LOUIS CAPALDINI,

Grievant,

v v.

DOCKET NO. 01-CORR-362

WEST VIRGINIA DIVISION OF CORRECTIONS

and OFFICE OF THE GOVERNOR,

Respondents.

D E C I S I O N

Grievant, Louis Capaldini, filed the following grievance against his employer, the West Virginia Division of Corrections ("Corrections"), and the Office of the Governor, on May 25, 2001:

> Failure to return Grievant to covered position as arranged September 9, 2000 (breach of express agreement)(See March 5, 2001 letter stating held position no longer available when it was; May 16, 2001 letter); detrimental reliance - having been encouraged to apply for position; violation of procedural [and] substantive due process in failing to return grievant to position as promised; age discrimination.
>
> Relief sought: Return to a covered position acceptable to grievant in Charleston; restoration of lost pay, compensation for emotional and psychological distress and attorney's fees.

This grievance was filed directly at level four, and having no objections from Respondents, was scheduled for a level four hearing on June 21, 2001, in the Grievance Board's Charleston, West Virginia office. This matter became mature for decision on July 21, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Hoyt Glazer, Esq., Stuart Calwell, PLLC; Corrections was represented by Leslie K. Tyree, Esq.; and the Office of the Governor was represented by Daynus Jividen, Esq., Senior Assistant Attorney General.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Resume of Louis A. Capaldini.

Ex. 2 -

September 9, 2000 letter from Louis A. Capaldini to James H. Phillips, with handwritten note from Hilda L. Williams.

Ex. 3 -

February 2, 2001 letter from Louis A. Capaldini to David Satterfield; February 23, 2001 letter from Louis A. Capaldini to Jim Rubenstein; March 5, 2001 letter from Jim Rubenstein to Louis A. Capaldini.

Ex. 4 -

May 16, 2001 letter from Jim Rubenstein to Louis A. Capaldini, with attached application packet.

Ex. 5 -

April 24, 2001 letter from Jim Rubenstein to Beverly C. Gandee, with attached application packet.

Ex. 6 -

May 16, 2001 letter from Jim Rubenstein to Rita Albury, with attached application packet.

Respondents' Exhibits

Ex. 1 -

June 14, 2001 letter from Leslie K. Tyree to Hoyt Glazer, with attachments.

Testimony

Grievant testified in his own behalf, and presented the testimony of David Satterfield.

Respondents presented the testimony of Wayne Armstrong.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was employed in various positions by Corrections from 1995 until September 15, 2000. At the time he left Corrections on September 15, 2000, Grievant was employed in its Office of Research.

2. On September 9, 2000, Grievant advised his supervisor at Corrections, James Phillips, that he had accepted an “Interim Commissioner of Culture and History” position effective September 16, 2000, and that he would leave his Corrections position on September 15, 2000. G. Ex.

2. 3. Grievant was offered the position at Culture and History by former Governor Cecil Underwood's Chief of Staff, James Teets. Grievant could not legally hold two positions with the State, and the Director of Human Resources at Corrections suggested he resign from Corrections in order to process the transfer to the Governor's Office.

4. Mr. Teets told Grievant his position at Corrections would be kept open, and Grievant relied on that information in deciding to accept the Culture and History position.

5. Ms. Hilda L. Williams, Corrections' Director of Human Resources, made a handwritten notation on Grievant's September 9, 2000 resignation letter to James Phillips, dated that same day, as follows:

> Mr. James Teets advised Mr. Otis G. Cox Jr. Cabinet Secretary that we (DOC) were to keep a vacant position for Mr. Capaldini in case the position at Culture & History did not work out on a permanent basis. Mr. Jim Rubenstein advised me to process the paperwork (WV-11) and Lou's resignation.

G. Ex. 2.

6. Governor Underwood lost the 2000 gubernatorial election to Bob Wise.

7. On February 1, 2001, David Satterfield, the new Chief of Staff of the Office of the Governor under the Wise administration, advised Grievant his services would no longer be required, and that he would be laid off effective close of business on February 9, 2001. See Attachment to Grievance Statement.

8. At the time Grievant resigned from Corrections, the Commissioner was Otis Cox, and Jim

Rubenstein was Assistant Commissioner. Under the Wise administration, Jim Rubenstein was appointed Acting Commissioner of Corrections. 9. On February 7, 2001, Grievant contacted Acting Commissioner Rubenstein regarding his return to his position at Corrections. On February 23, 2001, Grievant again requested he be restored to his former position at Corrections, referencing his September 9, 2000 resignation letter and the handwritten note from Hilda Williams. Grievant told Mr. Rubenstein his last day at Culture and History would be February 28, 2001, and requested a starting date at Corrections of March 1, 2001. G. Ex. 3.

10. On March 5, 2001, Mr. Rubenstein informed Grievant Corrections did not have any vacant positions in the Office of Research at that time. G. Ex. 3.

11. On April 13, 2001, Corrections posted a position of Corrections Program Specialist, Senior. The working title for this position was grievance evaluator for Corrections' inmate grievance/administrative remedy process. Grievant applied for the position, and on April 24, 2001, was advised by Mr. Rubenstein that he had been selected for an interview. G. Ex. 4.

12. There were three applicants interviewed for the position: Grievant, Beverly Gandee, and Rita Albury. Ms. Gandee was selected for the position. All three met the minimum qualifications for the position.

13. Grievant interviewed for the position on May 2, 2001. On May 16, 2001, Mr. Rubenstein advised Grievant he was not selected for the position. G. Ex. 4.

14. Grievant filed this grievance on May 25, 2001, protesting Corrections' failure to return him to his previous position in the Office of Research, as well as his non-selection for the Corrections Specialist, Senior, position.

DISCUSSION

Respondents have moved to dismiss this grievance on the ground that Grievant has no standing to avail himself of the Grievance Procedure for State Employees, W. Va. Code §§ 29-6A-1, et seq., as he had resigned his position from Corrections, and was not an employee of the State of West Virginia at the time he filed the grievance. Respondents further contend the Division of Corrections has no authority, statutory or otherwise, to hold vacant positions open for political appointees in case they should lose their appointments, and any promises made by its agents or agents of the Office of the Governor were ultra vires and cannot be enforced. Respondent Division of Corrections denies

discrimination played any part in the selection of Beverly Gandee over Grievant for the Claims Program Specialist Senior position.

Grievant argues he is entitled to reinstatement with the Division of Corrections because the State encouraged his expectations of employment based on promises that various employees made to him both orally and in writing, and based on the subsequent conduct of the Respondents in encouraging him and interviewing him for employment. Grievant further claims he has been discriminated against due to his age in his non- selection for the Corrections Program Specialist Senior position.

W. Va. Code § 29-6A-1 provides as follows:

> The purpose of this article is to provide a procedure for the equitable and consistent resolution of employment grievances raised by nonelected state employees who are classified under the state civil service system, or employed in any department, other governmental agencies, or by independent boards or commissions created by the Legislature, with the exception of employees of the board of regents, state institutions of higher education, the Legislature, any employees of any constitutional officer unless they are covered under the civil service system, and members of the department of public safety.

W. Va. Code § 29-6A-2(e) defines an “employee” as

> any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of Legislature, except those persons employed by the board of regents or by any state institution of higher education, members of the department of public safety, any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature. The definition of “employee” shall not include any patient or inmate employed in a state institution.

In addition, the West Virginia Division of Personnel Administrative Rule defines, in Section 3.37, an “employee” as “any person who lawfully occupies a position in an agency who is paid a wage or salary and who has not severed the employee-employer relationship.” (Emphasis added).

The West Virginia Supreme Court of Appeals has held that, “if any employee under civil service resigns or “abandons” a position under such circumstances that those terms become synonymous, the [civil service] commission is without authority to reinstate that employee unless the severance of the employee from his or her position was under such circumstances that it violated [W. Va. Code § 29-6-1 et seq.].” Billings v. Civil Serv. Comm., 154 W. Va. 688, 178 S.E.2d 801 (1971). Respondents contend there is noevidence in this case that Grievant resigned his position at the Division of Corrections under duress or due to fraud, or for any other reason that might have violated the West

Virginia Civil Service Act. Rather, the evidence shows that Grievant resigned willingly in order to accept a significant promotion as Commissioner of the Division of Culture and History.

Grievant argues he is entitled to a hearing under the grievance procedure, citing McClung v. Marion County Commission, 178 W. Va. 444, 380 S.E.2d 221 (1987), wherein the West Virginia Supreme Court noted the state employer had shown remarkable “sophistry” by disallowing a grievance hearing because it could only be requested by an employee and not a terminated person who was no longer an employee. Grievant's reliance on McClung is misplaced however; the grievant in that case, an at-will employee, was discharged from his employment with the county commission, and alleged his discharge was the result of retaliation. Clearly, a discharged employee has standing to invoke the grievance process to contest the discharge. Even an at-will employee is entitled to invoke the grievance process if he alleges his discharge was in violation of a substantial public policy.

Here, however, Grievant is not protesting his layoff from the Division of Culture and History, and concedes that, as a political appointee, his continued employment as Commissioner depended upon the re-election of the governor who appointed him. Rather, Grievant is contesting the Division of Correction's decision not to reinstate him into his classified service position in the Office of Research following his layoff from the Division of Culture and History. This “twist” takes Grievant's case out of the realm of McClung. The issue, then, is whether Grievant, a non-employee of the State, has any standing to protest Correction's decision not to reinstate him to his old position some 10 months following his resignation, and/or to protest his non-selection for another position at Corrections.

W. Va. Code § 29-6A-2(i) defines a “[g]rievance” as

> 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 any violation, 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.

Grievant contends Corrections promised him orally and in writing that his old job would be there for him should his appointment at Culture and History not pan out following the gubernatorial election. If Grievant's allegation in this regard is true, then Grievant has standing to pursue his breach of promise through the grievance process, as that promise would constitute a “written agreement”

regarding Grievant's employment status with Corrections.

Grievant's claim of discrimination based on his age, however, is not grievable through the Grievance Procedure for State Employees. While the specific claim of age discrimination would fall within the grievance procedure's definition of “discrimination”, W. Va. Code § 29-6A-2(d), the Grievance Procedure specifically limits grievances of this nature to current part-time or full-time employees of the State. Grievant was not anemployee of the State of West Virginia at the time he applied for the position at Corrections on April 24, 2001. Thus, Grievant is precluded from grieving his non-selection for the position at Corrections through the Grievance Procedure for State Employees.

With respect to the alleged promise that a position would be held open for Grievant at Corrections, that complaint does not involve a disciplinary matter, and 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 § 4.21 (2000); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). W. Va. Code § 29- 6A-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17,1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant testified the person who told him a job would be kept open for him at Corrections was Jim Teets, Governor Underwood's Chief of Staff. Grievant testified he confirmed Mr. Teets' promise with Otis Cox, then-Commissioner of Corrections, and Mr. Cox acknowledged he remembered the conversation. Hilda Williams made a written notation on Grievant's resignation letter which states that Mr. Teets advised Mr. Cox that job should be kept open for Grievant, and that then-Assistant Commissioner Jim Rubenstein instructed her to process the paperwork for Grievant's resignation fromCorrections. That is the sum total of the evidence regarding the promise of Grievant's future of employment at Corrections.

Neither Mr. Teets, Mr. Cox, Ms. Williams, nor Mr. Rubenstein testified at the level four hearing, and any representations attributed to them by Grievant constitute hearsay evidence. Under W. Va. Code § 29-6A-6(e), formal rules of evidence are not applicable in grievance proceedings, except for

the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Hamlin v. W. Va. Div. of Corr., Docket No. 00-CORR-180 (July 12, 2001); Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accountswith other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981).

No explanation was given why Mr. Teets, Mr. Cox, Ms. Williams, or Mr. Rubenstein were not called to testify, and the only testimony regarding this exchange came from Grievant. It appears from all of the evidence presented in this matter, that Mr. Teets was the only person who actually told Grievant a job would be kept open for him at Corrections. According to Grievant's testimony, then-Commissioner Cox merely acknowledged he remembered the conversation with Mr. Teets and Grievant. Ms. Williams' note merely repeats the same information relayed by Grievant regarding what was said, and in fact, it is very possible that Grievant himself provided Ms. Williams with that information. Ms. Williams' note also says that Mr. Rubenstein instructed her to process Grievant's resignation, without any indication that he agreed to the representations made by Mr. Teets. It appears to the undersigned that Mr. Teets acted alone when he told Grievant a job would be kept

open for him at Corrections.

While Grievant may have relied on Mr. Teets' representation that a job would be kept open for at Corrections, it is undisputed that Grievant voluntarily resigned his position at Corrections to take a much better paying, high-profile position with the Underwood administration. Grievant has presented no authority which would authorize Mr. Teets tobind either Corrections or the Wise administration to employment promises made during the Underwood administration, whether made in good faith or not.

To the contrary, the West Virginia Supreme Court has spoken regarding promises made to hold open classified civil service positions for specific individuals. In Drennan v. Department of Health, 163 W. Va. 185, 255 S.E.2d 548 (1979), the plaintiff, Drennan, had applied and interviewed for a position with the Department of Health, and had been told she had been selected for the position. However, a West Virginia legislator had written to the Office of the Governor on behalf of another individual, requesting the subject position be held open for her until she could take the civil service examination. The job was held open, the individual took and passed the exam, and was hired into the position. Drennan brought this case alleging undue political influence prohibited her from obtaining the position at the Department of Health, and the Court agreed, stating:

> The civil service system was established for the salutary purpose of affording to those seeking employment in the classified service equal opportunity of employment, with protection from favoritism, undue interference, political or otherwise, or discrimination and an act contrary to such purpose cannot be countenanced.

Syl. Pt. 1, Drennan, supra.

The Court made its ruling in reliance upon W. Va. Code § 29-6-20(c), as amended, which read, in pertinent part:

> No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote on political action or any person, or for any consideration.

This prohibition was included in the Rules and Regulations of the West Virginia Civil Service System in effect at that time, and is also found in the current Administrative Rule of the West Virginia Division of Personnel at Section 16.1(c). Prohibition of Political Activities.

Therefore, just as it was found an improper use of position for the Office of the Governor in Drennan to request the Department of Health keep open a classified service position for a specific individual, so it would be improper for Mr. Teets, acting for the Office of Governor Underwood, to request Corrections keep open Grievant's previous classified service position until his return from administrative service.

CONCLUSIONS OF LAW

1. 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 § 4.21 (2000); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probably than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17,1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

2. W. Va. Code § 29-6A-1 provides as follows:

> The purpose of this article is to provide a procedure for the equitable and consistent resolution of employment grievances raised by nonelected state employees who are classified under the state civil service system, or employed in any department, other governmental agencies, or by independent boards or commissions created by the Legislature, with the exception of employees of the board of regents, state institutions of higher education, the Legislature, any employees of any constitutional officer unless they are covered under the civil service system, and members of the department of public safety.

3. Grievant was not employed by the State of West Virginia as a civil servant, or in any other capacity, on April 14, 2001, when he applied, and was not selected for, the Corrections Program Specialist, Senior, position at Corrections.

4. Grievant has no standing to bring an action against the Office of the Governor or Corrections for his non-selection to the Corrections Program Specialist, Senior, position.

5. Grievant's claim of breach of contract arising from his claim of a promise of employment at Corrections is an actionable claim under the Grievance Procedure for State Employees, W. Va. Code § 29-6A-1, et seq.

6. If any employee under civil service resigns or “abandons” a position under such circumstances that those terms become synonymous, the [civil service] commission is without authority to reinstate that employee unless the severance of the employee from his or her position was under such circumstances that it violated [W. Va. Code § 29-6-1 et seq.]. Billings v. Civil Serv. Comm, 154 W. Va. 688, 178 S.E.2d 801 (1971).

7. Grievant has presented insufficient evidence for this Grievance Board to find that he resigned or abandoned his position at Corrections under duress or due to fraud,or for any other reason that might have violated the West Virginia Civil Service Act, W. Va. Code § 29-6-1, et seq.

8. The civil service system was established for the salutary purpose of affording to those seeking employment in the classified service equal opportunity of employment, with protection from favoritism, undue interference, political or otherwise, or discrimination and an act contrary to such purpose cannot be countenanced. Drennan v. Dept. of Health, 163 W. Va. 185, 255 S.E.2d 548 (1979); Frantz and Devaul v. W. Va. Dept. of Empl. Security, Docket Nos. 89-ES-050/89-ES-186 (July 25, 1989).

9. W. Va. Code § 29-6-20(c) and the Administrative Rule of the West Virginia Division of Personnel provide as follows:

> No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote on political action or any person, or for any consideration.

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 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. Any appealing party must advise this office of the intent toappeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 24, 2001