CHARLES E. LUNAU

v. Docket No. 95-CORR-002

WEST VIRGINIA DIVISION OF CORRECTIONS

D E C I S I O N

Charles E. Lunau, employed by Respondent Division of Corrections (CORR) and classified as an Electrician I, was at all pertinent times assigned to the West Virginia Penitentiary (WVP). In Fall 1994, he initiated several separate grievances in which he alleged, among other things, that he had worked out of his job classification for over two years, that discrimina tion and favoritism as well as other improprieties had occurred with respect to the ultimate hiring of a worker other than he for a position at a newly-opened correctional facility, and that a high-ranking administrator had promised him salary increases which never materialized.1 Following a February 16, 1995, level four hearing, the parties completed a responsive briefing schedule on March 31, 1995.

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1All of the grievances were previously consolidated for hearing and decision at level three.

Background

Several years ago, WVP officials began the task of prepar ing for the eventual relocation of the penitentiary from Moundsville, located in Marshall County, West Virginia, to a new site and facility in Mount Olive, situated in Fayette County. More recently, concern was also focused on the staffing and opening of a separate, smaller correctional complex in Marshall County, the Northern Regional Jail and Correctional Facility

(NRJ).

From at least early 1993, WVP staff were being cross-trained for possible employment at the two new facilities while concurrently keeping operations intact at the aged WVP facility. Grievant, a long-time WVP employee in his early sixties, was formally assigned supervisory duties for WVP's Maintenance Department beginning in late January 1993. The record totally supports that thereafter Grievant was recognized as the supervi sor of the Maintenance Department both within and without WVP.2 See Gr Exs 1-7 (2/16/95).

Perhaps the assignment was consistent with the effort to provide workers with cross-training; however, it took over eighteen months for Grievant to receive a new assignment. In

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2The parties essentially supplemented the record adduced below at the level four hearing. Grievant testified on his own behalf and called several witnesses, John Barrett, Jerry Jacobs and Edward Coster. CORR's witnesses were Gertrude Campbell and Paul Kirby. Besides the testimony and documentary evidence generated at level four, the record consists of the pleadings, lower-level decisions and a copy of the December 8, 1994, level three transcript/exhibits.

August 1994, Grievant was directed to temporarily switch places with a worker responsible for "outside maintenance," in order that they both learn the functions and/or operations of the other's area. This placement apparently lasted only one day, and Grievant was reassigned as supervisor of maintenance. See Gr Ex 4. In any event, Grievant never received any extra money or any kind of salary increase for his services from the time he

accepted the enhanced maintenance department duties, despite promises during that time from a high-ranking WVP administrator that merit increases would be sought. This situation prompted a couple of Grievant's grievances.

Another event occurred in mid-1994 which possibly triggered Grievant's belief that he had no recourse but the grievance procedure. CORR posted a memo entitled "Career Opportunity" which noted that some positions were available at NRJ and that current and/or displaced WVP correctional employees who were interested in transfer to NRJ were to be given hiring preference for those positions. Grievant applied for the posted position of Building and Grounds Manager at NRJ. The successful appli cant was a WVP worker, Grievant's former subordinate, who had only a few years' service time at WVP. Having provided a backdrop of relevant events, the grievance issues may now be addressed.

Pay Increase Issue

Grievant testified that, in 1993 WVP's then-Deputy Warden Paul Kirby promised him a five percent salary increase by November 1, 1993, and told him again in 1994 that he would get a ten percent pay increase in May 1994.3 These conversations about a salary increase occurred after Grievant had assumed the supervisory responsibilities for the maintenance department. Grievant testified that he got neither of these raises as promised. He claims that he had a contract with Mr. Kirby regarding the raises and that the contract was breached. Grievant did not explain his contract theory further. He seeks a five percent pay increase effective November 1, 1993, relative to the first incident and a ten percent increase effective May 1, 1994, relative to the second incident.

Mr. Kirby denied both that he promised to give Grievant a pay raise or that he had the final authority to grant a pay raise. He claimed he had merely indicated to Grievant that he would check on the possibility of an increase. According to Mr. Kirby, at the time he inquired about pay raises for several deserving maintenance employees, he was informed that the Governor had instituted a freeze on all pay increases. Gertrude Campbell, a personnel administrator within WVP at the time, corroborated Mr. Kirby's testimony about the freeze.

The situation of a promised pay increase, whether real or imagined, which does not materialize has prompted other griev ances. However, it is not necessary to reach a determination here about whether Mr. Kirby promised a raise or whether Grievant incorrectly perceived that such a promise had been

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3At Grievant's level three hearing in December 1994, Mr. Kirby identified his current position as that of Administrator of the NRJ.

made, although the evidence certainly suggests that the subject of a raise had been the topic of discussions with Grievant. Unfortunately for Grievant, Mr. Kirby was not the final authority on salary matters, and the promise of a benefit from a party not authorized to actually grant the benefit does not constitute a legal contract upon which Grievant can reasonably rely.4 No contract existed because Mr. Kirby was not authorized to grant salary increases. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991); Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994); Fraley v. Dept. of Health

& Human Rsrcs., Docket No. 92-HHR-448 (Mar. 12, 1993). There fore, Grievant has not established any factual or legal basis for the relief he seeks of two separate, specified pay increas es.

The NRJ Position

On June 21, 1994, CORR internally posted a newly-created position for Building and Grounds Manager (BGM) at NRJ so that current CORR employees could obtain a promotion into the new position. Grievant, one of ten applicants, filed two grievances when another applicant, Carl Adkins, was selected. He alleges

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4In Grievant's post-hearing written argument, he stated that he relied on Mr. Kirby's promise and that caused him "to act in a way that might have been different had he not been promised the raise." Grievant did not identify what he may have done differently had the promise not been made.

discrimination, favoritism and other improprieties relative to Mr. Adkins' selection.5

Grievant claims that administrators gave Mr. Adkins an unfair advantage over other WVP workers by assigning him to NRJ for three months prior to the interviews for the BGM position. This, he claims, was especially crucial because the interview included questions which required specific responses about the systems in place at the facility. Finally, he alleges that the applicants were not all asked the same questions during the interview. Grievant contends he should have been promoted to the BGM position because he had more seniority and experience than any of the other candidates.

At level four, Grievant subpoenaed a private-sector member

of the interview committee, Jerry Jacobs, to testify regarding the interview questions asked of the applicants. Mr. Jacobs is an independent contractor who was doing consulting work for CORR and NRJ at the time the interviews were being conducted. According to Mr. Jacobs, prior to the interviews, he had been provided with a list of open-ended questions, and from those he developed some hypothetical questions about maintenance problems. While Mr. Jacobs admitted that some of the questions

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5Discrimination is defined in W.Va. Code 29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W.Va. Code 29-6A-2(h).

may have contained references to equipment or systems located at NRJ, he stated that the applicants needed no particular knowl edge of those items to respond because he provided the basic premise and functioning of the equipment or system if the applicant was unfamiliar with them. Mr. Jacobs testified that such questions were asked to assess the applicants' problem-solving abilities.

Mr. Kirby was also a member of the interview panel. He testified that each applicant was asked essentially the same questions. He corroborated Mr. Jacobs' account that the inter view questions were open-ended and designed to allow for indi vidual responses and follow-up questions.

Ms. Campbell discussed how the actual selection for the BGM position was made. She testified that, because the position was a newly-created one for NRJ, it was treated in the same manner as an in-house promotion. According to Ms. Campbell, an inter view panel conducted interviews of the applicants; thereafter, each member of the panel assigned a score to each applicant. Ms. Campbell testified that at the conclusion of the interview process, she collected the score sheets from the interview panel and personally averaged the applicants' scores.6 Finally, she stated that the BGM position was offered to Mr. Adkins because

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6The interview questions for the BGM vacancy were entered at level four as Joint Exhibit 3, and the interview panel's accumulative tally sheet as Joint Exhibit 5. Grievant's average score, as reflected on the tally sheet, was 12.9 points lower than the average score of Mr. Adkins, the successful applicant. he attained the highest score of all of the other applicants for the position.

CORR contends that all of the pertinent testimony relating to the selection process for the BGM position refutes Grievant's allegations of wrongdoing. In particular, CORR notes that the applicants' inexperience at NRJ did not have an impact on their ability to respond to the interview questions, as corroborated by Mr. Jacobs, a neutral witness in the matter. Grievant's only response was that Mr. Jacobs' testimony was compromised because of his concern about possible future consulting contracts with CORR.

In this grievance, as in all non-disciplinary cases, Grievant must prove all of the allegations constituting the

grievance by a preponderance of the evidence. Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989). Grievant has not met his burden of proof here. The record does not support that CORR acted improperly or treated Grievant unfairly when it selected a candidate other than he for the BGM position.

CORR maintains that it complied with applicable regulations promulgated by the West Virginia Division of Personnel for promotion, and uniformly considered all of the internal appli cants when it filled the BGM position. On the other hand, Grievant seems to feel he was entitled to the position because he had the most seniority and the most experience in maintenance at WVP. However, the fact that a candidate has the most experi ence or the most seniority does not necessarily entitle that candidate to a position. Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995).

In this case, CORR conducted a selection process in which more than one individual assessed the candidates' responses to questions posed about maintenance problems. While some ques tions posed may have been specific about the new systems in stalled at NRJ, applicants were assisted with information, when needed. In the end, the committee rated the candidates indepen dently, and Mr. Adkins was ranked higher than Grievant.

The witnesses' testimony in this regard was consistent in all respects. In addition, Mr. Jacobs appeared to be a disin terested party. At hearing, he answered all questions posed in a sincere and forthright fashion. Moreover, Grievant failed to back up his assertions as to Mr. Jacobs' alleged bias, and he produced no evidence that Mr. Jacobs was being considered by CORR for future consulting work. After due consideration of all

of the evidence and the parties' arguments, it is determined that Grievant's allegations of wrongdoing, including unlawful discrimination and favoritism, in the matter of his non-selec tion for the BGM position are not supported.

Misclassification Claim

In order for Grievant to prevail on this claim, he must prove by a preponderance of the evidence that his duties more closely matched the West Virginia Division of Personnel's (Personnel) classification specification for Building Mainte nance Supervisor II (BMS2) than that of Electrician, his current classification and the classification held during the relevant period of time. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fash ion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for these purposes, the "Nature of Work" section of a classification specification is its most critical section. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascer tain whether the Grievant's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dept. of Health and Human Resources, Docket No. 90-HHR-444 (Mar. 28, 1991). The predominant duties of the position in question are class controlling. Broaddus v. W. Va. Div. of Human Services, Docket No. 89-DHS-606 (Aug. 31, 1990).

According to Grievant, he began working unofficially as the

supervisor of maintenance at WVP in November 1992. He claims he was classified as an Electrician, but performed the duties of a BMS2. However, then-Acting Maintenance Director, Lt. Tony Lemasters, did not formalize the assignment until January 27, 1993, when he issued a memorandum advising some supervisors in other areas that Grievant would be supervising the Maintenance Department, under his direction, until further notice. In a June 1993 memorandum, Mr. Lemasters, who then identified himself as the Director of Support Services, announced that a "Depart ment Head Staff Meeting" had been recently held, and named Grievant as one of the eight participants. One portion of the report made note of Grievant's current advisories regarding "Maintenance."

Still later, in August 1994, Mr. Kirby, who at that time was serving as Acting Maintenance Director, issued a memorandum which announced an assignment switch between Grievant and Capt. Pat Glasscock, the worker who had been supervising outside maintenance. Grievant contends that the other worker had been unable to "run" the Maintenance Department, and had, in fact, threatened to file a grievance over the situation, all of which prompted a rescission of the job-swap directive after only one day. Grievant was still supervisor of the Maintenance Depart ment at WVP at the time of the level four hearing, although it is unknown what his assignment and duties have been since all of the prisoners were transferred from WVP to Mount Olive in Spring 1995. In any event, this case does not involve reclassi fication, only possible back wages, because WVP is now closed.

Pertinent sections of the West Virginia Division of Person nel's (Personnel) classification specification for Electrician are as follows:

Nature of Work

An employee in this class performs skilled electrical work in the installation, alteration, repair and maintenance of electrical equipment and wiring used in communication, light, and power systems. Assignments, supervision, and review are received from Building Maintenance Supervisor. The employee may supervise maintenance staff on a project by project basis. Performs related work as required.

Examples of Work

Installs and maintains security detection and fire alarm systems, distribution systems, cable systems, air conditioning and heating systems, lighting fixtures, ballasts, and timing clocks.

Removes, disassembles, repairs, or replaces electrical units and components such as motors, generators, voltage regula tors, control panels, fuses, circuit breakers, switches, wiring and pumps.

Inspects for damage, tests, analyzes, and repairs electri cal circuits, tools and equipment.

Completes connection of utility electricity to power, lighting, heating, refrigeration, alarm and control equipment, machinery, and circuits.

Plans layout, methods, materials, scope of work, and sequence of operations.

Pertinent sections of the classification specification for BMS2, one Pay Grade higher than Electrician, describe the following:

Nature of Work

Under general supervision, at the full-performance level, plans, organizes, and directs the upkeep and management of

buildings for a large institution. Organizes and directs the work of skilled and semiskilled trades-workers performing facilities maintenance and repair. Performs related work as required.

Distinguishing Characteristics

This class is distinguished by a greater amount of time spent in direct supervision of building maintenance staff and by responsibility for maintenance of a larger facility or institu tion.

Examples of Work

Organizes and directs the work of crews cleaning buildings, repairing and maintaining mechanical and electrical equipment, plumbing systems, and building structure.

Ensures compliance with fire, electrical, OSHA, and other applicable laws, rules or regulations.

Develops, interprets, and revises blueprints for specific maintenance projects.

Inspects building facilities continuously to ensure proper maintenance.

Maintains supply inventory and requisitions supplies and materials as needed.

Reviews, evaluates and verifies employee performance by inspecting completed assignments, and reviewing work product and work performance.

Establishes schedules and priorities for maintenance, repair, and construction projects.

Analyzes and prepares budgets, cost estimates, material and labor estimates, equipment requirements, and delivery schedules.

Maintains employee time records for payroll purposes; writes activity reports as necessary.

Plans renovations and other special projects.
Establishes procedures for carrying out maintenance respon sibilities.
Determines the need and arranges for additional lighting, heating, ventilation, and other needed equipment.

CORR readily admits that Grievant performed "some" of the duties specified for BMS2. However, it claims that an "essen tial function" of that position is conducting formal employee evaluations, and that Grievant did not perform that duty. CORR also maintains that Grievant's case fails because he was super vised in the maintenance department by a superior, Mr. Kirby, who was ultimately responsible for the activities occurring in the maintenance department, including final inspection of projects and budgeting issues. CORR urges that the best fit for Grievant was his current classification.
Grievant's claim that he had been working out of his classification for over two years as a BMS2 has merit. First, the specification in question does not describe employee perfor mance evaluations as an "essential function" in the "Nature of Work" or "Distinguishing Characteristics" sections. Moreover, a position's "Examples of Work" which are listed in the BMS2 class specification are representative duties only. That Grievant might not have been involved in all of the duties does not mean that he would have been misclassified had he actually held the title. See Dollison, supra. Finally, that Grievant's work would be ultimately supervised by the person who was second in command to the Warden at WVP is understandable. The BMS2 specification does not require the incumbent to have the final word on any matter more properly assigned to a higher authority. Although Grievant still performed electrician duties while

he was the designated maintenance supervisor, he was responsible for identifying maintenance problems in all maintenance areas, advising about projects and budgetary matters, and directing the work of other maintenance employees on a daily basis, all consistent with the responsibilities of a BMS2. Grievant's supervisory responsibilities and related duties for the time in question were his predominant duties and class controlling. See Broaddus, supra. The record clearly demonstrates that the duties performed by Grievant from January 1993 until all of the prisoners were transferred from the West Virginia Penitentiary to Mount Olive in Spring 1995, more closely matched those of a BMS2.

In addition to the foregoing, the following formal findings of fact and conclusions of law are appropriate.

Findings of Fact

1. On two occasions, a high-ranking WVP official promised Grievant he would try to get him a merit raise.

2. Ostensibly, because a "freeze" was placed on merit raises during the times in question, the sought-after raises for Grievant and others never materialized.

3. Grievant vied for a maintenance/management position at a new correctional facility, and was interviewed for the posi tion by a selection committee comprised of CORR employees and an independent contractor who served as a consultant for the new complex.

4. Following interviews in which open-ended questions were posed to the applicants about maintenance problems, a less-senior employee was rated higher than Grievant for the position. The highest ranked employee was ultimately selected for the position.

5. In early 1993, Grievant, classified as an Electrician, was formally directed to serve as the maintenance department supervisor at WVP, at the time, the largest correctional facili ty in the State. The evidence supports that Grievant was regarded as the maintenance supervisor both within and without WVP.

6. Grievant performed electrician duties while he was the designated maintenance supervisor, but he was primarily respon sible for identifying maintenance problems in all maintenance areas, advising about projects and budgetary matters, and directing the work of other maintenance employees on a daily basis.

7. During the period Grievant was the designated mainte nance supervisor, he was not directed to conduct formal evalua tions of maintenance employees, although he informally commented upon the workers' performance and initiated the process to provide small bonuses when indicated.

Conclusions of Law

1. In non-disciplinary cases, the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. Grievant has not established any factual or legal basis for the relief he seeks of two separate, specified pay increases, because the party who purportedly promised the raises was not authorized to grant the raises. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991); Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994); Fraley v. W.Va. Dept. of Health & Human Rsrcs., Docket No. 92-HHR-448 (Mar. 12,

1993).

3. An agency's decision by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong. See Bourgeois v. BOT/Marshall Univ., Docket No. 93-BOT-268A (Mar. 29, 1994).

4. Inasmuch as the record reflects that CORR accorded the same hiring considerations to all applicants, Grievant failed to show any wrongdoing on CORR's part, including unlawful discrimi nation and favoritism, as those terms are contemplated by W.Va. Code 29-6A-2(d) and 29-6A-2(h).

5. Grievant failed to prove by a preponderance of the evidence that he was entitled to the Building and Grounds Manager position at NRJ as a matter of law.

6. Grievant established by a preponderance of the evi dence that he performed the duties of a Building Maintenance Supervisor II at the West Virginia Penitentiary in Moundsville, West Virginia, from January 1993 until all of the prisoners were transferred to another facility in Spring 1995.

Accordingly, the grievance seeking back wages on a misclassification claim is GRANTED, and Respondent is Ordered to appropriately compensate Grievant for the difference between the wages of an Electrician and Building Maintenance Supervisor II for the time in question. All other grievances and/or relief sought are 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: May 31, 1995