MICHAEL MOORE,

Grievant,

v. **Docket No. 01-DJS-449**

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, Michael Moore, employed by the Division of Juvenile Services (DJS or Respondent) as a Correctional Officer II at the West Virginia Industrial Home for Youth, filed a level one grievance on May 27, 2001, challenging his nonselection for promotion to Corrections Case Manager. For relief, Grievant requested reclassification, with back pay, effective June 1, 2001. After the grievance was denied at all lower levels, appeal was made to level four on July 27, 2001. An evidentiary hearing was conducted on October 12, 2001, at the Grievance Board's Westover office. Grievant represented himself, and DJS was represented by Jendonnae Houdyschell, Esq. The matter became mature for decision November 13, 2001, the due date for submission of proposed findings of fact and conclusions of law. (See footnote 1)

The underlying facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant was first employed by Respondent in 1995, and has been classified as a Correctional Officer II (CO-II) at the West Virginia Industrial Home for Youth (WVIHY) at all times pertinent to this grievance. 2. Grievant applied for the posted vacancy of Case Manager for the "After-Care" Unit in March 2000. (See footnote 2) Upon completing a review of the applicants, the interview committee ranked Grievant the highest, with a score of 4.36. Kayla Ash was ranked second with a score of 3.82.

3. The Internal Employee Placement Unit of the West Virginia Division of Personnel (DOP) determined that Grievant met the minimum qualifications for the position of Corrections Case Manager.

4. WVIHY “After-Care” Coordinator Barbara Templeton notified Grievant that he had received the position of Corrections Case Manager.

5. Prior to the completion of the WV-11 personnel action form changing Grievant's classification, the applications were reviewed by Respondent's central office staff. This review was conducted in part to a concern that Respondent was not attracting external applicants for many positions.

6. DJS Director Manfred Holland determined that while Grievant met the minimum qualifications for the position, Ms. Ash was the better qualified applicant. Ms. Ash holds a Bachelors degree, and was previously employed by community agencies which provide typical “After-Care” services. (See footnote 3)

7. Grievant was notified by letter dated May 21, 2001, that he had not received the position. 8. The DOP job description for Corrections Case Manager includes minimum qualifications in:

Training: Graduation from an accredited four-year college or university with a major in criminal justice, corrections, psychology, sociology, counseling, counseling and guidance, criminology, or social work.

Substitution: Experience in an area of corrections programming or treatment may be substituted for the required training on a year-for-year basis.

Experience: Two years of full-time or equivalent part-time experience in inmate counseling, security or treatment in a correctional setting or in counseling, counseling and guidance, as a probation and parole officer, mental health counselor or social worker.

Substitution: Master's Degree from an accredited college or university in criminal justice, corrections, social work or related behavioral science field may substitute for the required experience on a year-for-year basis.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); See W.Va. Code §29-6A-6; Howell v. W. Va. Dep't of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

Grievant argues that he is qualified for the position when his four years service as a military policeman is substituted for the college degree. (See footnote 4) Because he meets theminimum qualifications listed on the classification specifications, and was ranked first by the interview committee, Grievant argues that he was entitled to the position. (See footnote 5) Respondent argues that ultimate hiring authority lies with Director Holland who properly determined that Ms. Ash was better qualified than Grievant for a position in “After-Care”. Respondent asserts that Ms. Templeton has no authority to hire or fire employees at DJS, and acted inappropriately when she announced Grievant's promotion prior to receiving an approved WV-11 form. Respondent denies that the decision was in violation of any statute, rule, regulation, policy, or written agreement, and that it was not arbitrary and capricious, or clearly wrong.

Grievant's frustration in this matter is understandable. DOP determined that he met the minimum qualifications for the position, and the interview committee ranked him as first choice. It is not clear from the record whether the central office had previously reviewed and approved personnel actions prior to this case; however, Director Holland was acting within his authority to do so, and the hiring process was not finalized until the WV-11 process was completed. See Ollar v. Dep't of Health and Human Resources, Docket No. 92-HHR-186 (Feb. 3, 1997). At level four, Ms. Templeton testified that she understood shecould select the individual for the position, but also acknowledged that she did not exercise final hiring authority. Respondent is not bound by the ultra vires action by agency officials who incorrectly advised Grievant that he had been awarded the position. Thompson v. Div. of Juvenile Serv., Docket No. 01-DJS-140 (Oct. 12, 2001); Mullan v. Div. Of Juvenile Services, Docket No. 01-DJS-345 (Oct. 12, 2001); Fraley v. Dep't. of Health and Human Resources, 92-HHR-448 (Mar. 12, 1993).

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

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 Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dep't of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

2. Grievant failed to prove that DJS violated any rule, regulation, policy, or statute when it

determined that another applicant was better qualified for the position of “After-Care” Case Manager.

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 EmployeesGrievance 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 §29-5A-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.

Date: November 30, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievent elected not to file post-hearing proposals.

Footnote: 2

As the name indicates, the “After-Care” Unit follows the individuals upon their release from WVIHY, to assist with treatment, etc., with the goal of keeping them from further experiences with the criminal justice system.

Footnote: 3

The record does not reflect specific information relating to Ms. Ash's education and experience.

Footnote: 4

This matter is further complicated by the fact that DJS contacted DOP regarding Grievant's qualifications, and advised Personnel Specialist Lynn Schillings that it did not want DOP to use Correctional Officer experience as a substitution for the Bachelors degree required for the Corrections Case Manager position. After some review by DOP, it was determined that although DJS did not exist in 1996 when the substitution was first allowed, in the interest of fairness to all Department of Military Affairs and Public Safety employees,it would continue the practice. Based upon this determination, Grievant was ruled to meet the minimum qualifications for the position, and was eligible to be promoted if selected. It does not appear that this request by Respondent was directed at Grievant personally.

Footnote: 5

At hearing, Grievant questioned a number of witnesses about whether an investigation into allegations made against him in 1998 was the reason he did not receive the position. Every witness responded in the negative, and former Chief Correctional Officer Roger Elder testified that he had conducted the investigation, and found no wrongdoing by Grievant, who was a new employee at the time, and may not have understood his responsibility to report certain incidents. No discipline was levied, and no written record appears to exist regarding this matter.