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DENNIS DUNFEE and

Docket No. 89-DHS-41

JANET LEE CONNER

Docket No. 89-DHS-40

v.

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES

D E C I S I O N

Grievants Dennis Dunfee and Janet Lee Conner are employed by respondent West Virginia Department of Human Services and are presently classified as Economic Service Workers. In late January 1989, they filed level four grievances¹ in which they contended that they were qualified for a posted Child Advocate Paralegal Trainee position but the person selected by respondent to fill the position was not. Filing records indicate the grievances were procedurally sufficient and a level four hearing was conducted March 9, 1989. Proposed findings of fact and conclusions of law were submitted by the parties April 11, 1989, and respondent filed a supplemental response April 28, 1989.

¹The grievances were consolidated for hearing and decisional purposes by Order dated February 1, 1989. According to the January 18, 1989, level three decision, the grievances were handled as one grievance at that level. The undated level three transcript shall be cited, T3.____.

Grievants' co-worker, Ronald Faulk, testified on their behalf and, in addition, they subpoenaed John Ferguson, the individual who was employed for the disputed position, and Ferguson's application materials.

According to the testimony adduced, the trainee position was posted August 1, 1988. Dunfee and Conner both applied via an official application for Child Advocate Paralegal or Trainee with the respondent agency. They met the minimal qualifications for the position. Several weeks later Mr. Ferguson appeared, as a new employee, in grievants' department. When questioned by grievants and Mr. Faulk about his employment, Ferguson did not appear to know just exactly what his job title or duties were. Shortly thereafter, grievants inquired to supervisors about the posted position but were not given satisfactory answers. Finally, several months later, Mr. Ferguson was moved to the Child Advocacy Department to fill the trainee position. Grievants then wrote a letter of inquiry about the status of the posted position, but the Supervisor, Elaine Hoffman, refused to respond in writing as they requested and instead told them orally that the job had been filled.

Mr. Ferguson's job application for trainee listed 90 hours of college completed at Marshall University. His employment history listed experience in a Law Office as Legal Assistant for Paula Silver, Attorney. He wrote that the employment commenced in 1987 and continued to the present and denoted that the position was full-time, however, he inserted 20 hours worked per week. Although no salary was listed, he indicated that he

supervised one secretary. His description of his job duties was as follows:

Researching legal documents and recorded judicial decision; preparing legal documents; reviewing cases; interviewing clients; criminal investigations; credit investigations; debt collections; assisting in daily law office activities; examining records of County Clerk's office and Circuit Clerk's office as to liens, judgements.

Numerous other previous jobs listed in the application dealt mainly with horse training and related activities.

Under oath at the hearing, Ferguson related a different calculation of his academic accomplishments, e.g., that he had attained only 74 or 76 college credits. He also described his function as a non-paid legal assistant differently than he stated on the application. At hearing he admitted that he had only observed the work of his attorney wife, Paula Silver, at various hours. Ms. Silver holds the attorney Child Advocate position in respondent's Wheeling agency.

Grievants have shown that respondent's employment of Mr. Ferguson was based, in part, on misleading information supplied by Mr. Ferguson on an official application for the trainee position. Mr. Ferguson's false swearing exposed him to possible discharge as stated on the application:

AFFIRMATION:

In signing this application, you are certifying all statements are true and complete. This application will not receive further consideration should you fail to sign. Misrepresentation is grounds for disqualification and is sufficient cause for your dismissal, should you be employed by our agency.

Moreover, one of respondent's agents began to process Ferguson for employment in the Child Advocate office before

making the paralegal position vacancy known to interested employees (T3.4-8). While grievants have shown that Ferguson's appointment was not warranted, they have proffered no compelling authority, law, statute, regulation or policy which would necessarily accord them preference in properly filling the position.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievants filed respondent's application for a position vacancy posted August 1, 1989, for Child Advocate Paralegal Trainee at respondent's Region I, Wheeling Office. Respondent agreed that grievants were qualified for said position.

2. According to Sandra Gilmore, Administrator for respondent's Child Advocate Bureau, Mr. Ferguson "indicated an interest" in June 1988, in a Paralegal trainee position and, without posting the job at that time, she initiated steps to secure Ferguson a position in the department (T3.4-8).

3. John Ferguson filed an application for the trainee position August 8, 1989. Shortly thereafter, respondent hired Mr. Ferguson as an Economic Service Worker on a 90-day temporary basis. Mr. Ferguson did not appear to know his job duties and told co-workers he was waiting for "something else."

4. Respondent called for a Civil Service Register to consider with respect to filling the trainee position. On September 28, 1989, Mr. Ferguson's name appeared on a certified register.

5. Respondent's agents would not inform grievants of the status of the trainee position when they inquired repeatedly.

6. On November 1, 1988, John Ferguson was hired for the trainee position in a manner which suggests respondent deviated from its normal hiring practices, as is apparent from the record herein.

7. Mr. Ferguson falsified the paralegal/trainee application he submitted. His application stated he had accumulated more college credit than he admitted to in testimony. He wrote that he had meaningful work experience assisting an attorney but he testified that he merely observed his wife, an attorney who also serves as Child Advocate attorney in respondent's Wheeling office, perform those tasks. The remainder of Mr. Ferguson's employment history involves horse-training activities.

8. Grievants' request for relief at level four was that respondent vacate the trainee position and employ one of them for the position.

9. Respondent avers that policy and regulations enable it to hire from within or without the agency, depending on agency need.

CONCLUSIONS OF LAW

1. Grievants have shown that John Ferguson's qualifications for the position of Child Advocate Paralegal trainee were in question inasmuch as Ferguson engaged in false swearing to enhance his credentials, an offense which disqualified him and/or is cause for his dismissal.

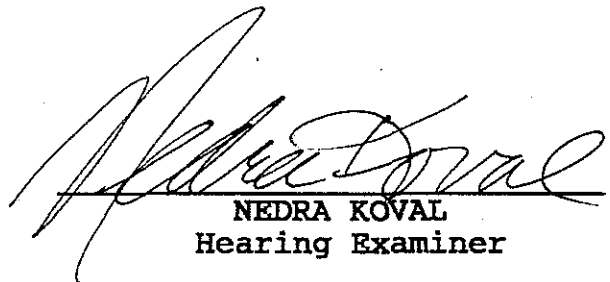
2. The employment of John Ferguson was based on misleading information and unorthodox means which arbitrarily excluded grievants herein from meaningful consideration for the trainee position, notwithstanding this fact, grievants have not shown a clear legal right to the position.

3. Respondent may fill a position vacancy with a qualified person in accordance with policy, rules and regulations and agency needs.

Accordingly, this grievance is **GRANTED**, but only to the extent that respondent is Ordered to vacate the position in question. When the position is refilled, all original applicants should be reviewed and serious consideration must be given to grievants herein. Final determinations must be made in a manner consistent with all relevant employment policies, rules and regulations.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: June 12, 1989



NEDRA KOVAL
Hearing Examiner