FRANK BROOKS THOMPSON, III,

Grievant,

v. DOCKET NO. 94-RJA-139

WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Respondent.

D E C I S I O N

Frank Brooks Thompson, III (Grievant) filed this grievance on April 8, 1994 at Level IV protesting his dismissal by the West Virginia Regional Jail and Correctional Facility Authority (Authority) on March 22, 1994, for failing to successfully complete the physical agility test adopted by the Authority and required of all uniformed staff.

The basic facts are not in dispute. Grievant was hired as a corrections officer for the Authority on July 20, 1993 and assigned to the South Central Regional Jail. He had previously been a corrections officer at the Kanawha County Jail for eight years. On or about August 21, 1993, Grievant was required to take a physical agility test by the Authority. The physical agility test is one step in a six step mandatory hiring process for uniformed staff, adopted by the Authority on April 22, 1988.

Grievant was administered the physical agility test on August 21, 1993. Grievant successfully completed all aspects of the test except for the sit-up portion, in which he was able to complete only 17 of 18 required sit-ups. Grievant was informed by Chief of Operations Howard H. Painter, by letter dated September 7, 1993, that he was being placed on probationary status for six months at which time he would be administered the physical agility test again. The letter stated that "failure to successfully complete the physical agility test at that time may result in your dismissal." Grievant's Exhibit 1.

During this six-month period, Grievant exercised regularly, watched his diet, and lost approximately 15 pounds. He was able to successfully complete the requirements of the physical agility test in his self-testing. Grievant is a former champion kick boxer and holds a second degree

black belt in Karate. He is undoubtedly a serious and disciplined athlete. Nevertheless, on March 18, 1994, Grievant was again administered the physical agility test and failed for the second time to complete the requirements. Grievant was informed by Mr. Painter by letter dated March 22, 1994 that he was being dismissed from the Authority because he "failed to successfully complete the [physical agility] requirements, as outlined in Policy and Procedure Statement No. 3022." Grievant's Exhibit 4.

Grievant testified that the reason he failed the second physical agility test was because he had injured his neck and back shoveling snow and moving a fallen tree in late January or earlyFebruary, 1994. He did not seek medical attention at that time because he did not believe he was "that hurt" and thought he had merely pulled a muscle. He did not miss any work due to this injury. Grievant testified that a number of employees, including his immediate supervisor, noticed that he was having difficulty turning his head and held one shoulder in an awkward position, which he explained was because of the injury. (See footnote 1)

Grievant spoke with Jail Administrator Larry Parsons prior to taking the physical agility test in March, 1994, and indicated that he was having personal problems and asked him "for more time to prepare because I wasn't prepared" to take the test. Grievant testified that

> I stated several reasons, some being emotional and some being physical - I don't think that I ever actually stood right up and told the man that I was injured.

Thus, despite this injury and Grievant's apprehension about taking the physical agility test, he did not tell his supervisor or the persons administering the test that he had suffered an injury. Grievant testified that he "didn't particulary want him to know that I was injured." He offered as an explanation, after much prodding from counsel, that he was concerned that he would not be able to work and was worried about his job security.

Grievant received medical attention for his injury for the first time on March 24, 1994, six days after failing the second physical agility test, and two days after the issuance of hisdismissal letter. Grievant's counsel attempted to persuade Mr. Painter by letter dated March 25, 1994, to stay his dismissal pending his medical treatment and offered to provide an opinion letter from his chiropractor, Russell L. Jones, as proof of his injury. Grievant's Exhibit 2. Grievant and his counsel testified that Mr. Painter had accepted this offer but then rejected it by letter dated April 1, 1994. Grievant's Exhibit 3. Mr. Painter was not called as a witness and no other witnesses testified to the existence of this

"agreement" except for Grievant. It is apparent that Mr. Painter entertained the idea of staying the dismissal, but upon further investigation into the matter, decided to uphold it. It is clear from Mr. Painter's April 1, 1994 letter that he did not consider Grievant to be credible.

Grievant offered the testimony of Dr. Jones to substantiate the nature and extent of his injury. However, the existence of Grievant's injury is not in dispute. It is Grievant's failure to inform his testers of his injury prior to taking the physical agility test that is problematic.

Positions of the Parties

Grievant contends that the Authority's decision to dismiss him for twice failing the physical agility test was arbitrary and capricious. Grievant contends that he has been denied due process because the Authority advised him he could file his grievance directly at Level IV, thus denying him process at the lower levels of the grievance process. Grievant also contends he was denied dueprocess because he was not issued a copy of the Authority's policy and procedures manual when he was hired.

The Authority argues that Grievant is an at-will employee who could be dismissed at any time for any or no reason not violative of public policy. In the alternative, the Authority argues that the passing of the physical agility test by all uniformed personnel of the Regional Jail system is mandated by state law and that finding an exception to this rule for Grievant is not warranted and would unnecessarily expose the Authority to liability for any risks to Grievant's safety, the safety of other jail personnel, and the safety of the inmates under its authority.

Discussion

W. Va. Code § 31-20-27 provides that correctional officers employed by the RJA are classified exempt. Individuals holding positions statutorily exempted from coverage under the classified service are at-will employees who may be terminated for any reason not violative of public policy or for no reason at all. Roach v. Regional Jail Authority, Docket No. 92-RJA-107 (Oct. 8, 1993); Parker v. W. Va. Health Care Cost Review Authority, Docket No. 91-HHR-400 (June 30, 1992). W. Va. Code § 29-6-4(c) lists the offices and positions exempt from coverage under the classified service. That list includes "(14) uniformed personnel of the division of public safety." The RJA was incorporated in the Department of Military Affairs and Public Safety through the provisions of W. Va. Code § 5F-2-1.

Grievant, as an at-will employee, does not possess the same property rights or interests in his

continued employment that employees classified under the state civil service system enjoy. Nevertheless, employees of the Authority have been granted access to the State grievance process, and are entitled to all the protections afforded by that process. Grievant alleges he has been denied due process under the grievance statute.

Grievant filed his grievance directly at Level IV. The Authority filed a Motion to Remand the grievance on the ground that Grievant was a probationary employee and therefore, not entitled to an expedited Level IV hearing pursuant to Simms v. W. Va. Div. of Rehab. Services, Docket No. 92-RS-250 (Jul. 31, 1992) and Bonnell v. W. Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). This motion was filed despite the fact that Grievant was advised by Mr. Painter in his dismissal letter that he could file a grievance directly at Level IV. W. Va. Code § 29-6A-4(e) provides that "an employee may grieve a final action of the employer involving a dismissal, demotion or suspension exceeding twenty days directly to the hearing examiner. . . ." This provision has been interpreted by this Board to apply only to disciplinary actions. See Fox v. Dept. of Health and Human Res., Docket No. 91-HHR-469 (Feb. 18, 1992); Williamson v. Dept. of Human Serv., Docket No. 89-DHS-33 (Feb. 27, 1989). Grievant's dismissal was not disciplinary in nature as no charge of misconduct was brought against him, and thus, it was improper to file thisgrievance directly at Level IV, regardless of his employment status.

Grievant objected for the first time to the Motion for Remand at the Level IV hearing on June 1, 1994, and argument was heard on the matter. The motion was denied, partly due to the Authority's direction to Grievant to file his grievance directly at Level IV. The Level IV hearing was subsequently conducted. Grievant has now apparently withdrawn his objection to the Motion for Remand, and in his fact/law proposal, submitted on June 15, 1994, argues that he was denied due process because he was not given the opportunity to be heard at all levels of the grievance process. This due process claim must be denied.

The Authority's failure to provide Grievant an opportunity to be heard at the lower grievance levels can hardly be deemed a violation of due process. Not every procedural irregularity will result in due process error. Cf. Roberts v. Gatson, 392 S.E.2d 204 (1990). Any error in procedural process is harmless in view of Grievant's submission of the claim for a decision on the merits based on the evidence adduced at the Level IV hearing. Grievant was given a full and fair opportunity at the Level IV hearing to present his case. See Walker v. Gatson, 370 S.E.2d 725 (1988). (See footnote 2)

Nonetheless, the Authority is cautioned to accurately advise grievants in the future regarding the proper procedure for redressof their grievances in order to avoid the confusion which resulted in the instant case.

Grievant also claims that he has been denied due process because he was not personally issued a copy of the Authority's policy and procedure manual, particularly the policy regarding medical deferrals. This claim is without merit and is denied. Jimmy B. Plear, Deputy Chief of Operations for the Regional Jail Authority, testified that 7 or 8 copies of the Authority's policy and procedure manuals were located in the office at the South Central Regional Jail and were available for all personnel to review. Grievant testified that he had looked at these manuals on occasion for guidance. There is no requirement that each individual employee of the State be issued their own policy and procedure manual. According to the Division of Personnel's Policy on Policies, "a complete set of policies and bulletins will be maintained at each worksite in a central location that is easily and openly accessible to all employees." Additionally, the Division of Personnel maintains that "it is important for all employees to be aware of the policies and procedures which exist within their own division/agency." W. Va. Div. of Personnel Rules and Regulations (Rev. 1/3/94). The evidence shows that the Authority complied with this directive on policies and that Grievant had the opportunity to and sometimes did review the policy and procedure manual at his worksite. His failure to become familiar with those policies he now claims are crucial to his casedoes not amount to a denial of due process on the part of the Authority.

In order to prevail, Grievant must establish the truth of his allegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989). Grievant has failed to prove that he has been denied due process and those claims are denied.

Grievant also claims that the Authority's decision to dismiss him for twice failing to pass the physical agility test was arbitrary and capricious. In reviewing the dismissal of an at-will employee, this Board does not apply an arbitrary and capricious standard. The rule that an employer has the absolute right to discharge an at-will employee is tempered by the principle that the discharge cannot contravene some substantial public policy. To identify sources of public policy, courts look to constitutional provisions, legislative enactments, regulations, or judicial opinions. Bowe v. Charleston Area Medical Center, 189 W. Va. 145, 149, 428 S.E.2d 773, ___ (W. Va. 1993); Reed v. Sears, Roebuck & Co., Inc., 188 W. Va. 747, 754, 426 S.E.2d 539, ___ (W. Va. 1992).

The physical agility test is required of all correctional officers working in the Regional Jail system. The West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails, 95 CSR 1, provides in Section 95-1-4, Personnel, that

> the selection, retention, and promotion of all personnel shall be on the basis of merit and specified qualifications.

Subsection 4.5 specifies that a physical examination of all employees shall be given at the time of employment and reexamination when indicated. The Authority has promulgated regulations, in accordance with this section, which set out the requirements for the physical test which must be taken and passed. Thus, the administration of a physical agility test is mandated by legislatively enacted state law and must be followed. Grievant must prove by a preponderance of the evidence that the Authority somehow contravened this legislatively enacted regulation in dismissing him in order to prevail in this grievance.

The physical agility test is described in detail in W. Va. Regional Jail and Correctional Facility Authority Policy and Procedure Statement 3022, dated December 31, 1988. Respondent's Exhibit 1. Policy 3022 states that "applicants for a position of Correctional Officer in regional jails shall be required to successfully complete an examination of physical agility. Tenured officers shall successfully complete an annual test of physical agility." Policy 3022, p. 1. Thus, not only is it important that new hires are physically fit for the job, but tenured employees must remain physically fit during their employment with the Regional Jail Authority.

The justification given for the physical agility test is

> that the Authority is legally responsible for the safety of inmates in regional jails and, although this responsibility entails virtually every aspect of a correctional officers' duties, the rendering of aid to an injured inmate in an emergency situation is of paramount importance. Although the frequency and extent of aid is unpredictable and incaculable, the officer must be able to perform the task when required.

Policy 3022, p. 1. Not only is the safety of the inmates of paramount importance, but the safety and security of the facility and other correctional officers is of the utmost concern to the Authority. The purpose of the physical agility test is to make sure physically qualified people are employed in the

facility so that they can protect themselves and others if it becomes necessary. There is no room for error in a jail environment. Grievant was unable to successfully complete the test on two different occasions. This makes him physically unable to perform the duties of a corrections officer. The standards set forth in Policy 3022 and developed by the Authority have a reasonable purpose and were administered to Grievant in a fair and objective manner. The Authority's decision to dismiss Grievant for failure to pass the test was neither arbitary nor capricious, and was indeed in keeping with its stated purpose and justification for requiring such a test. Grievant has failed to demonstrate how his dismissal for twice failing the physical agility test contravenes the purpose behind the enactment of the regulation.

In addition to the foregoing facts, the following conclusions of law are made.

Conclusions of Law

1. W. Va. Code §§ 30-20-27 and 29-6-4(c) establish that Grievant, a correctional officer employed by the Regional Jail and Correctional Facility Authority, is a classified-exempt employee who serves at the will and pleasure of the Authority.

2. At-will employees may be terminated for any reason not violative of public policy or for no reason at all. Roach v. Regional Jail Authority, Docket No. 92-RJA-107 (Oct. 8, 1993).

3. Grievant has not shown that he was dismissed in violation of any public policy.

4. Grievant has failed to prove that he has been denied due process in light of the fact that he was given the opportunity to have a full and fair hearing, have representation of counsel, and an opportunity to confront witnesses at the Level IV hearing.

5. Grievant has failed to prove that he has been denied due process by not receiving his own individual copy of the Authority's policy and procedure manual, when such manual was available to all employees for review.

6. Grievant has failed to prove that the Authority's decision to dismiss him for twice failing the required physical agility test was arbitrary or capricious.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO ALLEN

Administrative Law Judge

Dated: July 22, 1994

Footnote: 1 *Grievant did not call any jail employees as witnesses on his behalf at the Level IV hearing.*

Footnote: 2 *The benefits received by the provisions of the grievance statute do not in any way alter Grievant's at-will employment or provide Grievant with a property interest in his employment. However, the grievance statute does confer procedural rights which must be afforded to employees within its scope.*