DAVID J. MULLAN,

Grievant,

v. **Docket No. 01-DJS-345**

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, David J. Mullan, employed by the Division of Juvenile Services (DJS or Respondent) as a Correctional Officer at the Industrial Home for Youth, filed a level one grievance on April 20, 2001, in which he alleged in pertinent part:

I qualified by the requirements given on 17 November 2000 for Corporal position posting . . . I participated in testing, written, oral and file review, and on January 16, 2001 was sent a letter congratulating myself on being promoted to Corporal. . . In February I was notified that my Corporal position was being terminated by Mr. Ross and Mr. Tenny. At that time I was advised that their [sic] was new requirements for Corporal positions and that new applications needed to be submitted.

For relief, Grievant requested that he be promoted to Corporal (Correctional Officer III (CO- III)), effective March 1, 2001.

The grievance was denied at all lower levels, and appeal to level four was made on May 18, 2001. A level four hearing was conducted in the Grievance Board's Westover office on September 20, 2001. Grievant represented himself at level four, while Respondent was represented by Jendonnae Howdyshell, Esq., Assistant Attorney General. The matter became mature for decision upon receipt of Respondent's proposed findings of fact and conclusions of law on September 24, 2001, Grievant having waived the opportunity to file written proposals.

The essential facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant was most recently employed by Respondent effective September 2000, as a Correctional Officer I (CO-I) at the West Virginia Industrial Home for Youth (WVIHY). Grievant had

previously been employed by Respondent as a CO from 1997- 1999.

2. On November 17, 2000, Respondent posted fourteen CO-III positions at the WVIHY.

3. Attached to the posting was the Department of Personnel (DOP) classification description for CO-III, effective October 6, 1997. The qualifications on this classification description included, "one year of full-time or equivalent part-time paid experience as a correctional officer, police officer, probation/parole officer or related experience."

4. Grievant was determined to be an eligible candidate, and successfully completed the three part testing process.

5. By letter dated January 16, 2001, Alvin D. Ross, Superintendent of WVIHY, congratulated Grievant on being selected to fill the position of CO-III.

6. When processing the promotion, DOP determined that Grievant was not qualified to hold the position of CO-III. Specifically, he did not have the required years of experience.

7. Effective October 2, 2000, DOP issued a revised classification description for CO-III. At that time the minimum qualifications included three years of experience, and included a special requirement, completion of the Division of Juvenile Services Basic Training Academy. 8. Grievant completed the Basic Training Academy in February 2001.

Discussion

Initially, Respondent contends this grievance is untimely because the grievance was not initiated within the time limits contained in W. Va. Code §29-6A-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. w. Va. Dep't. of Health and Human Resources, Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998). 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. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); 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). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No.

95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code § 29-6A-3 requires that "[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf ofthe employer at or before the level two hearing." The record does not establish that timeliness was raised at level two or three, therefore, the issue may not be considered at level four. Summers v. Monongalia County Bd. of Educ., Docket No. 98-30-224R (July 27, 2000).

Because the merits of this grievance do not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); See W. Va. Code §29-6A-6; Howell v. W. Va. Dep't of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

At hearing, Grievant asserted that he was given different reasons for the retracted promotion at levels one and two, and opines that too many officers qualified for promotion and this was simply Respondent's method of eliminating some of them. Respondent argues that it was unaware of the change in the job classification at the time of the posting, and while Grievant's experience was unfortunate, DOP exercises the final authority in determining whether an individual meets the minimum qualifications of a position. Based upon DOP's ruling, Respondent denies any wrongdoing beyond prematurely announcing Grievant's promotion.

A review of the record shows that Grievant's immediate supervisor lacked authority to grant relief at level one, and the level two decision refers to the error in posting. Therefore, Grievant's reference to different reasons at different levels is not supported by the written decision, but may have verbally been communicated to him. While his frustration with the situation is understandable, when asked to specify the improper action taken by Respondent, Grievant stated only that the error should have been discoveredearlier. Grievant does not challenge DOP's authority in determining whether an applicant meet the minimum qualifications of a position, or that the most recent classification description for CO-III required three years of experience. Absent any allegation of a violation of statute, rule, regulation, policy, or practice, Grievant has failed to state a claim upon which relief may be granted.

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

Conclusions of Law

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. w. Va. Dep't. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

2. W. Va. Code § 29-6A-3 requires that "[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing."

3. The record does not establish that the timeliness issue was raised at level two or three, therefore, the issue may not be considered at level four. Summers v. Monongalia County Bd. of Educ., Docket No. 98-30-224R (July 27, 2000).

4. Because the merits of this grievance do not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21(2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dep't of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

5. Absent any allegation of a violation of statute, rule, regulation, policy, or practice, Grievant has failed to state a claim upon which relief may be granted.

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

Date: October 12, 2001 _____

Sue Keller

Senior Administrative Law Judge