STEPHEN C. GILLESPIE AND MARSHA ESTEP-GILLESPIE

v. Docket No. 96-RJA-425

WEST VIRGINIA REGIONAL JAIL AND

CORRECTIONAL FACILITY AUTHORITY

DECISION

The grievants, Stephen Gillespie and Marsha Estep-Gillespie, are husband and wife employed by the West Virginia Regional Jail and Correctional Facility Authority (CJA) as Correctional Officer II (CO II) and Booking Clerk respectively. On or about August 13, 1996, when both were assigned to the Southern Regional Jail (SRJ) in Beckley, they received a memorandum from RJA Chief of Operations Jimmy Plear advising that in accordance with CJA policy, their July 19, 1996 marriage would necessitate that one or the other resign or request a transfer to another CJA facility. The memo further advised that policy provided that if these options were not pursued, the less senior of the two would be dismissed. The grievants rejected both choices and filed a grievance on August 21, 1996, contesting the validity of the policy. There was no authority to grant relief at Levels I and II; (See footnote 1) a Level III hearing was held September 20, 1996.

The Level III Hearing Evaluator subsequently determined that, despite their refusal to request transfers, RJA should deviate from its policy and retain Mrs. Gillespie at SRJ andreassign Mr. Gillespie to the South Central Regional Jail (SCRJ) near Charleston. Through counsel, they lodged a written protest of that proposal, and appealed to Level IV on October 16, 1996; Mr. Gillespie's transfer was effective on that date. A Level IV hearing was held December 19, 1996, (See footnote 2) and the parties submitted proposed findings of fact and conclusions of law by January 2, 1997.

Background

RJA's Policy and Procedure #3006, in effect since December 31, 1988, specifically provides:

Because there is potential for conflict, jealousy or other emotional response that may affect security or programming for the inmate population, no more than one member of a family shall be employed in the same facility.

1. Members of a family shall include: spouse, son, daughter, son-in- law, daughter-in-law, stepson, stepdaughter, father-in-law, mother-in-law, grandfather, grandmother, grandson, granddaughter, father, other, brother, sister, brother-in-law, and sister-in-law.

2. Applicants having anyone with the above relationship working in a specific facility shall not be considered for employment in that facility.

3. If, due to marriage, or other event, a relationship as described above occurs in a facility, one employee in the relationship must request, within sixty (60) days, a transfer to another facility operated by the Authority. Such transfer will be granted if the employee can and will meet the Authority's residency requirement of maintaining his/her primary residence within one hour travel time of the facility where he/she is employed.

In the event that one employee in such a relationship does not request a transfer or such transfer cannot be made for any reason, the employee in the relationship with the least amount of seniority with the Authority will be dismissed from the employ of the Authority.

Also relevant to the inquiry is RJA's Policy #3009, effective July 19, 1989, which, in pertinent part, provides:

All employees of the Authority, who are employed in a regional jail, shall maintain their primary residence within the region or an adjacent region of the facility in which they will be working. Such residence shall be within reasonable driving time of the facility at which they will be working, as determined by the Executive Director.

Applicants who successfully complete the hiring process for employment by the Authority, and who reside outside the region or an adjacent region must agree to move their primary residence to the region or an adjacent region and within a reasonable driving time of the facility in which they accepted employment, within ninety (90) days from date of employment.

Applicants who successfully complete the hiring process for employment by the Authority whose primary residence is located more than a reasonable driving time from the facility at which they will be working must agree to move their primary residence within a reasonable driving time of such

facility and within West Virginia within ninety (90) days from date of employment.
Any employee failing to adhere to this policy shall be dismissed from employment with the Authority.

When the facility Administrator or the Executive director has reason to believe that an employee is not in compliance with the residency requirement he or she shall notify the employee in writing of such believed non- compliance and give the employee a reasonable opportunity to demonstrate that he or she is in compliance with the requirement. Upon failure to demonstrate compliance with the requirement the employee shall be dismissed.

All employees shall promptly notify the facility administrator of any change in their residence.

The Executive Director shall determine reasonable driving time to facilities for purposes of this policy.

The grievants concede that they were aware of the ramifications of Procedure #3006 when they were wed. There is no dispute that they cohabited for a period prior to their marriage, and that other couples employed at SRJ have done so without overt reaction on RJA's part. The uncontroverted evidence of record is that while RJA administrators become concerned over and most likely afford some special attention to any romantic involvement among employees, the agency has consistently declined to inquire into the nature of the relationship, if any, of unmarried employees who share living quarters. It is clear that Procedure #3006 is invoked only when administrators are advised that “marriage or other event” has created one of the familial relationships set forth therein.

The grievants also concede that the probability of assaults, both verbal and physical, against SRJ employees is greater in the intake or “booking” area of SRJ, where Mrs. Estep- Gillespie is stationed, than other sections of the facility, and that, in the normal course of his duties as a COII, Mr. Gillespie might be called upon to assist and/or protect her. There isno evidence of any instances prior or subsequent to their marriage where the grievants' relationship actually caused security-related or other problems. (See footnote 3)

Finally, the record reflects that Mr. Gillespie has more seniority with RJA than his wife, and that the decision to transfer him to SCRJ was based on the availability of a COII vacancy there and RJA's desire to retain both employees. It appears that if there were Booking Clerk vacancies in other RJA facilities, they were remotely situated to SRJ.

Argument

The grievants claim that the travel time associated with Mr. Gillespie's assignment to the South Central Regional Jail has caused them significant financial problems; they advance numerous arguments for reversal of the action. Their Level IV proposals set forth the following claims:

The failure of Policy 3006 to be applied to situations where individuals cohabited and/or live together, with strong emotional and sexual ties, creates a situation that when the individuals attempt to 'legitimize' their relationship by a marriage ceremony results in a potential for encouraging individuals to live together rather than become married and, therefore, has a discriminatory amoral result of requiring individuals to decide whether to remain employed, while living together, or potentially be fired merely because of their decision to marry.

The Jail Authority violated Policy 3006 by the October 16, 1996, Transfer Order, requiring Stephen Gillespie (Grievant with the most seniority) to be transferred to the South Central Regional Jail, allowing Marsha Gillespie to remain employed at the Southern Regional Jail. Policy 3006 mandated and required the Jail Authority to fire Marsha and allow Stephen Gillespie to remain employed at the Southern Regional Jail.

The July 19, 1996 marriage of Grievants does not constitute an “event” under Policy 3006 based upon their having lived together and worked together at the Southern Regional Jail for over two (2) years prior to their marriage and it is recognized, in this case, that there was no more emotional attachment between Grievants as a result of their “marriage.”

The Regional Jail Authority did not provide any sufficient evidence to justify the policy concerns underlying Policy 3006 and failed to provide any sufficient evidence as to the adverse effect of Grievants' employment due to their marriage.

Grievants challenge for the constitutionality and discriminatory effect of Policy 3006 is recognized in that requiring them to get a divorce to remain employed while living together violates Sate and Federal laws as being unconstitutional, ambiguous, vague, discriminatory, amoral and impossible to implement.

The stated “policy” of Policy 3006 that there is a “potential for conflict, jealousy or other emotional

response that may affect security or programming" if there is more than one member of the family employed in the same facility and the corresponding "Residency Requirement" of less than one hour travel, was effective in December of 1988, prior to the institute of the Regional Jail system, envisioning the system of county jails and, therefore, has been rendered "moot" and unenforceable--the subsequent attempt to amend the "Residency Requirement" by allowing moves into an adjacent region is improper. Therefore, the entirety of Policy 3006 is deemed invalid and incapable of application and enforcement in the case at hand.

Despite their assertion that Procedure #3006 required Mrs. Gillespie's dismissal, the grievants seek, as relief, that they be allowed a "waiver" of its provisions and that they both be allowed to remain at SRJ. They also seek restitution for travel and other costs. RJA responds that the portions of Policy #3009 which address a "reasonable driving distance" superseded the "one-hour" requirement in Policy #3006. RJA notes, and the record confirms, that SRJ and SCRJ are in "adjacent regions," and that other RJA employees, including RJA Executive Director Jack Roop, commute from Beckley to Charleston each work day. The agency denies that Policy 3006 is unconstitutional in its application or otherwise; it avers generally that the underlying philosophy of the policy is sound, and that its provisions were fairly applied. RJA concedes that a strict application of the policy would have required Ms. Gillespie's dismissal and her husband's retention at SRJ.

Findings and Conclusions

It is not necessary to address in detail each and every claim advanced. The grievants' legal arguments are, for the most part, specious; several of their contentions are simply illogical. The undersigned summarily finds as follows. Policy #3009 supplanted and/or augmented Policy #3006 and, in any event, when read in pari materia, they authorized Mr. Gillespie's reassignment to SCRJ. Notwithstanding the policies' provisions on the distance of an employee's residence from his or her assigned facility, RJA had the inherent authority to make reasonable accommodations aimed at retaining both employees. Mr. Gillespie's transfer to SCRJ was the most reasonable and perhaps only alternative to his wife's dismissal.

The undersigned further finds that there was no ill-will between the grievants and RJA, and the agency's decision to transfer Mr. Gillespie was motivated solely by a desire to retain two employees

with commendable work records. Since the grievants are not seekingthe termination of Mrs. Gillespie's employment, they cannot rely, in any manner, on the deviation from the provision of Procedure #3006 which mandates the dismissal of the least senior employee in a husband and wife relationship.

It is telling that the grievants' arguments do not reflect which portion of the West Virginia Constitution and/or the United States Constitution prohibits RJA from adopting or implementing the policy in issue. The undersigned is also unable to locate any such provision.

In Townshend v. Bd. of Educ. of the County of Grant, 396 S.E.2d 185 (W.Va. 1990), the West Virginia Supreme Court of Appeals did not hesitate to uphold a policy whereby employees of a county board of education were prohibited from supervising their spouses and certain other relative-employees. On the question of the soundness of the policy's underlying philosophy, the Court remarked, “We have no doubt that in many cases where husbands and wives are employed in supervisor/supervisee capacities, the married couple makes an exemplary effort to maintain fairness, but we cannot say that a policy based on the assumption that married couples are susceptible to the natural prejudices of their relationships is irrational, arbitrary or capricious.” Id. at 398. It seems clear that the Court would endorse a policy which does not necessarily address fairness, but seeks to ensure the couple's and other employees' physical well-being and the security of a correctional facility.

The grievants are correct in asserting that they were required to make, in their words, a choice between “amoral” and “legitimate” living arrangements. It is wholly inaccurate and even illogical, however, to say that RJA's policy placed them in that position, and that thepolicy is, therefore, infirm. It was the grievants' informed decision to engage in a romantic relationship which ultimately forced them to choose between two legal rights, i.e., the right to wed and the right to retain their positions at SRJ. “Such mutually-exclusive 'choice of right' situations are neither uncommon nor inherently unfair.” Beverly v. Wyoming County Bd. of Educ., Docket No. 91-55-408 (Jan. 23, 1992).

In summary, a preponderance of the evidence in the case establishes that Mr. Gillespie's transfer comported with all applicable RJA policies and procedures, and that it was otherwise effected in a manner which was neither arbitrary nor capricious. The grievants have failed to substantiate their claim that the policy is “invalid, unconstitutional, discriminatory, and impossible to enforce or apply.”

Accordingly, the 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 hsould 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: March 28, 1997

Footnote: 1

The Level III decision was not issued within the timeframes provided for in W.Va. Code §29-6A-4(c); at the Level IV hearing, CJA conceded the infraction. The grievants did not indicate what injury they had incurred, and the undersigned ruled that the error was harmless.

Footnote: 2

This hearing also was not scheduled within the timeframes of Code 29-6A-4. At the hearing, the undersigned explained that physical plant-related problems with the Beckley Office of the Education and State Employees Grievance Board and the necessary relocation of hearing sites had caused the delay. The grievants' claim that the delay was an encroachment on their "due process" rights was noted and rejected.

Footnote: 3

There was some brief testimony at Level IV from SRJ Administrator Dudley Burgess to the effect that a Sergeant Robinson had advised him that the grievants had been eating lunch together; he seemed to imply that they were spending an excessive amount of time socializing. This evidence has been disregarded. On cross-examination, Mr. Burgess essentially could not explain the basis for this complaint or provide details on the extent or times of the grievants' alleged excessive contacts. The record as a whole does not support that Sergeant Robinson's report was well-founded.