THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBERT AARON HARRIS,
Grievant,

v. **Docket No. 2009-0017-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/TYGART VALLEY REGIONAL JAIL and DIVISION OF PERSONNEL,
Respondents.

DECISION

On July 10, 2008, Grievant filed a level one grievance against his employer, Respondent Regional Jail and Correctional Facility Authority ("RJCFA") with assignment to the Tygart Valley Regional Jail, challenging whether Respondent should have posted a position before filling it. Grievant's level three statement of grievance reads, unedited, as follows:

> ON 11 NOVEMBER 2007 THE POSITION OF CORRECTIONAL OFFICER IV WAS POSTED FOR THE TYGART VALLEY REGIONAL JAIL AND HAD A CLOSING DATE OF 28 NOVEMBER 2007 (SEE ATTACHED POSTING). JASON LAWSON AND I WERE THE ONLY TWO INDIVIDUALS THAT APPLIED FOR THE POSITION. WE TESTED FOR THE POSITION ON 20 DECEMBER 2007, NEARLY ONE MONTH AFTER THE CLOSING DATE. WE BOTH PASSED THE TEST. MR. LAWSON HAD THE TOP SCORE AND RECEIVED THE POSITION, BUT DID NOT START THE POSITION UNTIL THE 15 FEBRUARY 2008, ALMOST 3 MONTHS AFTER THE CLOSING DATE OF THE POSITION POSTING. MR. LAWSON RESIGNED FROM THE REGIONAL JAIL AUTHORITY ON THE 02 JUNE 2008, LEAVING THE POSITION VACANT AGAIN. TYGART VALLEY REGIONAL ADMINISTRATOR, MIKE MARTIN, CONTACTED THE REGIONAL JAIL AUTHORITY CENTRAL OFFICE ABOUT ME FILLING THE VACANT POSITION AND SUBMITTED A LETTER FOR ME TO BE UPGRADED ON 03 JUNE 2008. AS PER POLICY 3038 OF THE WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (SEE ATTACHED COPY) THE REQUEST FOR ME TO BE UPGRADED WAS WELL WITHIN THE TIME

LIMIT. WV REGIONAL JAIL REGIONAL JAIL [sic][1] AND CORRECTIONAL FACILITY POLICY IS PROVIDED TO US TO ADHERE BY AND I DON'T FEEL I SHOULD BE SLIGHTED DUE TO REGIONAL JAIL POLICY NOT COINCIDING WITH THE DIVISION OF PERSONNEL POLICIES. I SHOULD NOT BE PENALIZED FOR THE DURATION OF TIME IT TOOK FROM THE CLOSING DATE OF THE POSTING; TO THE TIME IT TOOK TO ADMINISTER THE TEST AND THEN THE TIME IT TOOK TO FILL THE OPEN POSITION. WHEN THE REGIONAL JAIL PUT IN FOR MR. LAWSON TO GET THE SERGEANT POSITION THE DIVISION OF PERSONAL [sic] DENIED THE UP GRADE AND WANTED THE TEST TO BE REPOSTED. AROUND A MONTH LATER THE DIVISION OF PERSONAL [sic] FINALLY APPROVED THE UP GRADE TO SERGEANT TO MR. LAWSON ON THE TEST THAT WE TOOK ON 20 DECEMBER 2007. I FEEL THAT SINCE THE DIVISION OF PERSONAL [sic] APPROVED THE POSITION OF SERGEANT TO MR. LAWSON ON 15 FEBRUARY 2008 ON THE TEST WE TOOK ON 20 DECEMBER 2007 THEY ACCEPTED ALL OF THE POSTINGS OF THAT TEST AND PER WEST VIRGINIA REGIONAL JAIL POLICY 3038 STATES THAT THERE IS A SIX MONTH ELIGIBILITY LIST FOR ALL THAT TOOK THE TEST AND THAT WAS APART [sic] OF THAT POSTING FOR THE POSITION OF SERGEANT (SEE ATTACHED COPY). I DO NOT KNOW WHY THE DIVISION OF PERSONAL [sic] DID FOR MR. LAWSON AND THEY ARE REFUSING TO DO THE SAME FOR ME. I FEEL THAT I AM NOT BEING TREATED FAIR OR EQUAL AND THAT IS NOT RIGHT TO DO FOR ONE AND NOT FOR THE OTHER.

As relief, Grievant seeks the following,

THE VACANT POSITION OF CORRECTIONAL OFFICER IV AT THE TYGART VALLEY REGIONAL JAIL. I WISH TO RECEIVE BACK PAY FROM THE TIME THE POSITION BECAME VACANT, WHEN MR. LAWSON RESIGNED, AND THE REQUEST FOR ME TO BE UPGRADED, WAS SUBMITTED. I WOULD LIKE THE WEST VIRGINIA REGIONAL JAIL AUTHORITY AND THE DIVISION OF PERSONNEL TO GET TOGETHER AND ENSURE THEIR POLICIES COINCIDE, SO THERE ARE NO FUTURE DISCREPENCIES [sic]. I WOULD LIKE TO SEE THE PROMOTION

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[1]The undersigned realizes it may appear somewhat silly to comment on a typographical error since this appears in all capital letters; however, Grievant used caps throughout the statement of grievance. Accordingly, all due apologies to the reader and Mr. Harris for this commentary. Customarily, a summary of the statement of grievance would be employed by the undersigned. Grievant read this statement into the record as his case-in-chief at level three. Accordingly, the entire statement of grievance is made a part of his Decision.

PROCESS MADE QUICKER SO NO OTHER EMPLOYEES ENDURE A SIMILAR PROBLEM.

This grievance was denied at level one by letter from John L. King, Chief of Operations, dated August 7, 2008, reflecting the outcome of a conference conducted on July 23, 2008. The Division of Personnel was joined as a party to the proceeding at level two. A level two mediation session conducted on November 19, 2008, was unsuccessful. A level three hearing was conducted before the undersigned on March 11, 2009, in Elkins, West Virginia. Grievant appeared pro se. RJCFA was represented by Chad M. Cardinal, Esquire. The Division of Personnel ("DOP") was represented by Karen O'Sullivan Thornton, Esquire. This case was submitted for consideration at the conclusion of the level three hearing, and became mature on that date.

Synopsis

Grievant argues that he should have been awarded the position of Correctional Officer IV (Sergeant), upon the resignation of the Sergeant that tested higher than Grievant during the competitive process. Grievant cites a violation of RJCFA policy in not awarding him this promotion. This policy establishes an eligibility listing for each promotion, and the eligibility listing exists for a duration of six months from the date of issue. Grievant was the first applicant numerically on the eligibility list, and the six-month duration period had not lapsed. However, Grievant is a covered employee under the classified service system. As such, RJCFA is now governed by policies and procedures of the DOP. Its applicable policy does not allow for eligibility listings when awarding a promotion; for each vacancy necessitating a promotional process, a new posting is required. This grievance is denied.

After a detailed review of the entire record, the undersigned makes the following findings of facts:

Findings of Fact

1. Grievant is employed as a Correctional Officer 3 with the RJCFA, holding the assigned rank of Corporal.

2. On November 11, 2007, the position of Correctional Officer IV was posted for the Tygart Valley Regional Jail. Grievant and Jason Lawson were the only two applicants for the position.

3. Both applicants tested for the position after the closing date of the posting. Mr. Lawson received a higher test score than Grievant; consequently, he was awarded the position.

4. Mr. Lawson resigned from the RJCFA on June 2, 2008. Tygart Valley Regional Jail Administrator Mike Martin contacted the RJCFA concerning Grievant filling the vacant position. By correspondence dated June 3, 2008, Mr. Martin requested Grievant be upgraded (reallocated) to the position.

5. RJCFA policy #3038, relating to promotions, reads in pertinent part;

> Applicants shall be ranked on a promotional list according to the officer composite score, as determined by the competitive process. Such list is valid for a period of six (6) months from the date of issue, or until an insufficient number of candidates remain on the list to fill current vacancies. The list shall be utilized during that period to fill subsequent vacancies in the appropriate rank at the particular facility. All appointments from this list shall be in order of ranking for that particular facility.

6. Grievant participated in the competitive process which was held in December 2007. Grievant was the first choice in the order of ranking to fill vacancies for the Tygart Valley Regional Jail.

7. Effective January 1, 2008, Grievant is a covered employee under the classified service system; as such, RJCFA is governed by the policies of the DOP.[2]

8. WEST VIRGINIA CODE § 29-6-24 provides:

> Whenever a job opening occurs within the classified service, the appointing authority shall, in addition to any requirement of law or regulation for the posting of job opening notices, at least ten working days before making an appointment to fill the job opening, post a notice within the building or facility where the duties of the job will be performed and throughout the agency, which notice states that a job opening has occurred and describes the duties to be performed by a person employed in that position.

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 Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

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[2]WEST VIRGINIA CODE § 31-20-27.

Grievant alleges that he should have been awarded the position of Correctional Officer IV at the Tygart Valley Regional Jail upon the resignation of Sergeant Jason Lawson. He asserts no posting was necessary because he was the first in line on the eligibility listing for promotion. DOP counters that for each vacancy that occurs necessitating a promotional process, a new posting would have to take place. While they do not seem to be overly enamored with the situation, RJCFA does not dispute it is a covered agency.

The DOP Administrative Rule in section 9.5 provides that:

> Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. Posting of job openings using electronic or other communications media shall satisfy the requirement to post a notice provided that the appointing authority makes regular and convenient access to the media used available to each classified employee in the agency, or otherwise provides notice to each classified employee in the agency. The notice shall be posted for at least ten (10) working days before making an appointment to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the class to be used to fill the job opening.[3]
>
> (a) The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer . . .

The DOP Administrative Rule in section 3.92 provides that:

> The term "vacancy" is defined as "[a]n unfilled budgetary position in the classified service to be filled by original appointment, promotion, demotion, lateral class change, transfer, or reinstatement."

As John L. King, Chief of Operations for the RJCFA, accurately summed up at level three:

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[3]This posting requirement is also found at WEST VIRGINIA CODE § 29-6-24.

> It cannot be disputed that the Grievant tested for and was placed on an eligibility listing for Correctional Officer IV at the Tygart Valley Regional Jail in December 2007. It cannot be disputed that the West Virginia Regional Jail and Correctional Facility Authority became a covered agency on January 1, 2008. It cannot be disputed that Sgt. Jason Lawson resigned his position at the Tygart Valley Regional Jail on June 2, 2008. It cannot be disputed the West Virginia Division of Personnel has affirmed its policy of not allowing for eligibility listings for promotional processes and denying the approval of Robert Harris' promotion to the rank of Correctional Officer IV (Sergeant).

The undersigned is sympathetic to Grievant's position that, under the policy in effect prior to becoming classified nonexempt, he would be the next in line for promotion pursuant to the eligibility listing; however, RJCFA is bound to follow the laws and procedures related to posting and filling positions. When a given hiring decision is challenged, the grievance procedure allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.* Docket No. 93-RS-489 (July 29, 1994); *Skeens-Mihaliak v. Div. of Rehabilitation Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998); *Ashley v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-070 (June 2, 1995); *McClure v. W. Va. Workers' Compensation Fund,* Docket Nos. 89-WCF-208/209 (Aug. 7, 1989).

Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Surbaugh v. Dep't of Health and Human Serv.*, Docket No. 97-HHR-235 (Sept. 29, 1997). If a grievant can demonstrate the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion, this Board can require the employer to review the qualifications of the grievant versus the successful applicant. *Thibault, supra; Jones v. Bd.*

of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

As noted above, Respondent RJCFA is bound to follow the rules and procedures of DOP related to posting a vacant position. Grievant did not demonstrate that the RJCFA violated any rules and regulations governing hiring; in fact, a violation would have occurred if they had followed their previous policy on promotion. Under the circumstances presented in this grievance, Respondent RJCFA did not act in an arbitrary and capricious manner, nor was the decision to follow DOP directives clearly wrong.

The following Conclusions of Law support the decision reached:

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 Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. Job openings must be posted for at least ten working days prior to making an appointment to fill the position.

3. Grievant has failed to prove that the RJCFA violated any rules and regulations governing hiring; acted in an arbitrary and capricious manner; or that the decision to follow DOP directives was clearly wrong.

According, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 30, 2009

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Ronald L. Reece
Administrative Law Judge