TRINA THOMPSON,

Grievant,

v. Docket No. 01-DJS-140

DIVISION OF JUVENILE SERVICES/

WEST VIRGINIA INDUSTRIAL HOME FOR YOUTH,

Respondent.

D E C I S I O N

Grievant, Trina Thompson, employed by the Division of Juvenile Services (DJS or Respondent) as a Correctional Officer II, filed a level one grievance on April 10, 2001, after she was not selected for promotion to Correctional Officer III. For relief, Grievant requested reclassification as a Correctional Officer III, with back pay, effective November 1, 2000. The grievance was denied at levels one and two, and was granted in part and denied in part at level three. A level four appeal was filed on April 27, 2001, and an evidentiary hearing was convened on July 10, 2001, at the Grievance Board's Westover office. Grievant was represented by Roger L. Cutright, Esq., and DJS was represented by Jendonnae Houdyschell, Esq. Prior to any testimony being taken, the parties agreed to submit stipulated facts, and that the decision could be based on those facts as well as proposed conclusions of law. The matter became mature for decision upon receipt of those documents on or before October 1, 2001.

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

Findings of Fact

1. Grievant was first employed by Respondent as a Correctional Officer I (CO-I) at the West Virginia Industrial Home for Youth (WVIHY) in September 1999.

2. On November 17, 2000, Respondent posted fourteen Correctional Officer 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, she did not have the required amount of experience.

7. Effective October 2, 2000, DOP had 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 October 2000. Her promotion to CO-II was delayed, but was granted effective November 1, 2000, at level three of the grievance procedure.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

Grievant argues that Respondent is attempting to change the minimum qualifications contained in the first posting, but as a matter of contract law, is bound by the terms of the first posting, and cannot be relieved of those obligations by relying on DOP's authority to change the class specifications. Grievant asserts her consideration for the contract is the time and energy expended toward the preparation and taking of the examination. Grievant agrees that DOP is the final authority in determining whether an individual meets the minimum qualifications for a job specification, but asserts that DOP is not the appointing authority, and does not have the final say on a promotion. Grievant next argues that any change in specifications are not effective until communicated to the appointing authority, and DOP's neglect in providing Respondent with the changed specifications at the time of the posting, does not relieve Respondent of the contractual obligation. Further, Grievant asserts that DOP may not change the minimum qualifications for a position after the examination has been given. Finally, Grievant argues that promoting her would place no undue burden on Respondent given that she had received a congratulatory letter indicating Respondent's willingness to place her

into the position.

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. Grievant does not challenge DOP's authority in determining whether an applicant meets the minimum qualifications of a position, or that the most recent classification description for CO-III requires three years of experience. As an employee of a State agency, Grievant is subject to the rules and regulations of both Respondent and DOP. Respondent is simply without authority to promote Grievant when DOP must process the personnel action. Certainly, Respondent posted an outdated classification description; however, there is no evidence that the matter was due to anything other than simple error. Grievant did not meet the minimum qualifications for the position in November 2000, and Respondent is not bound by the ultra vires action by agency officials who had incorrectly advised Grievant that she had been awarded the position. Fraley v. Dep't. of Health and Human Resources, 92-HHR-448 (Mar. 12, 1993).

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. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Dept. of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990).

2. Grievant did not possess the minimum qualifications for the position of CO-III in November 2000, and was ineligible for promotion at that time.

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