in Moundsville, Marshall County, West Virginia, by at least Spring 1994. Most inmates were slated for transfer to a new facility at Mount Olive, West Virginia.

3. Prior to the closure of WVP, a new correctional facility was built in Marshall County, the Northern Regional Jail and Correctional Facility. The building contains separate entities under one roof, the Northern Regional Correctional Facility (NRCF), staffed and operated by CORR, and the Northern Regional Jail (NRJ), staffed and operated by RJA.

4. During planning sessions to close WVP, administrators advised CO staff that they could vie for positions at Mount Olive or NRCF, and those positions would be awarded on the basis of good standing and seniority.

5. By 1994, Grievant had attained approximately eight and a half years of seniority with CORR while working as a correctional officer at WVP. However, there were many employees with far more seniority.

6. At some point in Fall 1994, CORR officials determined that approximately 69 correctional officer positions would be available at NRCF. A seniority list of staff was prepared, and CO staff who did not have enough seniority to make the list of 69 jobs were told they could avoid the risk of possible unem ployment by applying for RJA positions at NRJ.

7. Grievant and other CORR/WVP employees applied for and were offered jobs with RJA at the NRJ prior to the closure of WVP. The CORR/WVP employees who wished to accept employment with RJA were required by CORR to submit a letter of resigna

tion.

8. In a very cordial hand-written letter dated October 13, 1994, Grievant resigned his position with CORR. He noted that October 16 would be his "last day as a Correctional Officer for the Division of Corrections" and thanked CORR for the employment opportunity. CORR Ex 6 (8/2/95).

9. By approximately June 1995, all of the WVP inmates had been transferred elsewhere and the old prison was effectively closed for business. At that point, CORR prepared a seniority-based, priority/preferred hiring list of all remaining CORR/WVP employees who had not transferred to alternate CORR employment.

10. Sometime during Summer 1995, Grievant observed that CORR had placed correctional officers with three years or less of CORR seniority in vacant positions at NRCF.

11. Prior to the closure of WVP, three WVP officers with less seniority than Grievant transferred to NRCF based on promotion in rank following a testing procedure. Grievant did not formally protest or file a grievance about this situation.

12. When vacancies occurred at NRCF after the closure of WVP, former CORR/WVP workers who had not accepted alternate employment and who remained on CORR's seniority-based, priori ty/preferred hiring list were offered reemployment with CORR.

13. In May 1995, Grievant wrote a letter to the chief NRCF administrator and formally requested that he be considered for "the next available" officer position. He thereafter filed a grievance about the transfers and recalls to NRCF, and CORR was eventually joined at level three as an indispensable party.

14. According to NRCF's Human Resources Administrator, Gertrude Campbell, Grievant is permitted to apply for vacancies at NRCF and will be considered for such positions when no more

displaced CORR/WVP employees remain on the priority/preferred hiring list.

Discussion

At issue in this grievance is whether Grievant, an employee of RJA, is legally entitled to hiring priority for vacant CORR positions within a facility jointly (but separately) adminis tered by both CORR and RJA, on the basis of prior seniority he held during his former employment with CORR.1 Simply put, the answer is no.

When filling positions at NRJ, RJA had to follow the guidelines established in W.Va.Code §31-20-27 (1992). That statute provides, in pertinent part:

(a) Notwithstanding any provision of this code to the contrary, the authority, when employing correctional officers to complete the approved staffing plan of a regional jail completed after the effective date of this section, shall employ any correctional officer applying for a position as a correctional officer at a regional jail who was employed in good standing at a county jail facility in the region at the time of its closing or at a prison facility operated by the division of corrections: Provided, That the regional jail is located within the same region as the prison facility that was closed due to relocation of the prison facility to a site outside the region. Only those correctional officers, who are employees in good standing at the time the prison facility is closed, are eligible for transfer under the provisions of this subsection. . . . . All Correctional officers employed under the provisions of this subsection shall

also be covered by the policies and procedures of the education and state employees grievance board . . ., and the classified-exempt service protection policies of the division of personnel.

With respect to the loss of positions due to the closure of WVP, W.Va. Code §25-1-21 (1992), entitled "Employment of dis placed correctional employees at other facilities," sets forth certain requirements which CORR must meet. The statute pro vides, in pertinent part:

(a) Notwithstanding any provisions of this code to the contrary, any person not a temporary or probation ary employee employed at the [WVP] at Moundsville at the time of its closing shall be afforded the opportu nity to transfer duty stations to the West Virginia

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1At the October 12, 1995, level four hearing, Grievant withdrew a separate claim against RJA with respect to his present salary.

penitentiary at Mount Olive, the West Virginia medium security prison at Huttonsville or the northern regional and correctional complex at Moundsville if he or she is an employee in good standing at the time the facility is closed. Any person so transferred shall retain his or her rank or classified service classifi cation, salary and benefits. The commissioner shall promulgate rules pursuant to [Code §29A-1-1 et seq.], to effectuate notice and procedures for said trans fers: Provided, That the commissioner shall have the authority to, upon consideration of an employee's age

and length of service, direct an employee's transfer
to one of the three facilities based on staff require
ments.
(b) The commissioner shall, within thirty days of the
closing of [WVP], establish and maintain, for a period
of two years, a list of all correctional officers who
are eligible for transfer purposes to subsection (a)
of this section and who wish to remain eligible for a
two-year period for transfer to the Mount Olive
correctional complex, or the Huttonsville correctional
center or the northern jail and correctional complex
at Moundsville. The commissioner shall give priority
to any person on the list for employment in an avail
able position equivalent to the position that person
held at [WVP] unless the commissioner determines that
that person is physically or mentally unfit for
employment: Provided, That the commissioner has the
authority to transfer a correctional officer to any of
the three facilities based upon his or her determina
tion of staff requirements.

Based on his reading of W.Va. Code §§25-1-21 and 31-20-27, Grievant believes he is a "displaced" CORR/WVP employee who simply "transferred" to RJA. He theorizes that he is entitled to be retained on CORR's seniority-based preferred hiring list and given the opportunity for reemployment with and/or "trans fer" to CORR/NRCF as appropriate jobs becomes available. There is nothing in Code §25-1-21 to support Grievant's belief that he can now "transfer duty stations" within CORR, because he was no longer a CORR employee when WVP closed. Moreover, Grievant obviously places too much emphasis on the word "transfer" in

Code §31-20-27, and not enough emphasis on the word "employed." The word "transfer" in Code §31-20-27, when viewed in context with the content of the rest of the section, must be taken to denote the physical movement of a county jail employee or CORR employee to a different employment with RJA. The actual process to gain a position with RJA, a new facility within a new State agency, required a resignation from a present employer and the new employment with another employer. Additionally, the tone and content of Grievant's October 1994 letter of resigna tion is ample evidence that he knew CORR and RJA were separate entities and that his employment status with CORR was severed upon his movement to RJA.

It is true, as Grievant alleges, he was "forced" to resign his job with CORR in order to accept employment with RJA. However, the new employment with RJA could not be effected or processed without a resignation. Nevertheless, it is quite clear that Grievant decided in Fall 1994 not to take the risk that he might become unemployed when WVP finally closed, so he applied for and accepted a job with RJA. Grievant knew when he resigned his job with CORR and accepted a similar position with RJA that he would work under the same roof with CORR officers, but their employers and working conditions would be different. On the other hand, some WVP employees with very little seniority decided to assume some risk and not resign. Thus, they were placed on the preferred list when WVP closed and their jobs ended. Grievant cannot have it both ways, that is, to avail himself of the benefit of secure employment at one point and then move ahead of other former CORR workers who opted not to seek employment elsewhere. Absent some showing on Grievant's part of a legal entitlement to preferred hiring by CORR for NRCF

jobs, there is no relief available. See Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989). The following conclusions of law are appropriate.

Conclusions of Law

1. Grievant must prove all of the allegations consti tuting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. Grievant failed to demonstrate a violation of W.Va. Code §§25-1-21 and 31-20-27 or any other law, regulation or policy with respect to his resignation from the Division of Corrections and employment with the Regional Jail Authority in October 1994.

3. Grievant is not eligible for special treatment or hiring at the Northern Regional Correctional Facility as long as any displaced and unemployed CORR/WVP workers remain on CORR's preferred/priority hiring list. See W.Va. Code §§25-1-21 and 31-20-27; Logan v. W.Va. Regional Jail and Corr. Authority, Docket No. 94-RJA-225 (Nov. 29, 1994).

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 Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the

civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: December 12, 1995