RAY GEROSKI,

Grievant,

v. Docket No. 96-CORR-117

WEST VIRGINIA DIVISION OF CORRECTIONS\
DAVIS CENTER,

Respondent.

DECISION

Grievant, Ray Geroski, filed this grievance against Respondent, West Virginia Division of Corrections\Davis Center, on January 26, 1996, alleging age and “job discrimination.” As relief, Grievant seeks to be reclassified as a Correctional Officer III.

Grievant was denied relief at Level I by his immediate supervisor on January 28, 1996. On February 2, 1996, the grievance was denied at Level II by David L. Hockman, Superintendent of the Davis Center. On March 8, 1996, Level III Hearing Evaluator Clinton W. Semmler denied the grievance. Grievant's appeal to Level IV was received by the Grievance Board on March 19, 1996. At Level IV, hearings were set for May 23, 1996, June 18, 1996, August 15, 1996, and October 8, 1996. Each hearing was continued for good cause. A Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on December 6, 1996. The grievance becamemature for decision on January 10, 1997, at the end of the post-hearing submission deadline.

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant has worked at the Davis Center over 17 years, and holds the rank of Correctional Officer (CO) II. Grievant is 58 years old.

2. In the past, Grievant has served as Shift Supervisor, and has trained newly hired employees. He has also received certification in Respondent's Journeyman Program.

3. On October 5, 1995, David L. Hockman, Superintendent of the Davis Center, wrote a letter to Nicholas J. Hun, Commissioner, requesting that Phares Evans, CO II, be promoted to CO III..

4. When the promotion was requested there were not any vacant CO III positions at the Davis Center.

5. Ms. Mary Sagace, Business Manager at the Davis Center, was informed by the West Virginia Department of Personnel (Personnel) that Mr. Evans' CO II position was being reallocated because of the duties he performs. On the “Personnel Action Form,” Ms. Sagace checked the promotion box. It came back from Personnel with promotion box marked through, and reallocation checked.

6. Phares Evans' CO II position was reallocated to a CO III on October 17, 1995. He has worked at the Davis Center for nine years, an serves as a field training officer.

7. Mr. Evans was not promoted, and his position was not posted.

DISCUSSION

Grievant alleges “job and age” discrimination. W. Va. Code §18-29-2(m) provides:

> "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

Grievant did not seriously pursue his claim of discrimination. Grievant's testimony and evidence were mainly directed toward reasons why he thought he should be promoted since Mr. Evans was allegedly promoted. However, Grievant and Mr. Evans do not have similar job responsibilities.

Mr. Evans' job responsibilities include being a filed training officer for the Davis Center and other Correctional institutions. “He goes to the Academy to assist with training (one time for six weeks) to teach CPR and First Aid. He also goes to Huttonsville and Mount Olive to help get their staff trained in these areas so that the department meets the requirements set forth by policy.” Level IV, Gr. Ex. 3.

Concerning Grievant's allegation of age discrimination, he failed to prove the age of Mr. Evans (which is required in proving age discrimination). Therefore, Grievant failed to prove, by a preponderance of the evidence, that discrimination was a factor in the reallocation of Mr. Evans' position.

Although the effect might be identical, Grievant failed to make a distinction between a promotion and the reallocation of a position. Grievant asserted that Respondent violated Policy Directive 413.01, entitled Correctional Officer Promotion. However, that policy is irrelevant in this case because Mr. Evans' position was reallocated; he was not promoted. According to the evidence produced during the hearing, tenure and seniority are not factors considered when a position is reallocated, and positions which are reallocated do not need to be posted.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters Grievant must prove all of the allegations constituting his grievance by a preponderance of the evidence. Rice v. W.Va. Dept. of Tax and Revenue, Docket No. 90-ABCC-452 (Jan. 23, 1992); Owens v. W.Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

2. Grievant failed to prove, by a preponderance of the evidence, a claim of discrimination, or that he is entitled to the relief he sought.

Accordingly, the grievance is **DENIED**.

Any party 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 theappropriate court.

Dated: 4/23/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE