ALAN CHAMBERLAIN, et al.,

Grievants,

v. **Docket No. 99-CORR-250**

DIVISION OF CORRECTIONS/

HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievants Alan Chamberlain, Troy McCauley, Sr., Donald Higgins, and John Riffle, employees of the Division of Corrections ("Corrections") at the Huttonsville Correctional Center, each filed a grievance in April 1999, when they were not selected for promotion into posted vacancies, stating, "Policy Directive 413.01 was not followed during recent CO [Correctional Officer] IV Promotion Board." Each sought an increase in pay, although the amounts sought varied, with Grievants Chamberlain and Higgins seeking an "[i]ncrease in pay equal to that of CO II to CO IV or 10%, which ever is greater," and Grievants McCauley and Riffle seeking "[i]ncrease in payequal to that of CO III to CO IV of 5%, which ever is greater." Grievant McCauley also sought interest. (See footnote 1)

While Grievants made various arguments at the Level III hearings, challenging whether Policy Directive 413.01 was followed, at Level IV they specifically alleged only that the Policy was obsolete due to changes in the classification system since its implementation, that the Policy should provide for veterans to receive additional points based upon W. Va. Code § 29-6-10, (See footnote 2) and two of the Grievants believed that the manner in which seniority points were awarded was not fair to those employees who held higher ranks. Grievants Riffle and McCauley believed an employee classified as a CO II with 20 years of seniority, for example, should receive fewer seniority pointsthan an employee classified as a CO III with five years of seniority, arguing that the employee who held the higher rank should be recognized for his efforts in attaining the higher rank.

Grievants also elicited testimony at Level IV in support of two arguments they had raised at Level

III, so these arguments will also be addressed. Those arguments were that the written examination was improperly scored, since some applicants were not asked to complete a schedule as part of the examination; and that Policy Directive 413.01 was not followed in that applicants were not notified in writing of the written exercise. (See footnote 3)

In order to better understand this grievance, a summary of Policy Directive 413.01, highlighting those areas challenged by Grievants, will be provided.

Policy Directive 413.01 was made effective October 14, 1993, by Commissioner Nicholas J. Hun. Its stated purpose is "to establish Division of Corrections policy for the selection of Correctional Officer personnel for promotion." Section I. 1.01. It provides that, "[p]romotions shall occur in accordance with the procedures set forth herein when 1) a vacancy exists, 2) funds are available, and 3) approved by the Commissioner." It provides that an applicant must meet the minimum qualifications established by the Division of Personnel, and additional criteria are set forth for certain classifications. No additional criteria are stated for CO IV. PolicyDirective 413.01 refers only to three levels of Correctional Officers, as additional levels have been added since the Policy Directive was adopted.

A review board consisting of three members is to be established. Policy Directive 413.01 sets forth selection criteria in Section 2.05. It provides that "quality points" are to be assigned to each applicant based upon the promotion test, seniority, in-service training, and apprenticeship.

An applicant may earn a maximum of 10 points on the promotion test, with the points determined by dividing the test score by 10. An applicant may earn a maximum of 10 points for seniority. "One (1) point assigned for every two years time in grade in Division of Personnel classification of Correctional Officer I, II, or III, or Chief Correctional Officer as applicable." A maximum of five points may be earned for in- service training, with two and a half (2.5) points awarded for completion of the minimum in-service training required for the preceding two years. Under the category apprenticeship, a maximum of five points is available for a Journeyman Certificate, with one point for enrollment in the apprenticeship program, and two points for completion of one component of the program.

The Policy Directive allocates an additional 50 points for "interview/exercises." It provides, "[t]he ten (10) applicants receiving the highest scores on Section 2.05 A will be interviewed. Each member of the Review Board shall conduct a separate rating based on a structured, scored interview used for all applicants." It requires the interview to "be no less than ten (10) questions, with each assigned a

score to total fifty (50) points;" however,

> The Chairperson may assign up to twenty (20) points of the interview for written exercises, simulations, and the like; provided:
>
> a. Each applicant is notified in writing prior to the interview date;
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> b. each exercise is job-related to the vacancy being filled;
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> c. each exercise is completely objective and measurable through a point system; and
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> d. each exercise is scored and signed by all members of the Review Board.

The interview questions "shall be drafted by the Review Board Chairperson and reviewed by the other Review Board members prior to the interview date." The ratings assigned by each Board member are then added together and divided by three for the applicant's interview final score.

Interview points are added to quality points, and the officer with the highest point total is to be promoted.

The following Findings of Fact are made based upon the record developed at Levels III (See footnote 4) and IV.

Findings of Fact

1. Grievants Chamberlain and Higgins have been employed by Corrections for eight years, and are Correctional Officer II's ("CO II"). Grievants McCauley and Riffle are employed by Corrections as Correctional Officer III's ("CO III"). Grievant Riffle is a 21 year employee, and has been a CO III since 1994. Grievant McCauley is a 12 year employee, and has been a CO III since 1994. 2. Corrections posted five vacancies for Correctional Officer IV's ("CO IV"). Grievants applied for these vacancies, but were not selected.

3. The members of the Review Board (See footnote 5) were Jerry Hainey, Sergeant Randy Sprinkle, and Major Shaw. (See footnote 6)

4. All applicants were given the same written examination. Two applicants were asked a question about scheduling which should not have been on the written examination. That question was removed from the examination when this error was discovered, and no one was graded on the answer to the scheduling question.

5. No applicant was notified that a written examination would be administered.

6. All applicants were classified as CO I, CO II, or CO III, and had been employed in one of these classifications the entire time they had been Corrections employees. Each applicant was awarded one point for every two years he or she had been a Corrections employee.

7. The applicants with the five highest scores were offered the positions. One of these five declined the position, and the sixth highest scoring applicant was offered a position and accepted. 8. Grievants Riffle, McCauley, and Chamberlain are veterans. Grievant McCauley is a disabled veteran. They were awarded no points for their status as veterans.

9. Grievant Riffle received a score of 48.5; Grievant Higgins received a score of 49.5; Grievant Chamberlain received a score of 48.2; and Grievant McCauley received a score of 46.2. The six highest scores were 52.8, 53.7, 56.6, 58.1, 58.8, and 63.6.

Discussion

Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

Respondent admitted Policy Directive 413.01 was obsolete, in that the number of Correctional Officer levels has changed; however, it has now been revised. Respondent stated that Policy Directive 413.01 was followed as closely as possible. With regard to seniority, Respondent argued all officers who applied for the posted positions were eligible to receive points for their seniority, regardless of their rank. Respondent pointed out that the relief sought by Grievants, a pay raise without placement into the posted positions, was not available as relief; and that Grievants had to demonstrate a flaw in the selection process which would result in Grievants being placed in the posted positions.

Respondent argued for the first time in its post-hearing written argument that Grievants could not argue in this grievance that veterans points should have beenadded to their scores, as their statement of grievance does not address this. Rather, the statement of grievance alleges a violation of Policy Directive 413.01, and veterans points are not addressed in that Policy Directive. Respondent argued it would be unfair to allow Grievants to pursue this argument when it is not set forth in the statement of grievance, and would allow a separate grievance to be filed which would

otherwise be time-barred.

Grievants had no opportunity to respond to this argument, as they were not put on notice at the Level IV hearing that Respondent intended to raise this issue. Respondent argued at the Level IV hearing that Grievants had misinterpreted W. Va. Code § 29-6-10, which discusses veterans points. This Grievance Board does not allow parties to raise new issues for the first time in post-hearing written submissions, as that is what is considered unfair. See Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). If a party does not raise its arguments at the hearing, the other party is deprived of the opportunity to respond with counter argument and evidence in support of its position.

Further, in this case, by remaining silent, Respondent waived its right to raise this issue, as the language of the governing statute makes it clear Respondent is to make the objection at the latest, when the grievant attempts to introduce evidence in support of the new grievance, so that the grievant may withdraw the evidence, or the parties may agree that the new grievance may be incorporated into the grievance being heard. W. Va. Code § 29-6A-3(j) provides:

> Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance shall be measured from the date of such ruling.

As to Respondent's argument that it would be unfair to allow Grievants to argue whether veterans points should have been awarded, it is assumed Respondent is arguing it was blindsided with this at Level IV, or it should have been allowed to address these arguments at Level II. It is clear from the Level II responses, as well as the Level III record, that Respondent has not been blindsided, and Grievants' argument was made and addressed at Levels II and III. The Level II responses made by Deputy Warden Keith Weese state, "[t]he following are a list of items that you allege that were not followed during the above promotion board: (1) failed to give veterans points . . .."

Finally, by statute, this was an issue which the grievance evaluator at Level II had to decide, not the undersigned. The Level II grievance evaluator did not rule that the assertion that Grievants should have been awarded veterans points was a new grievance. (See footnote 7) Grievants'

representative stated that if the scores were properly adjusted for Grievants, Grievant Higgins would still have a 49.5, Grievant Riffle would have a 54, Grievant Chamberlain would have a 58.7, and Grievant McCauley would have a 56.7. If Grievants scores were adjusted as suggested, Grievants Higgins and Riffle still would not be within the top six.

Grievants presented no evidence that any of the highest six scores was in error. Accordingly, Grievants' seniority argument, if accepted, would not affect these scores. Further, Policy Directive 413.01 provides that points are awarded for time as a CO I, CO II or CO III. While Grievants may disagree with this provision of the Policy, Corrections properly applied this provision, and the undersigned finds nothing arbitrary or capricious in this rule.

As to Grievants' argument that Policy Directive 413.01 is obsolete because it does not address all levels of Correctional Officers, the undersigned fails to see how this makes any difference here. Where the Policy Directive addresses points for seniority, although it only discusses time spent in the CO I, II, or III classifications,those are the only classifications applicable to Grievants, and they received credit for their time employed in those classifications. It does not appear that the other provisions of the Policy Directive challenged by Grievants are obsolete, and it was appropriate for Corrections to follow its policy.

Further, Grievants suggested no alternative. Absent Policy Directive 413.01, the general rule in a state selection grievance is that an agency's decision as to who is the most qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). There was no such showing in this case.

Grievants' argument regarding the question about completing a schedule was addressed by Mr. Hainey. He explained that two applicants were asked, as part of the examination, to complete a schedule, one of whom was Grievant Chamberlain. Grievant Chamberlain questioned this after he completed the examination. Mr. Hainey had asked a paralegal to put the test questions together, and he had not carefully reviewed them. When he realized there was a question about preparing a schedule, he immediately removed it as it should never have been there. He testified that question was not counted in scoring any applicant's test. While Grievants' representative indicated Grievant Chamberlain was somehow affected by being asked this question, Grievant Chamberlain offered no testimony that this question had affected his performance in any way. The question was removed

from the test, and no one's score was affected by the question. This corrected error was not a flaw in the process. Grievants are correct that the Policy requires written notification that there will be a written exercise, or at the least that there will be an interview. Corrections did not follow the Policy in this regard. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). However, an agency's actions will not always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that `a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). Grievants did not indicate they were prejudiced in any way by Respondent's failure to provide written notice. Grievants did not state whether oral notice was provided.

Finally, Grievants' argument that they should have received additional points for their status as veterans is rejected. W. Va. Code § 29-6-10 provides, in pertinent part:

> The board shall have the authority to promulgate, amend or repeal rules, according to chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, to implement the provisions of this article:
>
> . . .
>
> (3) For open competitive examinations to test the relative fitness of applicants for the respective positions in the classified service. Such examinations need not be held until after the rules have been adopted, the service classified and a pay plan established, but shall be held not later than one year after this article takes effect. Such examinations shallbe announced publicly at least fifteen days in advance of the date fixed for the filing of applications therefor, and may be advertised through the press, radio and other media. The director may, however, in his or her discretion, continue to receive applications and examine candidates long enough to assure a sufficient number of eligibles to meet the needs of the service and may add the names of successful candidates to existing eligible lists in accordance with their respective ratings.
>
> An additional five points shall be awarded to the score of any examination successfully completed by a veteran. A disabled veteran shall be entitled to an additional ten points, rather than five points as aforesaid, upon successful completion of any examination.

The "board" is the "state personnel board." W. Va. Code § 29-6-2.

This Code provision addresses those matters about which the Division of Personnel may promulgate rules. This Code Section does not create the right for veterans to receive preference points, but merely indicates this is one of the areas Personnel may address in its rules. The Code Section which creates the right is W. Va. Code § 6-13-1, entitled "Preference rating of veterans on written examinations for positions in state departments filled under nonpartisan merit system." That Code Section provides:

> For positions in any agency as defined in section four, article one, chapter five-f of this code or any other political subdivision of this state in which positions are filled under civil service or any job classification system, a preference of five points in addition to the regular numerical score received on examination shall be awarded to all veterans having qualified for appointment by making a minimum passing grade; and to all veterans awarded the purple heart, or having a compensable service-connected disability, as established by any proper veterans' bureau or department of the federal government, an additional five points shall be allowed.

This Code Section then goes on to define veteran. Personnel's Administrative Rules, Series I at §§ 3 and 6, implement this Code Section. Section 3.100 defines Veterans' Preference Points, and talks in terms of adding points to "the final passing score." Section 6 is entitled "Applications and Examinations." Section 6.1, "Character of Examinations," discusses "examinations for entrance in the classified service." Section 6.6, "Scoring examinations," discusses scoring examinations, and the addition of points for veterans to the final passing score "in an examination." While this section does not say it is discussing "examinations for entrance in the classified service," it is clear from a review of Section 6 in its entirety that this is what the Section is talking about. The only reference in these rules to any other examination administered by the Division of Personnel is in Section 11.2, entitled "Promotion by Competitive Examination," which provides that if an agency decides to fill a vacancy by promotion by competitive examination, the exam is to be given under the direction of Personnel. It says nothing about scoring the examination or veterans preference points.

The undersigned concludes that both the statute and Personnel's Administrative Rules implementing the statute mean that a veteran receives extra points only when he takes the examination for entrance into the classified service. Grievants were not entitled to any additional points on the test given here for their status as veterans. (See footnote 8) The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. Grievants failed to demonstrate a flaw in the selection process, or that any of them should have been awarded one of the posted positions.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: October 18, 1999

Footnote: 1

Grievants Higgins and McCauley filed their grievances on April 28, 1999, and Grievant Chamberlain filed on April 27, 1999, and Grievant Riffle filed on April 25, 1999. Grievants received their Level I and II responses that the relief sought could not be granted at those levels, with the last Level II response issued on May 12, 1999. Grievants appealed to Level III, and Level III hearings were held on May 14 (Chamberlain and McCauley) and May 24, 1999 (Higgins and Riffle). Level III decisions denying the grievances were issued on May 24 (Chamberlain and McCauley) and June 1, 1999 (Higgins and Riffle). Grievants Chamberlain, Higgins and Riffle then appealed to Level IV on June 7, 1999, and Grievant McCauley appealed to Level IV on June 2, 1999. The grievances were consolidated at Level IV, and a hearing was held on September 20, 1999. Grievants were represented by John Jeffers, and Corrections was represented by Charles Houdyschell, Jr., Esquire. This matter became mature for decision on September 23, 1999, upon receipt of an affidavit

from Grievant Chamberlain (who was unable to attend the Level IV hearing), as was agreed at the Level IV hearing.

Footnote: 2

Grievants believed some employees had received an interview due to their military experience, and argued if this was appropriate, they should receive some credit for their military service; however, as no evidence was presented that any applicant had received an interview due to his military experience, this need not be further addressed.

Footnote: 3

Grievants raised some other issues at the Level III hearing; however, no evidence was presented to support the assertions made, and the arguments were not raised at Level IV. Accordingly, these arguments are deemed abandoned.

Footnote: 4

The only evidence adduced at Level III was two exhibits.

Footnote: 5

The parties referred to this as the "Promotion Board."

Footnote: 6

The parties did not further identify Major Shaw.

Footnote: 7

The undersigned would not find this to be a new grievance. While the statement of grievance is narrow, the grievance procedure is not intended to become a procedural quagmire. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739(1990). It is clear Grievants are grieving the failure of Respondent to select any of them for the posted positions. Grievants articulated this at the Level II conference, so that everyone understood what the grievance was about. Further, even if the undersigned found the veterans points argument to be a separate grievance, such a finding would not automatically make that grievance untimely as Respondent argues, as the statute provides that, "[t]he time limitation for filing the new grievance shall be measured from the date of such ruling." The only thing accomplished by sending this back would be that the parties could address the issue at the lower levels of the grievance procedure, which has already occurred here. Then, if the grievance reached Level IV, the parties would have to repeat the very same evidence the undersigned has already heard.

Footnote: 8

While this issue is also addressed in White v. W. Va. Division of Corrections, Docket No. 98-CORR-423 (Feb. 3, 1999), where the Administrative Law Judge concluded the statutory language did not support Corrections' contention that veterans preference points are only to be awarded upon entry into the classified service, that decision did not decide this issue as it was not necessary to the outcome of thegrievance.