JOHN S. TOTH,

Grievant,

v. Docket No. 98-CORR-344D2*

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION ON DEFAULT

John S. Toth (Grievant) is employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer IV, holding the rank of Sergeant, at the Anthony Correctional Center (ACC). He filed this action on August 13, 1998, alleging that he was wrongly denied promotion to Lieutenant. This grievance was denied, also on August 13, 1998, by Chief Correctional Officer V. Wayne White. CORR received Grievant's appeal to Level II on August 14, 1998. Grievant received no response at Level II until August 20, 1998, when he received a letter, dated August 19, 1998. This letter scheduled a hearing for this grievance on August 24, 1998. Grievant sent a letter to CORR, dated August 22,

***A "2" has been added to the docket number to distinguish this decision from the "Order Granting Default" previously issued in this matter.1998, claiming that he had prevailed by default, as CORR had failed to hold a conference on his grievance within five days of its receipt of his appeal.**

On September 2, 1998, Grievant appealed his claim of default to Level IV. A Level IV default hearing was held on November 17, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. The undersigned administrative law judge issued an Order Granting Default on December 10, 1998. (See footnote 1) **CORR timely requested a hearing to demonstrate that the remedy, promotion, sought by Grievant was clearly wrong or**

contrary to law.

That hearing took place on January 19, 1999. Grievant was represented by Jack Ferrell of the Communications Workers of America, and CORR was represented by Assistant Attorney General Leslie K. Tyree. The parties declined to submit proposed findings of fact and conclusions of law and this grievance became mature for decision at the conclusion of the hearing.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1 1.

On April 24, 1998, three Lieutenant positions were posted at ACC.

2 2.

Grievant was one of four or five applicants for the positions.

3. Grievant was not selected for promotion. Instead, Sergeant Cochran (Cochran) was promoted, on or about August 12, 1998. 4. Grievant filed this grievance on August 13, 1998, alleging that he was wrongly denied promotion from Sergeant to Lieutenant.

5.. CORR issued a response at Level II on August 19, 1998, which this Grievance Board determined was untimely, placing CORR in default in accordance with W. Va. Code § 29-6A-3(a)(2).

6. CORR's policy mandates a selection process consisting of a three member review board, which assesses candidates in the areas of a promotion test (10 quality points maximum), seniority (10 quality points maximum), in-service training (five quality points maximum), apprenticeship (five quality points maximum), and interview/exercises (50 quality points maximum), so that a perfect candidate would score 80 quality points.

7. The promotion test has a maximum raw score of 100, and CORR policy mandates that a candidate's score be divided by ten to determine his or her number of quality points.

8. Grievant took the promotional examination and passed, with a raw score of 84.

9. Grievant scored 53.15 quality points. Sergeant Cochran scored 52.64 quality points.

10. Grievant has more seniority than Cochran.

11. CORR policy requires that the candidate with the highest point total must be selected.

12. Patterson did not select Grievant for promotion because he was the subject of an investigation. 13. The incident that led to the investigation occurred on or about July 26, 1998.

14. Grievant was disciplined, pursuant to the investigation, during September of 1998.

15. CORR's Policy Directive 413.01, which establishes CORR's policy for promotion, does not provide for consideration of a candidate's disciplinary record as part of its criteria for selection of officers for promotion.

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. (See footnote 2) This default provision is contained in W. Va. Code § 29-6A-3(a)(2), which provides, in pertinent part:

> **The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.**

(emphasis added).

In a default matter, Respondent has the burden of establishing its defense by a preponderance of the evidence. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104(June 30, 1994); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Obviously, promotion from Sergeant to Lieutenant is a remedy which logically "flows from" this grievance. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

In previous decisions that did not involve the default provision, this Grievance Board has

declined to instate employees to positions they were seeking through the grievance procedure when it was determined that they did not hold the minimum qualifications required for the position. Hill v. Marshall County Board of Education, Docket No. 97-25- 102 (Dec. 31, 1997), Quintrell v. Lincoln County Board of Education, Docket No. 95-22- 051 (Aug. 31, 1995), Cyphers v. Marion County Board of Education, Docket No. 94-24- 134 (Oct. 31, 1994), Weaver v. Mason County Board of Education, Docket No. 94-26-128 (Oct. 25, 1994).

Implicit in these decisions is the concept that government agencies should not conduct the public's business through employees who are not minimally qualified to perform the essential duties of their jobs. For example, an unsuccessful applicant for a school bus operator's position, who prevailed by default, should not be selected to transport students if s/he does not have the license or certification required to operate a school bus. Therefore, in accordance with W. Va. Code § 29-6A-3(a)(2), it is clearly wrong to award a position to an employee by default where s/he does not meet the minimum qualifications. Williamson v. W. Va. Dep't of Tax and Revenue and W. Va. Dep't of Admin., Div. of Personnel, Docket No. 98-T&R-275D (Jan. 6, 1999).

Accordingly, an agency may establish that the remedy of placing a grievant into aposition, as the result of a default occurring under the state employee grievance procedure, is clearly wrong or contrary to law by demonstrating, by a preponderance of the evidence, that a grievant does not hold the training, license, or certification minimally required for the position or classification at issue. Whether a prevailing grievant holds the minimum qualifications for a given job must be determined on a case-by-case, fact-specific basis.

At the second Level IV default hearing, CORR's sole witness was Warden Patterson, who testified that CORR employs a lengthy selection process, which is designed to guarantee that only the most qualified officers are promoted. Patterson further testified that, because Grievant and Cochran were tied for the third of the three available Lieutenant positions, (See footnote 3) **he decided to employ a tie-breaker, pursuant to CORR's Policy Directive 413.01 § 2.07, and that he broke the tie by considering Grievant's disciplinary action.** (See footnote 4) **However, CORR did not cite any statute, policy, rule, or regulation, and presented no other evidence, to prove that promoting Grievant to Lieutenant would be clearly wrong or contrary to law. CORR also presented no evidence to prove that Grievant does not hold the training,**

license, or certification minimally required for the position or classification at issue. Accordingly, CORR failed to rebut the presumption that Grievant prevailed on the merits of his grievance.

At the Level IV hearing, CORR chose instead to seek a reconsideration of the default decision, Toth v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-344D (Dec. 10, 1998), already made in this grievance. This Grievance Board has recognized the principle that "finality is desirable in the law," and applied it to grievance procedures. Spurlock v. Lincoln County Bd. of Educ., Docket No. 97-22-019 (May 29, 1997), and cases cited therein. The Supreme Court of Appeals of West Virginia has explained the doctrine of stare decisis as follows: "[a] simple statement of this rule will be found in Black's Law Dictionary, 3d Ed., wherein it is stated that it means: 'To stand by decided cases; to uphold precedents; to maintain former adjudications. . . [t]he doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.' Its further purpose is '[t]o adhere to precedents, and not to unsettle things which are established." In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113 (1947). In the interest of both finality and judicial economy, the undersigned declines to revisit his previous decision.

CORR then argued that it is the position of CORR and the Division of Personnel **(See footnote 5)** **that promotion should not occur by default, but should be awarded only to candidates who earn it by virtue of their qualifications. Leaving aside the fact that Grievant's score during the selection process was higher than the successful applicant's, and the fact that Grievant has more seniority than the successful applicant, See W. Va. Code § 29-6-10(4), the undersigned is not permitted to enact or amend legislation. If CORR and the Division of Personnel are unhappy with the changes in default procedures enacted by the legislature in 1998, their remedy is with the legislature.**

Accordingly, Grievant will be promoted to Lieutenant, effective the date Cochran was awarded the promotion; and awarded all back pay and benefits, including interest, to which he would have been entitled as a Lieutenant.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2).

2. When the employer asserts that the remedy received is contrary to law orclearly wrong, the employer must establish such a defense by a preponderance of the evidence. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

3. Where a grievant seeks instatement to a particular position or classification as a remedy based upon the employer's default at Levels I through III of the grievance procedure for state employees, and the employer establishes by a preponderance of the evidence that the grievant does not hold the minimum training requirement to perform the essential duties of the position, awarding such a position to an unqualified individual would be "clearly wrong" within the meaning of W. Va. Code § 29-6A-3(a)(2). Williamson v. W. Va. Dep't of Tax and Revenue and W. Va. Dep't of Administration, Div. of Personnel, Docket No. 98-T&R-275D (Jan. 6, 1999).

4. Whether a prevailing grievant holds the minimum qualifications for the position or classification at issue must be determined on a case-by-case, fact-specific basis. Williamson, supra.

5. Respondents failed to establish that awarding the remedy of promotion to Lieutenant to Grievant would be clearly wrong or contrary to law.

Accordingly, Respondent's request for a determination under W. Va. Code § 29-6A- 3(a)(2), that the remedy sought, promotion from Sergeant to Lieutenant, is clearly wrong or contrary to law, is DENIED. Because it has been presumed, in accordance with W. Va. Code § 29-6A-3(a)(2), that Grievant prevailed on the merits of his grievance, this grievance is GRANTED, and Respondent CORR is Ordered to promote Grievant to Lieutenant, effective the date

Cochran was awarded the promotion; and award him all back pay and benefits, including interest, to which would have been entitled as a Lieutenant. Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated February 2, 1999

Footnote: 1

Toth v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-344D (Dec. 10, 1998).

Footnote: 2

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

Footnote: 3 ***Patterson did not explain how Grievant and Cochran could have been tied, given the fact that Grievant scored higher than Cochran, and CORR's policy mandates the selection of the candidate with the highest score.***

Footnote: 4 ***Grievant was not informed of any disciplinary action against him until September of 1998, when he was reprimanded. However, given the outcome of this decision, it is not necessary to decide whether Grievant could have been denied promotion based upon a reprimand occurring after the promotions were awarded. It is noted that CORR's Policy Directive 413.01 does not provide for consideration of a candidate's disciplinary record as part of its criteria for selection. In any event, CORR failed to present any evidence to show that it would have been clearly wrong or contrary to law to promote an officer who was soon to be reprimanded.***

Footnote: 5 ***At the beginning of the Level IV hearing, CORR's counsel informed the undersigned, for the***

first time, that she represented Personnel in this matter. Therecord contains no mention of any request by Personnel to become a party to this grievance.