HEATHER HUNTER and KENNETH ROSE,

Grievants,

v. **Docket No. 01-CORR-032**

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Heather Hunter and Kenneth Rose ("Grievants") initiated their grievances on December 27, 2000, alleging they should be promoted from Correctional Officer Is to Correctional Officer IIs, after having obtained bachelor's degrees. Grievants' immediate supervisor was without authority to provide relief at level one, and a level two conference was held on January 9, 2001, after which the grievances were denied at that level. The grievances were consolidated for a level three hearing held on January 31, 2001, which was followed by a written decision, denying the grievance, dated February 2, 2001. Grievants appealed to level four on February 8, 2001. A hearing was held before Administrative Law Judge Andrew Maier in the Grievance Board's Beckley, West Virginia, office on April 9, 2001. Grievants represented themselves, and Respondent was represented by counsel, Leslie K. Tyree. The parties were given until May 7, 2001, to submit notice that this matter had been settled or to submit written fact/law proposals, and neither party did so. For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on May 29, 2001.

The following findings of fact are made from a preponderance of the evidence of record, including all lower level documents and exhibits, the transcript of the level threehearing, and review of the tapes of the level four hearing.

Findings of Fact

1. Grievants are employed by Respondent as Correctional Officer Is. (See footnote 1)

2. In September of 2000, Grievants applied for promotion to the position of Correctional Officer II. (See footnote 2)

3. Grievants' request for promotion was denied by the Division of Corrections ("DOC"), because neither of them had completed the Officer Apprenticeship Program ("OAP").

4. Both Grievants have a bachelor's degree in Criminal Justice Administration. (See footnote 3)

5. DOC Policy Directive 145.00 provides that "participation, satisfactory progress and completion of the [OAP] **is mandatory**" for all correctional officers and is a condition of continuing employment with DOC. (Emphasis in original.) The OAP consists of at least 4,000 hours of specified on-the-job training and 400 hours of related studies. Policy Directive 145.00 further states that all newly hired correctional officers must be enrolled in the program, which must be completed within two years of enrollment.

6. DOC Policy Directive 132.02 sets forth a detailed process whereby position vacancies are to be filled by promotion, which includes notice, a written examination, and interviews. Applicants are evaluated via a specific, detailed point system. This Policy Directive further provides that all applicants must meet the minimum qualificationsestablished by the Division of Personnel. If an applicant has a bachelor's degree, he or she is not required to have any work experience, whether or not he or she has completed the OAP, in order to be minimally qualified for promotion to Correctional Officer II.

7. DOC does not promote Correctional Officer Is until they have completed the OAP.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employee has not met his burden of persuasion. Dixon v. W. Va. Div. of Corrections, Docket No. 98-CORR-243 (Aug. 24, 1998). See

Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

Grievants base their entire argument upon the “minimum qualifications” portion of Policy Directive 132.02. They contend that the policy provides that an applicant with a bachelor's degree is not required to complete the OAP in order to be promoted to Correctional Officer II. Therefore, Grievants believe they should have received the promotions requested. The undersigned does not agree with Grievants' interpretation of Policy Directive 132.02. First, the policy only provides a list of the number of years of work experience required, with or without completion of the OAP, respectively, to be minimally qualified for promotion to each rank of correctional officer. Nowhere does it state that completion of the OAP is not required for promotion. Moreover, this policy sets out a very specific, detailed process which must be followed by DOC when filling positions by promotion, and the minimum qualifications requirement is only one small portion of it. Indeed, after having met the qualifications requirement, an applicant is only eligible for further consideration pursuant to the process set forth in the policy, consisting of testing, interviews, and evaluation. It does not by any means guarantee that promotion will be granted, especially in the instant case, where Grievants have introduced no evidence regarding the positions to be filled, other applicants' qualifications, and the results of the other portions of the evaluation and interview process.

Grievants have failed to prove that DOC's refusal to promote them was a violation of any law, policy, rule, regulation or written agreement. (See footnote 4) Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't ofEnergy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Grievants have failed to prove by a preponderance of the evidence that Respondent's refusal to promote them was a violation of any statute, policy, rule, regulation, or written agreement under which Grievants work. See W. Va. Code § 29-6A- 2(i).

Accordingly, this grievance is **DENIED**.

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, and 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.

Date: June 11, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record does not reflect the length of Grievants' employment.

Footnote: 2

It is presumed that Grievants were responding to a posted vacancy, although the record does not indicate what prompted Grievants' applications.

Footnote: 3

The record does not indicate when Grievants received their degrees.

Footnote: 4

However, since DOC consistently follows this unwritten practice of requiring completion of the OAP prior to promotion to Correctional Officer II, it would seem to be in the best interests of both employer and employee to put this requirement in writing, most logically by adding it to the provisions of Policy Directive 145.00.