RUSSELL POWELL,

Grievant,

v. **Docket No. 06-CORR-102**

DIVISION OF CORRECTIONS/
NORTHERN CORRECTIONAL FACILITY,

Respondent.

DECISION

Russell Powell ("Grievant") initiated this proceeding on an unspecified date in early 2006, contending he should have received veterans' preference points during a promotion process which occurred in January of 2006. He seeks to have the Division of Corrections' ("DOC") policy modified so that all veterans will receive preference points when applying for promotions. The grievance was denied at the lower levels, and Grievant appealed to level four on March 27, 2006. A hearing was conducted in Wheeling, West Virginia, on June 21, 2006. Grievant was represented by David Young, and Respondent was represented by Charles Houdyschell, Jr., Senior Assistant Attorney General. This matter became mature for consideration at the conclusion of that hearing, as the parties declined to submit written arguments.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed at the Northern Correctional Center ("NCC") as a correctional officer. (See footnote 1)

2. Grievant is also a veteran of the United States military.

3. Pursuant to DOC Policy Directive 132.02, promotions into vacant positions are handled via a specific process, which includes written testing and an interview board. After the testing is concluded, the six applicants with the highest test scores are interviewed.

4. Effective August 1, 2005, Policy Directive 132.02 granted veterans additional points on the

written examination, which was similar to the policy's granting of additional points for college degrees and experience.

5. Because of an EEO complaint and under advice from the Division of Personnel ("DOP"), the policy was again revised in January of 2006, removing the granting of additional points to veterans. The policy still grants additional points for college credit.

6. Pursuant to statute and the DOP rule, veterans are granting additional points upon entering their first position in the classified service.

7. Grievant applied for and received a promotion in January of 2006, scoring better on the examination than applicants who were college graduates, in spite of the removal of preference points for veterans.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6. *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's statement of relief in this case is to "reinstate military preference points into [Policy Directive 132.02] for all qualified applicants[.]" Clearly, Grievant is not seeking any relief with regard to the promotion which prompted this grievance, because he was the successful applicant. It appears that Grievant merely desires to have military preference points apply to future promotions for all DOC employees.

Since the promotion process which Grievant claims was unfair has concluded with him being the successful applicant, he is basically asking for an advisory opinion from this Grievance Board as to the legality of DOC's policy. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Champ v. Pendleton County Bd. of Educ.*, Docket No. 01-36-419R (July 14, 2003); *Khoury v. Public Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways*

Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998). In addition, Grievant is askingfor unavailable relief, which would be a declaration that DOC's policy is wrong. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

Although Grievant also contends that the change in DOC's policy violates statute and the DOP rule, this issue has been previously answered by this Grievance Board in the negative. In *Chamberlain v. Division of Corrections*, Docket No. 99-CORR-250 (Oct. 18, 1999), it was held that *W. Va. Code* § 6-13-1, which provides for "a preference of five points" is to be given to each veteran's "score received on examination" applies only to examinations for entrance into the classified service, as clarified and defined by DOP's Administrative Rule. Accordingly, as held in *Chamberlain*, a veteran has no statutory or regulatory right to preference rights after he has become a state employee and is a candidate for promotion.

The following conclusions of law support this decision.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6. *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174(Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988).

2. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Champ v. Pendleton County Bd. of Educ.*, Docket No. 01-36-419R (July 14, 2003); *Khoury v. Public Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways Economic Development and Tourism Auth.*, Docket No. 97-PEDTA- 484 (Apr. 17, 1998).

3. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

4. Grievant has failed to prove he has suffered any harm or injury as a result of Respondent's policy, and, accordingly, is seeking unavailable relief from this Grievance Board.

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. 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: July 7, 2006

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant's exact classification (CO 1, 2, 3, etc.) was not specified.