

EUGENE BLANKENSHIP,

Grievant,

v. Docket No. 99-CORR-505

**WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,
and WEST VIRGINIA DIVISION OF PERSONNEL,**

Respondents.

DECISION

Eugene Blankenship (Grievant) is employed by the West Virginia Division of Corrections (CORR) at the Mount Olive Correctional Complex (MOCC). His grievance alleges that he was wrongly denied the position of Correctional Trainer/Institutional Training Officer (ITO). This grievance was denied at Level I, on October 26, 1999, by Lead Trainer Sgt, Rick Perez; and at Level II, on November 2, 1999, by Director of Training Col. Randy Perdue.

A Level III hearing was held on November 12, 1999. The West Virginia Division of Personnel (DOP) was joined, as an indispensable party, by CORR at Level III. CORR was represented at this hearing by Kathryn Lucas, Grievant represented himself, and DOP was represented by Senior Personnel Specialist Lynn M. Schillings (Schillings). This grievance was denied at Level III, by Commissioner Paul Kirby, on November 19, 1999.

A Level IV hearing was conducted, before the undersigned administrative law judge, at this Grievance Board's Beckley office, on March 22, 2000. Grievant was represented by Steve Berryman, CORR was represented by Leslie Kiser Tyree, Esq., and DOP was again represented by Schillings. The parties were given until May 1, 2000, to submit proposed findings of fact and conclusions of law, Grievant did so, and this grievance became mature for decision on that date. 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. Grievant is employed by CORR at MOCC.
2. On August 6, 1999, MOCC posted the ITO position at issue in this grievance. The position required an Associate Degree or substitute experience in a correctional setting, and three years of full-time or equivalent part-time paid correctional experience.
3. Grievant applied for the position, and was selected as most qualified.
4. Grievant has a Bachelor's Degree in International Affairs with a minor in French.
5. By memorandum dated October 5, 1999, MOCC informed Grievant that he had been selected as ITO. The memo contained a line for Grievant to accept the position, which Grievant did.
6. By memorandum dated October 20, 1999, DOP rejected Grievant for the ITO position, because of insufficient work experience, noting that his degree "is not in the correct fields, therefore, cannot use to meet minimum requirements." [\(See footnote 1\)](#)
7. On or about November 1, 1999, Grievant requested that he be allowed to provide additional information about his qualifications, as he had work experience that he felt would qualify as substitute experience under the posting.
8. By letter dated November 4, 1999, Schillings, on the advice of CORR, refused to allow Grievant to provide additional information about his qualifications, because he had filed this grievance.
9. Sgt. Russell Matheny (Matheny) applied for a position as a Correctional Officer IV; was told by DOP that he lacked 13 months of required experience; requested that DOP allow him to provide additional information about his qualifications; and was allowed by DOP to provide additional information, resulting in his selection for the position.
10. On November 10, 1999, MOCC reposted the ITO position at issue in this grievance. The new posting required either a Bachelor's Degree, or an Associate Degree, or two years of substitute experience in a correctional setting, and three years of full-time or equivalent part-time paid correctional experience.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is

offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant alleges that he was wrongly denied the ITO position, arguing that he was subjected to discrimination because Matheny was allowed to provide additional information about his qualifications, but Grievant was not, and that MOCC's memorandum offering him the ITO position, and his acceptance of that position, constituted a binding employment contract. He seeks reinstatement into the position and back pay.

Grievant's contention that MOCC's memorandum offering him the ITO position, and his acceptance of that position, constituted a binding employment contract, is without merit. An applicant for a position is not selected until the last official act has been completed, which, as here, is generally approval by DOP. Ollar v. W. Va. Dep't of Health and Human Resources/Div. Of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993). Accordingly, this argument must fail.

W. Va. Code § 29-6A-2(d) defines "discrimination" as "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." To establish a prima facie case of discrimination, Grievant must show:

- (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
- (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
- (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

Once the grievant establishes a prima facie case, the burden shifts to the employer to prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

A preponderance of the credible evidence in this grievance establishes that Grievant was similarly situated, in a pertinent way, to another employee, Matheny, who applied for a position within CORR; was told by DOP that he lacked required experience; and requested that DOP allow him to provide additional information about his qualifications. Grievant was, to his detriment, treated by his employer in a manner that Matheny was not, in a significant particular, when DOP refused, at CORR's behest, to allow him to provide additional information about his qualifications, when it had allowed Matheny to do so. Nothing in the record of this grievance indicates that this difference in treatment was related to actual job responsibilities of Grievant and Matheny, or was agreed to by Grievant in writing.

Accordingly, Grievant has established a prima facie case of discrimination. As Respondent CORR has failed to demonstrate a legitimate, nondiscriminatory reason for this employment action, Grievant has established that he was the victim of discrimination by CORR.

The record in this grievance contains substantial evidence that Grievant might have convinced DOP that he had the experience required for the ITO position, had he been given the opportunity to do so, including a letter detailing his substantial military experience, a letter detailing his substantial experience working with children with behavioral problems, and his Marshall University transcript, which shows that he successfully took classes in Basic Military Science, Military Equipment WeaponsMarksmanship, The Soviet Armed Forces, and Army Physical Readiness Program, which might reasonably have been viewed by DOP as relevant to the paramilitary nature of a position with CORR. However, as Grievant and Schillings credibly testified at Level IV, and as reflected in Schillings letter of November 4, 1999, referred to in Finding of Fact Eight, CORR prevented DOP from reviewing this material, because Grievant had filed this grievance.

The purpose of the grievance procedure for state employees "is to provide a procedure for the equitable and consistent resolution of employment grievances. . . ." W. Va. Code § 29-6A-1. The grievance process is often spoken of as being an informal one, and parties are generally encouraged to resolve their disputes at the lowest possible level. See Lilly v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 98-PEDTA-489 (July 6, 1999), Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, 376 S.E.2d 639 (1988); Adams v. Cabell County Bd. of Educ., Docket No. 94-06-520 (May 15, 1995). However, Grievant's attempt to resolve this matter, made at Level II of this grievance, by providing additional information about his qualifications, was denied at CORR's behest. This was unfortunate, as DOP's consideration of this information might have saved

all concerned with this grievance considerable effort and expense.

Accordingly, this grievance will be Granted In Part, and CORR and DOP will be Ordered to reconsider Grievant's full qualifications, pursuant to the November 10, 1999, MOCC reposting of the ITO position.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

3. W. Va. Code § 29-6A-2(d) defines "discrimination" as "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." To establish a prima facie case of discrimination, Grievant must show:

(a) that he is similarly situated. in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 960-T&R-215 (Sept. 24, 1996).

4. Once the grievant establishes a prima facie case, the burden shifts to the employer to prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason

given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant established a prima facie case of discrimination.
6. CORR failed to rebut Grievant's prima facie case.
7. Grievant established, by a preponderance of the evidence, that he was the victim of discrimination by CORR.

Accordingly, this grievance is **GRANTED IN PART**, and CORR and DOP are **ORDERED** to reconsider Grievant's full qualifications, pursuant to the November 10, 1999, reposting of the ITO position.

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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

ANDREW MAIER
ADMINISTRATIVE LAW JUDGE

Dated: May 24, 2000

[Footnote: 1](#)

1 It is unclear how Grievant's degree could be in an incorrect field, as the posting did not specify that an applicant's degree be in any particular field.