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**WEST VIRGINIA EDUCATION AND
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HARRY D. GILLISPIE

v.

Docket No. 89-CORR-105

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

DECISION

Grievant Harry Gillispie, employed by respondent Department of Corrections, is classified as a Section Chief IV (SC4) and assigned to the West Virginia Penitentiary in Moundsville. In early 1989 he filed a grievance protesting certain reassignments of two other staff members ordered by newly-appointed Acting Warden Manfred Holland. He charged that the realignments were violative of Civil Service job posting regulations and requirements. Grievant did not prevail at the lower grievance levels and the matter was heard at level four May 4, 1989.¹

¹The grievance was denied at levels one through three February 2, February 6 and March 1, 1989, respectively. At the conclusion of the level four hearing, the parties agreed to simultaneous submissions of proposed findings of fact and conclusions of law by June 5, 1989, but grievant's proposals were not received until June 13, 1989. Respondent made no submission or request for extension and presumably waived its right to submit.

Grievant reasoned that respondent erred when it reassigned the two staff members because the two positions were originally posted and filled according to Civil Service regulations. He theorized that, the movement and reassignment of duties of selected staff, in effect, vacated the positions and required a reposting and filling in accord with the regulations. Conversely, respondent argues that no regulations were violated as a result of the reassignments because no vacancies were created by the movement of the affected employees to their present duties.

According to grievant, underlying events in this dispute occurred sometime in Fall 1988 during respondent's former administration. Respondent transferred an employee who was magistrate to different duties. Respondent, who had vacant and budgeted positions to fill, then posted a position for a Section Chief II (SC2) - Magistrate. Grievant and others, including at least one former employee, Ed Myers, and an employee in the parole office in Wheeling, Hank Fitzpatrick, made application and were interviewed for magistrate.

According to grievant, then-Warden Jerry Hedrick inquired during interview if he was willing to go back to SC2 level and take a salary cut, to which he, grievant, said no. Mr. Fitzpatrick, who had experience and training in counseling and safety studies, was awarded the position. After the first position was filled another budgeted employment "slot," this time a SC4, was posted for a newly-created prison duty title, Community Services Director/Community Affairs. Ed Myers, who

had served as institutional magistrate in past employment, was ultimately employed, via reinstatement, for the SC4 director position.

Sometime after his interim position began in late January 1989, Acting Warden Holland reassigned Fitzpatrick to other job duties including counseling and safety work in the Classification Department, not a SC2 titled position but with a similar salary base, and moved Mr. Myers to the magistrate position. Mr. Myers was not required to take the lesser wages of SC2 as a result of the movement and he retained his SC4 status; likewise, Mr. Fitzpatrick's salary status did not change. It was not disputed that, as a result of Mr. Holland's realignment of Fitzpatrick and Myers, Myers' SC4 position title of director was abandoned and some of his "director" duties, taken from grievant when Myers was first reinstated, were then reassigned to grievant.²

Mr. Holland testified about the reassignments at the level two proceeding. He stated that, when he assumed the acting warden position, he immediately determined that some personnel placements from the previous administration were faulty because the assignments did not take advantage of the employees' skills,

²Notably, while grievant groused somewhat about having the duties given back to him, he did not make that an issue on his written grievance complaint or at anytime thereafter. Therefore, the matter of his increased duties is not addressed herein.

Grievant, however, did claim at levels two and four that respondent had not yet assigned Mr. Fitzpatrick to any meaningful duties.

training and experience, or meet the prison's needs. Holland said he "saw" Myers³ with magistrate⁴ experience and Fitzpatrick with counseling experience and reassigned⁵ them to more appropriate duties. Mr. Holland concurred with grievant that bona fide vacancies must be posted but expressed a belief that, when no vacant position slot was to be filled, he could, at his discretion, assign or reassign staff to duties within classification or post such duties as a position opening if he wanted input about who was most interested or best-suited for a particular assignment.

Grievant feels he was unjustly denied an opportunity to bid on the magistrate assignment in January 1989. He maintains that respondent should not be able to post an assignment as a vacancy

³Mr. Myers was called by grievant at level four. Mr. Myers testified that Mr. Holland did not discuss the reassignment with him prior to the announcement for him to assume the magistrate duties. He said he did not view the change as a "lateral" transfer as he had less authority and responsibilities in the magistrate position.

⁴The magistrate "position" is not a Civil Service classified position but is one of several duty assignments unique to the needs of the prison.

⁵Some discussion ensued at level four about the difference between transfer and reassignment, that the former usually came about as the result of an employee request, and the latter, due to an administrative decision. These matters would be germane only if a grievant protested his or her own involuntary reassignment and such is not the case herein.

in one instance and reassign personnel to the same duties in another.⁶ Grievant asks as relief in this matter that respondent "[p]lace personnel back to the original position that they received through their interviews and post properly and follow regulations."

Grievant's logic and evidence in this matter are not compelling or persuasive.⁷ According to his own testimony and that of Officer Dennis Eisenhower, who holds a comparable position for respondent, staff at the prison are routinely reassigned to job duties according to need. Respondent's personnel administrator, Gertrude Campbell, pointed out that grievant, in his administrative capacity, regularly assigned and reassigned staff

⁶Grievant's desire to be magistrate was quite obvious and he made forceful argument that, if respondent could move personnel around at the whim of administrators, there would be no reason to have Civil Service rules and regulations. Certainly, if personnel movement via reassignment was for dubious purposes and favoritism, grievant would have a point. However, he made no such allegation. Further, if he did view the magistrate assignment as a SC2 function, see Note 7, infra, his assertion that the reassignments precluded him from an opportunity to move up the "ladder" of career advancement did not have quite the ring of truth to it, especially since he is currently hold SC4 classification.

⁷Testimony was rendered that the magistrate position was generally a SC2 duty and grievant hinted of impropriety in that regard, e.g., that SC4 Myers was thus misplaced by the reassignment, and Mr. Myers did state that the magistrate's responsibilities were "of a lesser degree" than those which he held as director. However, respondent averred that the magistrate duty had been assigned to employees within the SC classification series, I-IV, and to other classification titles as well.

to duties. Ms. Campbell also pointed out that only Mr. Myers and Mr. Fitzpatrick would have some basis for protest if they felt their respective reassignments were functional demotions.⁸

While respondent does not forcefully argue that the reassignments herein are validated by management prerogative, such appears to be the underlying rationale for the actions at issue, and such has been held to be proper by this Grievance Board. Crow v. W.Va. Dept. of Corr., Docket No. 89-CORR-116 (June 30, 1989).⁹ Moreover, Civil Service rules and regulations grievant relies on lend support only to respondent's position in this matter. While there was some suggestion that personnel movement via reassignment was at times the source of disgruntlement and dissatisfaction among staff subjected to the action, grievant was not the party reassigned and has not shown, as a matter of law, a complaint on his own behalf for which relief can be granted.

The remainder of this decision is set forth in the following findings of fact and conclusions of law.

⁸A functional demotion occurs when an employee is reassigned to duties of less number and responsibility without salary or other alteration. Functional demotion could possibly affect an employee's opportunities for further job advancement.

⁹Ironically, it was grievant herein, Officer Gillispie, who caused the grievant in Crow to be reassigned to duties not to that grievant's liking.

FINDINGS OF FACT

1. In Fall 1988 grievant, holding SC4 classification, applied for and did not receive a posted position as SC2 institutional magistrate. The magistrate "position" exists within the prison as a specific duty assignment which is not listed as a Civil Service designated position.

2. The position was posted and filled as a budgeted vacancy according to Civil Service rules and regulations. Shortly thereafter another budgeted position for SC4 director was filled in like manner.

3. In January 1989 then-Acting Warden Manfred Holland reassigned the successful magistrate applicant to duties which comported with his talents and reassigned the other staffer hired Fall 1988, the SC4 director, to the magistrate duty in line with the latter employee's experiences.

4. The two affected employees did not file a grievance on their reassignments.

5. Grievant was not denied a promotional opportunity as a result of the reassignments inasmuch as he currently holds a SC4 rating, the same as the current magistrate.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Hamlin v. W.Va. Dept. of Health, Docket No. H-88-036 (May 15, 1989); Harvey v. Governor's Office of Community and Industrial Development, Docket No. CID-88-061 (Feb. 27, 1989); Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988); Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

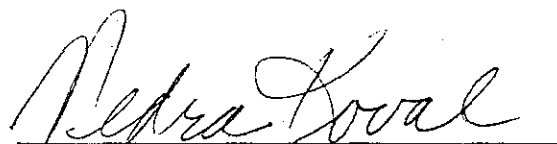
2. The evidence does not preponderate that respondent violated notice and posting regulations for position vacancies by means of its reassignment of certain staff members. See Crow v. W.Va. Dept. of Corr., Docket No. 89-CORR-116 (June 30, 1989).

3. Grievant did not demonstrate a grievable matter on his own behalf or provide a basis in law, regulation or policy on which to grant relief.

Accordingly, this grievance is **DENIED**.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall 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: August 29, 1989


NEDRA KOVAL
Hearing Examiner