BOBBY CHENOWETH, et al.,

Grievants,

v. Docket No. 02-CORR-171

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER and DIVISION OF PERSONNEL,,

Respondents.

DECISION

This grievance was initially filed on May 14, 2002, by thirteen correctional officers employed by the Huttonsville Correctional Center ("HCC"), alleging they had been denied opportunities to become Correctional Officer IIIs ("COIIIs"), because HCC had allowed COIIIs from the canine unit to be moved into the main facility into COIII positions. They requested as relief that all Grievants be promoted to COIIIs with back pay. After denials at the lower levels, Grievants appealed to level four on June 27, 2002. Subsequent to the level four appeal, approximately 69 additional employees requested to become Grievants, and they were added to this grievance by Order dated October 9, 2002. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on December 18, 2002. The original Grievants were represented by Jack Ferrell, and the additional Grievants were represented by Grievants Bobby Chenoweth and Thomas D. George. Respondent Division of Corrections was represented by Assistant Attorney General Heather A. Connolly, and the Division of Personnel was represented by Assistant Director Lowell Basford. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 3, 2003. The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed by HCC in various capacities, as correctional officers, case

managers, unit managers and correctional counselors. The specific job titles and assignments of the numerous Grievants were not identified for the record.

2. HCC operates two canine units; one is a specialized drug unit, and the other is a "multipurpose" unit. Employees who have obtained COII status are eligible to apply for vacant positions in the canine units, which are posted. Applicants for the canine units must undergo specialized training with a dog in order to be employed in the unit. The units perform contraband searches, inmate transports, public relations, and supervisory functions. Canine officers also serve other law enforcement agencies, when requested. Once training is successfully completed by both officer and dog, the officer is reallocated to a COIII.

3. Officers who complete training in the canine unit have been classified as COIIIs pursuant to the Division of Personnel's recommendation. They are trained for and perform supervisory work. COIII is the lowest classification of supervisory correctional officer.

4. In order to obtain a COIII position within the main facility at HCC, an officer must apply for promotion to a vacant position and must undergo testing, interviews, and obtain recommendation from a promotion board, pursuant to DOC policy.

5. Dogs used in the canine unit must recertify periodically, and cannot continue to be used if they do not successfully complete the testing. If a dog fails to recertify, theofficer to whom he is assigned can no longer work in the canine unit.

6. The class specification for COIII describes the nature of the position as "a first line supervisor of Correctional Officers." These employees are "responsible for enforcing or supervising the enforcement of the rules," and they "supervise . . and review . . . the work of subordinates . . . to ensure facility security or the functioning of a specialized post or unit."

7. Glen Johnson, Jr., was previously assigned to the canine unit, and is classified as a COIII. When his driver's license was suspended, he was removed from the canine unit by HCC officials and assigned within the main facility. Since being returned to the main building, he has performed supervisory duties consistent with his COIII classification.

8. After previously serving in the canine unit, John Miller left DOC employment for active military duty. Upon his return to HCC in 2001, he was reinstated to a supervisory position at the facility, but was not returned to the canine unit.

9. Andy Burns was removed from the canine unit when his dog could not be recertified. He was

placed in a supervisory position in the main facility for an unspecified period of time, then left HCC altogether.

10. Nikki Gum was removed from the canine unit for disciplinary reasons and assigned to a supervisory position in the main facility, sometime in 2002.

11. Gary Wileman was removed from the canine unit for cause (unspecified), and now serves in a supervisory position in the main facility.

12. No canine officers have been placed in vacant COIII positions in the main facility at HCC. 13. When vacant COIII positions have been posted, some of the Grievants in this case have applied, but have not received the positions.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievants contend that they have been denied opportunities to be promoted to COIII positions, due to HCC's practice of allowing canine officers to move back into the main facility. They also believe that HCC's "double standard", which allows canine officers to obtain COIII positions through training in that unit, while all others must be tested and approved by a promotion board, is unfair and illegal. They resent "young" officers from canine supervising older, more experienced officers within the facility.

Grievants' discontent with the situation at issue is understandable. It appears to them that officers who obtain positions in the canine unit are somehow "shortcutting" the usual route to promotion to COIII, while all other officers must wait for a position to become vacant and go through the interview and testing procedure. However, Grievants have failed to establish any legal impropriety in Respondent's practice, which will be explained below.

The evidence offered in this case does not show that any vacant positions have been filled by canine officers who returned to the main facility. As explained by Warden William Haines and DOP's Assistant Director Basford, the institution merely used itsdiscretionary authority to place an existing COIII position in a different physical location at the institution. The movement of such an officer in this

manner has not taken a “slot” away from other individuals who may have wanted to apply for a COIII position. As DOP's Administrative Rule provides, only job “openings” or “vacancies” are required to be posted and filled through application procedures. DOP Administrative Rule § 9.7 (2000). In addition, it has been previously recognized by this Grievance Board that placement in the canine unit or the main facility is merely an assignment, not a “position,” and assignments are at the discretion of DOC officials and based upon the needs of the facility. Miller v. W. Va. Div. of Corrections, Docket No. 01-CORR-497 (Sept. 26, 2002). Posting of the positions of the canine officers when they return to the institution would be a blatant violation of the regulations, let alone would any of Grievants wish to have their own positions posted if not vacated by them through resignation or otherwise. As explained by Mr. Basford, the canine officers are merely retaining their previous positions, and are being physically relocated.

Grievants' evidence does not establish that any employee has been denied a COIII position due to the movement of any of the canine officers discussed. Indeed, Grievants do not dispute that the canine officers who have returned to the main building do perform supervisory duties, and they are not misclassified. To “strip” these individuals of their job titles would effectively result in demotions, which would be difficult to justify, in view of the fact that the canine officers are trained to perform the supervisory functions they perform when returned to the facility. Obviously, these employees who have obtained their COIII classification through approved procedures and are performing job duties consistent with that job title should remain so classified. It is clear that the return of some of the canine officers to the main building has caused some resentment on the part of more experienced officers they supervise. (See footnote 1) However, Grievants' belief that the canine officers are somehow obtaining supervisory status through some simplified method to which Grievants have not been entitled, is simply not borne out by the evidence. In fact, the canine officers must go through what is arguably an even more rigorous process than officers who merely apply for a promotion, because they must successfully complete months of training to achieve COIII status. Conversely, officers who apply for standard promotion to a vacant COIII position must apply, be tested, and interview with a promotion board. While the undersigned certainly does not mean to diminish the difficulty presented in successfully obtaining a COIII promotion, it is simply incorrect to characterize the canine officers' “promotions” to COIII as less than hard-earned. Also, as noted by Grievants' own witnesses, tenure does not necessarily result in promotion to a COIII position through the promotion

board, and sometimes less experienced officers obtain those positions.

Finally, it is obvious from Grievants' arguments that there is some confusion regarding the definition of the term “promotion.” Grievants contend that canine officers are obtaining what they believe to be promotions to COIII status, without having to go through a promotion board like all other officers. However, as defined by DOP's Rule, a promotion only comes into play when an employee is placed in a higher-ranking vacant position. See DOP Administrative Rule §3.76. What occurs with the canine officers is actually a reallocation, which is defined in § 3.78 as a reassignment of a “position” from oneclassification to another based upon a significant change in duties and responsibilities assigned to the individual. The vacant position may be posted as a COII position, then after completing training and becoming qualified to perform the duties of a canine officer, these employees are reallocated to COIII, due to the duties assigned to their positions. Similarly, if any of the Grievants were assigned duties and responsibilities which are more consistent with another classification (such as COIII) than their assigned job title, they would also be reallocated. Finally, as clearly established in this case, any Grievant who wishes to become a COIII through the canine unit can apply for any opening which becomes available in that unit, go through the training, and be reallocated to COIII.

As observed by Mr. Basford, what DOC has done through its current practice is allow employees two possible avenues to being promoted to COIII, either through applying for vacancies within the institution, or by going through training and becoming canine officers. Grievants have not proven any illegalities in Respondent's practice.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Grievants have the burden of proving their 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Assignments within an institution are at the discretion of DOC officials and based upon the needs of the facility. Miller v. W. Va. Div. of Corrections, Docket No. 01- CORR-497 (Sept. 26, 2002).

3. Respondent's practice of placing COIII canine officers in supervisorypositions within the

main facility does not violate any law, regulation, policy, or written agreement.

4. DOC's reallocation of COIIs to COIII status after they have completed training for the canine unit and are performing duties consistent with the COIII classification specification is proper.

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, and 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: February 14, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

However, it should be noted that this has occurred only four or five times over the past several years and is not exactly an everyday occurrence.