SCOTT GIBB, et al.,

Grievants,

v. DOCKET NO. 98-CORR-152

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

DECISION

Sgt. Scott Gibb, Lt. F. Rush, Lt. D. Cox, Lt. D. Jones, Cpl. D. Galford, CO II B. Puffenbarger, CO II A. Smith and CO II B. Cox, Grievants, are Correctional Officers at the Denmar Correctional Center. Grievants filed a grievance against their employer, the West Virginia Division of Corrections, Respondent, on March 13, 1998. (See footnote 1) Grievants allege that Respondent's Policy Directive 460.04 requiring Correctional Officers to pass a physical agility test is unfair because it: is not being complied with equally throughout the Division of Corrections; constitutes age discrimination; is in violation of the Americans with Disabilities Act (ADA); provides no alternative to Officers who fail the test other than termination; and should not be required of employees who were hired prior to September 26, 1994, when the Policy was first promulgated. Grievants ask that the Policy be amended to: vary the types of tests and repetitions to accommodate older Correctional Officers; comply with the ADA; exempt Officers hired before September 26, 1994; and provide alternatives to termination for Officers who failthe test. It should be noted that all Correctional Officers to date, who have taken the test, have passed.

Upon the filing of the grievance, Grievants immediately requested to be allowed to proceed directly to Level III. Grievant's request was approved on March 13, 1998, by Stephen Wardley, Warden at the Denmar Correctional Center. A Level III hearing was held on March 30, 1998, before Mr. Ray Swecker, the Grievance Evaluator. A Level III decision was issued on April 15, 1998, in which the grievance was granted in part and denied in part. The Level III Grievance Evaluator agreed the policy should be implemented and applied equally throughout the Division of Corrections and

ordered the Commissioner to direct all training officers throughout the Division “to comply with this policy directive immediately and place the responsibility of this policy under the auspices of the Director of Training.” The remainder of the grievance was denied.

On May 11, 1998, the Grievance Board received Grievants' appeal of the Level III decision. A Level IV hearing was originally scheduled for July 15, 1998, but was continued for good cause shown. The hearing was then held on September 14, 1998. At thehearing, Grievants were represented by Grievant Gibb, while Respondent was represented by its counsel, Assistant Attorney General Charles Houdyschell. At the conclusion of the hearing, the parties agreed to waive the submission of any post-hearing documents or pleadings, and the case became mature for decision at that time.

DISCUSSION

Policy Directive 460.04 became effective September 26, 1994, and the evidence shows the Grievants were aware of the policy at that time, more than three years before the filing of this grievance. Grievants note, however, that, although they were aware of the policy, it was not implemented until earlier this year. The evidence appears to support this statement.

The evidence in this case, however, also clearly shows that everyone who has taken the test has passed and not one of the Grievants has been adversely affected by the policy to date. Further, Grievants have testified that they are not so much concerned about the current standards of the test, but whether the test will be become more stringent in the future. While Grievants' concerns may, or may not, be valid, they are, without doubt, speculative.

W. Va. Code 29-6A-2(i) provides:

“Grievance” means any claim by one or more **affected** state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including anyviolation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees. (Emphasis added.)

Consistent with W. Va. Code 29-6A-1, et seq., this Board has promulgated Procedural Rules

which include: "[T]he Board will, under no circumstances, issue an advisory opinion, i.e., an opinion on an issue not directly before the Board in a grievance." Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.20 156 C.S.R. 1 (1996).

At the time of the Level IV hearing, neither Grievants nor any employee within their knowledge had failed to pass the test. Neither had any employee been dismissed, disciplined, or was otherwise affected as a result of the implementation of the Policy. Accordingly, Respondent contends that this grievance should be dismissed for failure to state a claim upon which relief can be granted.

Since no Grievant in the instant case has actually been aggrieved or suffered any actual consequences to date as a result of this Policy, any damages, or subsequent relief, would be speculative and no remedy would be available to Grievants through the grievance process. As this Grievance Board has consistently held, relief which is speculative in nature, or if granted wouldresult in a mere advisory opinion, is not available from the Grievance Board. Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988); See Procedural Rules of the West Virginia Education & State Employees Grievance Bd., Supra. Grievants have failed to state a cause of action upon which relief may be granted.

The following findings of fact are appropriately derived from the record.

FINDINGS OF FACT

1. Grievants are employed by Respondent as Correctional Officers at the Denmar Correctional Center.

2. On September 26, 1994, Policy Directive 460.04 became effective and required employees to pass the minimum standards of a physical agility test.

3. Neither Grievants or any other state employees had been adversely affected under the policy as of the Level IV hearing on September 14, 1998.

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

CONCLUSIONS OF LAW

1. In a non-disciplinary action, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. and State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Gwilliam v. Preston County Bd. of Educ., Docket No. 95-

39-255 (Dec. 22, 1995).

2. Relief which is speculative in nature or if granted would result in a mere advisory opinion is not available from the Grievance Board. Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988); Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.20 156 C.S.R. 1 (1996).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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.

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RANDY K. MILLER

Administrative Law Judge

Dated: September 30, 1998

Footnote: 1 All Grievants, with the exception of Grievant Gibb, were identified in the grievance only by their rank, first initial and last name.