EDWARD RUDDER,

Grievant,

v. **Docket No. 99-DJS-107**

DIVISION OF JUVENILE SERVICES/

INDUSTRIAL HOME FOR YOUTH,

Respondent.

D E C I S I O N

Grievant, employed by the Division of Juvenile Services (Respondent) as a Unit Manager at the West Virginia Industrial Home for Youth (WVIHY), filed a level one complaint on December 29, 1998, following his non-selection for the position of Corrections Program Manager I (CPMI). Grievant's immediate supervisor lacked authority to grant the requested relief at level one, and the matter was denied at levels two and three. Grievant advanced his claim to level four on March 8, 1999. Grievant, representing himself, and Respondent, represented by C. Scott McKinney, Assistant Attorney General, agreed that a decision could be issued based upon the lower level record. The grievance became mature on May 7, 1999, with the receipt of Respondent's proposed findings of fact and conclusions of law.

Background and Argument

In July 1998, the two highest administrative positions at WVIHY, Superintendent and Deputy Superintendent, were vacant. Subsequently, Respondent's Director Phyllis Carter placed Unit Manager Matthew Biggie in charge of the facility. Mr. Biggie did not receive a change in classification or an increase in salary at this time. In August 1998, Paul W.Leeper was employed as Superintendent, and Mr. Biggie was directed to serve as Acting Deputy Superintendent until the position was permanently filled. Both Grievant and Mr. Biggie applied for the position of Deputy Superintendent, and were interviewed by Respondent's Deputy Director, Ivin Lee. In September 1998, the West Virginia Division of Personnel (Personnel) determined there were no eligible applicants for the position of Deputy Superintendent. Director Carter then posted the position of CPMI on October 27, 1998. Approximately four individuals submitted applications, including Grievant,

and the successful applicant, Mr. Biggie. The Personnel Action Form completed by Personnel, indicates that Mr. Biggie was promoted, effective December 16, 1998.

Grievant argues that Respondent, (1) violated Personnel Rule, Section 4.3, when it filled the position of CPMI without interviewing or considering him for the position, (2) engaged in discrimination under the Equal Opportunity Act, and (3) violated his civil rights by denying him an opportunity to advance his career. Specifically, Grievant asserts that Respondent reallocated, and downgraded, the position of Deputy Superintendent at WVIHY to CPMI, to facilitate the placement of Matthew Biggie, who was not qualified to hold the position of Deputy Superintendent. Specifically, Grievant argues that Mr. Biggie was improperly given the assignment pursuant to Personnel Rule 4.3, which provides that an employee may not retain a reallocated position if he was not eligible to hold the original position. Additionally, Grievant alleges that Respondent engaged in discrimination and favoritism when it did not interview any of the applicants. Grievant requests instatement to the CPMI post, or a re-evaluation of all applicants, except Mr. Biggie. Respondent argues that Personnel Rule 4.3 does not apply to this situation because the position of Deputy Superintendent was not reallocated, but rather a new position of CPMI was created and filled. Respondent also denies that it engaged in any acts of discrimination or favoritism, and in any event, the Equal Employment Opportunity Act does not apply to Grievant, who is not a member of any protected class. Finally, the general allegation of a civil rights violation is disputed by Respondent, which cites Grievant's own exhibit documenting his career advancements.

Discussion

Because Mr. Biggie was previously appointed Acting Deputy Superintendent, and was later named CPMI, and has continuously used the in-house title of Deputy Superintendent, Grievant believes the position of Deputy Superintendent was reallocated to that of CPMI. Personnel Rules, Section 3, defines “reallocation” as the “[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or difficulty of duties and responsibilities assigned to the position.” The record does not include a shred of evidence that Personnel reallocated the position of Deputy Superintendent. To the contrary, the Personnel Action Form establishes that Mr. Biggie was promoted, defined as “a change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities.” Therefore, Grievant

failed to prove that Respondent violated Personnel Rule 4.3 in appointing Mr. Biggie to the position of CPMI. Grievant's claim of discrimination under the Equal Employment Opportunity Act appears to be based upon a brochure issued by Respondent which contains an EEO Policy Statement. That statement, in part, requires Respondent to "be fair and equitable in all its relations with its employees and applicants for employment without regard to race, color, religion, ancestry, marital status, or physical disability." It also provides that "all persons should be afforded equal access to positions . . ." Grievant does not assert that he is a member of any of the listed protected classes, or otherwise define this claim. Grievant's claim of a civil rights violation is even more ambiguous, and was not addressed by him in any cognizable way at the level two hearing.

Grievant does articulate a concern that he was not interviewed, and believes that he was not properly considered, for the position of CPMI. However, Deputy Director Lee credibly testified that she reviewed the applications, and because Grievant and Mr. Biggie had been interviewed extensively when they applied for the Deputy Superintendent post, she determined it was not necessary to interview them again. Notwithstanding Grievant's expectations, Respondent was not obligated to interview him again. Personnel Rule 9.2(b) provides that [i]n selecting persons from among those certified, [the agency] may interview them." (Emphasis added). Grievant provided no evidence that he was treated differently than any other applicant for the CPMI position.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6. Grievant has failed to prove any misapplication of Personnel regulations, that Respondent engaged in discrimination, or that any other improper actions occurred in filling the position of CPMI.

The following findings of fact are made based upon a review of the record in its entirety, including the level three transcript with exhibits, the level three decision, and the proposed findings and conclusions submitted at level four.

Findings of Fact

1. Grievant has been employed by Respondent as a Unit Manager at the WVIHY at all times pertinent to this grievance.

2. In July 1998, both the Superintendent and the Deputy Superintendent positions at WVIHY

were vacant.

3. Sometime in late July or early August, Director Phyllis Carter temporarily placed Unit Manager Matthew Biggie in charge of the facility. Mr. Biggie's classification was not changed, and he was not given a salary increase.

4. In August 1998, Paul Leeper was appointed Superintendent, and Mr. Biggie was directed to serve as Acting Deputy Superintendent of WVIHY. Mr. Biggie's classification was not changed as a result of this reassignment.

5. Both Grievant and Mr. Biggie applied for the position of Deputy Superintendent. Deputy Director Ivin Lee reviewed the credentials of all the applicants and conducted interviews. 6. After Personnel determined that no qualified individuals applied for the position of Deputy Superintendent, Director Carter elected to leave the position vacant, and utilize a CPMI as the second in command at the facility.

7. Both Mr. Biggie and Grievant applied for the CPMI position.

8. Deputy Director Lee did not re-interview those applicants who were previously interviewed for the position of Deputy Superintendent.

9. Director Carter accepted Deputy Director Lee's recommendation that Mr. Biggie be awarded the CPMI position.

10. Personnel processed the change in Mr. Biggie's assignment as a promotion.

11. Personnel did not reallocate the position of Deputy Superintendent.

12. Grievant did not establish that he was treated differently than any other applicant for the position of CPMI.

13. During his tenure with Respondent, Grievant has held the positions of Correctional Officer I, Correctional Officer II, Field Training Officer, CPR First Aid Instructor, Aftercare Case Manager, Work Experience Program/Work Skills Program, Corrections Program Specialist/Special Program Supervisor, Full Time Hearing Officer, Coordinator Between Education & Juvenile Corrections, and Unit Manager.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No.

ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

2. Grievant has failed to prove any misapplication of Personnel regulations, that Respondent engaged in discrimination, or that any other improper actions occurred in filling the position of CPMI.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code §29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 20, 1999 _____

Sue Keller

Senior Administrative Law Judge