JOHN WARD

v. DOCKET NO. 95-RJA-410

WEST VIRGINIA REGIONAL JAIL AND

CORRECTIONAL FACILITY AUTHORITY

DECISION

Grievant, Mr. John Ward, is employed by Respondent, West Virginia Regional Jail and Correctional Facility Authority, as a Sergeant. Grievant filed a grievance on January 27, 1995, after Respondent selected the only other applicant, an outside, non-employee, for a vacant First Sergeant position. Basically, Respondent failed to apply an in-house policy to outside, non-employee applicants. Specifically, Grievant claims that:

> [t]he facility having a person test that is not qualified according to the memo put out for the first sergeant position and in contradiction to the career progression system. This erodes the career progression system and destroys consistency and predictability. (See footnote 1)

As relief, Grievant asks:

> that the facility not allow anyone to test for positions when it is contradiction [sic] to the Regional Jail Career Progression System. To not allow the facility to single out an individual for a position and them [sic] attempt to qualify them. To be promoted to the rank of first sergeant due to being the only one who qualified under the Regional Jail Career Progression System. For the Facility to pay any and all expenses occurred [sic] by the Grievant in connection with this grievance.

Pursuant to W.Va. Code § 29-6A-3(k), the Undersigned, at Level IV, allowed Grievant to amend the relief he was seeking, in accordance with the brief submitted by his counsel, to include all back pay and benefits.

The grievance was denied at Level I on February 1, 1995, and at Level II on February, 15, 1995. A Level III hearing was held on March 1, 1995, and the grievance was denied by a decision issued on July 24, 1995. Grievant appealed that decision to Level IV by a letter received by the Grievance

Board on August 7, 1995, and, subsequently, requested that a decision be made on the record. The case became mature on December 18, 1995, with the receipt of Grievant's response brief. (See footnote 2)

FINDINGS OF FACT

1. Grievant is an employee of the West Virginia Regional Jail and Correctional Facility Authority. He is employed at the Eastern Regional Jail in Martinsburg (ERJM) and holds the rank of Sergeant.

2. On or about August 15, 1994, E.T. Wensell resigned from the First Sergeant position and was the last person to hold that position.

3. As of December 15, 1994, there were no First Sergeants at ERJM.

4. ERJM posted a vacancy for the position of First Sergeant. The deadline for applying for the position of First Sergeant was December 29, 1994, and the tentative testing interview date was the week of January 2, 1995.

5. By letter dated December 19, 1994, E.T. Wensell notified Todd Chafin, Deputy Chief of Operations, Staff Training and Development, Regional Jail and Corrections Authority, that he, E.T. Wensell, was interested in applying for the job of First Sergeant. 6. Grievant, Corporal Reed (See footnote 3), and Mr. John R. Cook (See footnote 4), all employees of Respondent, also applied for the First Sergeant position.

7. Respondent applied Policy 3038 (See footnote 5), which contains provisions on hiring criteria, testing, scoring, selection, etc., only to its employees who applied for the First Sergeant'sposition but not to outside, non-employee applicants. Respondent did not have any hiring criteria or policy for outside, non-employee applicants.

8. After the pool of applicants was narrowed to two, Grievant, an employee applicant, and E.T. Wensell, an outside, non-employee applicant, Respondent did not apply Policy 3038.

9. Respondent did not give E.T. Wensell a composite score. Grievant received a composite score of 75.27 points.

10. E.T. Wensell did not receive any points for longevity or education, and competed for the position with oral examination points.

11. Respondent compared Grievant and E.T. Wensell only on the basis of the oral examination.

12. E.T. Wensell received an oral examination score of 16.18. Grievant received a score of 13.27

on the oral examination.

13. Respondent does not have an existing document which prescribes or sets forth the criteria by which non-employee applicants may become employed at the various ranks.

DISCUSSION

Grievant's favoritism claim will be addressed first. Favoritism, as defined by W.Va. Code §29-6A-2, means 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. A prima facie showing of favoritism, under W.Va. Code §29-6A-2(h), shall consist of Grievant establishing:

> (a) that he is similarly situated, in a pertinent way, to one or more other employees(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him;
>
> and,
>
> (c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

If the Grievant successfully proves a prima facie case, a presumption of favoritism exists, which Respondent can rebut by articulating a legitimate reason for its action. (See footnote 6) However, Grievant may still prevail if he can demonstrate the reason proffered by Respondent was mere pretext. See W.Va. Inst. of Technology v. WVHRC & Zavareei, 383 S.E.2d 490 (W.Va. 1989); Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990) (See footnote 7) .

In this case, it is impossible for Grievant to be able to prove favoritism or to even establish a prima facie case of favoritism, regarding the selection of E.T. Wensell for the First Sergeant position. Such a claim must fail because neither the definition of favoritism, nor the prima facie test for favoritism, can be established by Grievant because E.T. Wensell was not an employee when he was considered for the position.

The next issue is whether Respondent acted arbitrarily or capriciously in its selection process. In this determination it is irrelevant that E.T. Wensell was not an employee during the selection process

for the First Sergeant position. However, it should be noted that in reviewing the actions of the decision-maker to determine whether it acted in an arbitraryand capricious manner, the Undersigned cannot substitute his judgment for that of the decision-maker. Cutright v. Bd. of Trustees\W. Va. University at Parkersburg, and Mercer, Docket No. 95-BOT-090 (Nov. 2, 1995) citing, Booth v. W.Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-066 (July 25, 1994). Therefore, the Undersigned will place emphasis on the procedure which was employed by Respondent in the entire hiring process, rather than comparing the qualifications of the individual applicants in determining whether Respondent acted arbitrarily and capriciously in selecting a First Sergeant.

Corporal Reed was properly excluded based on Policy 3038. By letter dated December 29, 1994, Todd J. Chafin, Deputy Chief of Operations, Staff Training and Development, informed Corporal Reed that he was ineligible for consideration of the First Sergeant position. Said letter states in pertinent part:

> Thank you for your letter of 23 December 1994 requesting a clarification regarding the Vacancy Announcement for First Sergeant and to be considered for the same at the Eastern Regional Jail.
>
> After reviewing the Agency's Policy on promotions and in reference to your being eligible, it is my understanding that you now hold the rank of Correctional Officer II. Considering this and the Vacancy Announcement for First Sergeant sent to all facilities for West Virginia Regional Jail Employees which does state "each applicant must have permanent status and held the preceding permanent grade or rank for a minimum of twelve (12) months prior to the date of testing". Since you have not held the preceding permanent grade or rank for a minimum of twelve (12) months, I am sorry to inform you that you are not eligible at this time to test for the rank of Correctional Officer IV (First Sergeant).
>
> Please be advised that according to Policy #3038, you have the right to review and appeal this decision by submitting written arguments to the Executive Director within ten (10) days following receipt of this letter.
>
> In reference to your question concerning whether Edward T. Wensell submitted a letter of intent for this position, letters of intent are considered privileged information. As such, I am prohibited from verifying the receiptof employment for promotion applications. The Authority receives many letters of intent to be considered. A week prior to testing, an eligibility list will be made. Today being the closing date on the aforementioned announcement, the final eligibility listing has not been made.

> Finally in answer to your questions of whether the Authority has waived it's promotion requirement for candidates to hold their current position for a year in grade, the Authority has made no such waiver. Thus, unfortunately your application can not be considered for the reasons mentioned previously in this letter.

By this letter Respondent clarified its position as to Policy 3038 and the "time in-grade" requirement.

After Corporal Reed was eliminated, only two applicants were left, Grievant, an employee applicant, and E.T. Wensell, an outside, non-employee applicant. Respondent compared these two remaining applicants only on their oral examination score. E.T. Wensell scored higher, and was therefore hired over Grievant.

Grievant failed to show how Respondent acted arbitrary or capricious. Respondent properly applied Policy 3038, an in-house career progression policy, to its employees and then compared the remaining applicants based on their oral examination score. Policy 3038 could not properly be applied to outside, non-employee applicants.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all of the allegations constituting 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. The grievance procedure set forth in W.Va. Code §29-6A-1, et seq., is not intended to be a "super interview," but rather, allows for a review of the legal sufficiency of the selection process. Furthermore, an agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary or capricious or clearly wrong. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

3. Grievant failed to show a violation, misapplication or misinterpretation of any statute, policy, rule, regulation or written agreement.

4. Grievant failed to prove the allegations of his grievance beyond a preponderance of the evidence.

Accordingly, the grievance is **DENIED**.

DATED: February 20, 1996 JEFFREY N. WEATHERHOLT, ADMN. LAW JUDGE

Footnote: 1

Grievant also asserted a favoritism claim.

Footnote: 2

Briefs were to be simultaneously filed by November 24, 1995, with any responses due by December 4, 1995. Grievant complied with this deadline but Respondent, by a letter dated November 22, 1995, claimed that there was a misunderstanding and that counsel had agreed on a mutual briefing date as follows: "that the Grievant would submit Findings of Fact no later than November 30, 1995, and the Employer would file their response no later than December 20, 1995." Therefore, in an effort to be fair, the Undersigned extended Respondent's deadline until December 8, 1995, and also, accepted Grievant's response brief.

Footnote: 3

Corporal Reed was informed that he was not eligible to test for the First Sergeant position for two reasons both of which are derived from Policy No. 3038: (1) he held the rank of Correctional Officer II and (2) because he had not met the "time in-grade" requirement.

Footnote: 4

John R. Cook decided to withdraw his application before testing for the First Sergeant position.

Footnote: 5

Policy 3038 is a policy of the West Virginia Regional Jail and Correctional Facility Authority, Document No. 3038, which governs career progression.

Footnote: 6

While the burden of production may shift, the overall burden of proof never does. See Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).

Footnote: 7

Even though "school" cases are referenced, under W.Va. Code §29-6A-2(h) and W.Va. Code §18-29-2(o), the analysis is the same.