JOHN ROBINSON,

Grievant,

v.

DOCKET NO. 03-CORR-107

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, John Robinson, filed this grievance against his employer, the West Virginia Division of Corrections/Anthony Correctional Center ("Corrections" or "Anthony") on February 13, 2003:

> I feel that I have been discriminated against due to the fact that WVDOC Policy Directive #132.02 Correctional Center Promotion was not followed during the promotion board for COV that was held at Anthony Correctional Center on 28 January 2003. 1. The questions asked to me during this interview were of a nature that did not have definite right or wrong answers, therefore could not be scored fairly. 2. The written exercise was scored by the Warden[']s secretary rather than the members of the review board. This led to one of my competitors being selected for the position rather than me being selected.
>
> Relief sought: To be promoted to the rank of COV with all back pay, privileges, and seniority to the time my selection should have been made.

The grievance was denied at level one on February 14, 2003, by V. Wayne White, and at level two on March 11, 2003, by Warden Scott Patterson. A level three hearing was held on April 1, 2003, and the grievance denied by Grievance Evaluator Paula K. Gardneron April 2, 2003, and accepted by Commissioner Jim Rubinstein on April 4, 2003. Grievant appealed to level four on April 14, 2003, and a level four hearing was held in Beckley, West Virginia, on August 21, 2003. This matter became

mature for decision on September 21, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented at level three by Dennis Brackman, and at level four by John Toth, and Corrections was represented at level three by Scott Patterson, and at level four by Charles Houdyschell, Jr., Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Mount Olive Correctional Complex Corporal Promotion Board Interview.

Level Three Corrections' Exhibits

Ex. 1 -

W. Va. Code § 29-6A-4. Procedural levels and procedure at each level.

Ex. 2 -

Division of Corrections Policy Directive 132.02 Correctional Officer Promotion.

Ex. 3 -

Robinson v. W. Va. Div. of Corr., Docket No. 02-CORR-321 (Jan. 14, 2003); underlying grievance statement and lower level transcript and decisions.

Level Four Grievant's Exhibits

Ex. 1 -

January 28, 2003 Review Board Interview/Exercise Score sheets.

Ex. 2 -

Grievance documents relating to grievance filed by John Toth on August 13, 1998.

Level Four Corrections' Exhibits

Ex. 1 -

January 28, 2003 Accumulative Tally Sheet; COV Written Exercise Score sheets.

Ex. 2 -

January 28, 2003 Review Board Interview/Exercise Score sheets for unidentified candidate for position.

Ex. 3 -

January 28, 2003 Review Board Interview/Exercise Score sheets for John Robinson.

Ex. 4 -

January 28, 2003 Review Board Interview/Exercise Score sheets for unidentified candidate for position.

Ex. 5 -

Blank Correctional Officer V Interview Score sheets.

Testimony

Grievant presented the testimony of Scott Patterson. Corrections presented the testimony of Robert Wayne Armstrong.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence. (See footnote 1)

FINDINGS OF FACT

1. Grievant is employed by Corrections as a Correctional Officer at the Anthony Correctional Center.

2. On January 28, 2003, a promotion board was convened at Anthony for the purpose of selecting a Correctional Officer V.

3. Corrections Policy Directive 132.02, Correctional Officer Promotion, governs the promotion process.

4. The first portion of the process is a written test which accounts for one-tenth of the total points possible, but no more than 10 points total.

5. The second portion assigns a score for years of service. An employee is given ½ of a point per year of service up to 20 years or 10 points.

6. Next, 10 points are assigned if the employee has completed the physical agility test.

7. The top 10 applicants having the highest scores based upon the prior steps, i.e., test, seniority credit, and physical agility) are given interviews and a written exercise. 8. Grievant and two other applicants successfully completed the first steps of the promotion process, and were interviewed by a review board.

9. The Review Board consisted of Warden Scott Patterson, Lt. David Cox, and Lt. Jason Davis.

10. The interview consisted of 8 questions worth a total of 40 points, or 5 points each.

11. The written exercise was worth 30 points, measurable through a point system, and was job related to the vacancy being filled.

12. Each member of the Review Board conducted a separate rating based on a structured scored interview used for all applicants.

15. Each of the board members took turns asking interview questions, but the same questions were asked of each applicant.

16. In order to provide further structure, the interview questions had suggested answers. The suggested answers were ranked 1, 3, and 5. The more information the applicant provided consistent with the model answer resulted in a higher score.

17. The board members' total interview points were added together and divided by 3 for an average final interview score.

18. The written exercise required the applicants to draft a memorandum based upon a hypothetical scenario. Applicants were scored on spelling, punctuation, grammar, conciseness, coherency, completeness and accuracy. Each category had between 4 and 5 possible points.

19. The board members scored each written exercise, added their points together, and divided by 3 for an average final score. 20. The final tally for the three applicants is as follows:

	Grievant	Second App.	Third App.
Promotion Test	7.0	8.2	8.2

Years of Service

3.0
3.0
1.0

Physical Agility Test

10
10
10

Interview

25.67
30.00
31.67

Written/Skill Exercise

19.33
25.33
25.00

TOTAL

65.00
76.53
75.87

LIV Corrections Ex. 1.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his allegations 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); Howell v. W. Va. Dept. of Health and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). *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.” Hundley v. W. Va. Div. of Corr., Docket No. 98-CORR-218 (1998).

Grievant alleges that the selection process at Anthony was flawed and not in conformity with Corrections' Promotion Policy, specifically because the interview and written exercise portions of the process were not “structured.” Corrections' Policy states, in pertinent part:

> POLICY:
> It is the policy of the West Virginia Division of Corrections to maintain a mechanism that ensures the uniformity of selection of Correctional Officer personnel for promotion.
>
> *****
>
> 1. Each member of the Review Board shall conduct a separate rating based on a structured scored interview used for all applicants.
>
> a. It shall consist of eight (8) questions, with each assigned a score to total forty (40) points [i.e., eight (8) questions worth five (5) points each].
>
> b. The appointed Chairperson shall ensure that interview questions are provided to the Review Board.
>
> c. The board members' total interview points shall be added and divided by three (3) for an averaged final score.
>
> 2.
>
> The Chairperson shall assign up to thirty (30) points for written exercises:

a. The written exercise shall be job-related to the vacancy being filled.

b. The written exercise shall be measurable through a point system.

c. The Review Board members score each exercise. The points shall be added and divided by three (3) for an averaged final score and recorded on the Accumulative Tally Sheet (Attachment #2).

d. The Review Board members shall sign the completed Accumulative Tally Sheet (Attachment #2).

LIII Corrections Ex. 1.

Grievant maintains the interview and written exercises were not “structured” as provided for in the above-referenced policy. Specifically, he claims the scoring system was unfair, vague, open to interpretation and manipulation, and resulted in favoritism.

Corrections argues it followed the Promotion Policy to the letter in interviewing and testing the three applicants for the Correctional Officer V position, and that Grievant scored the lowest of the three. Corrections also points out that, even if the interview and written exercise scores were taken away, Grievant still would only rank second, and therefore,cannot prove entitlement to the position. *See* LIV Corrections Ex. 1; Finding of Fact No. 20, *supra*.

Grievant points to several factors which he concludes proves the selection process is not structured as mandated by the Promotion Policy. First, Grievant contends the board members scored the interview questions improperly because the sample answers given on the score sheet are numbered 1, 3, and 5, but the board members gave scores of 2 and 4. Clearly, the board members realized the sample answers and ratings were merely guidelines to use when scoring the applicants' answers, and that their ratings could fall somewhere in between the 1, 3, and 5 answers. Grievant has failed to prove this somehow violated the Promotion Policy, or resulted in an “unstructured”

scoring process.

Grievant next opines that the interview questions and answers left room for subjectivity among the board members, and that a true “structured” interview question would leave no room for the interviewer to express his or her opinions of the answers. In an ideal, sterile interview setting, there would be no room for subjectivity. However, this is not an ideal world, and the interviewers are human beings who cannot simply turn off their feelings and opinions about the answers given them. It appears Corrections acknowledges this fact, and attempts to minimize the subjectivity factor through the rules and guidelines published in the Promotion Policy. While Grievant believes the subjectivity factor should be eliminated, or minimized even further, he has failed to prove the process used was arbitrary or capricious, violative of the Policy, or clearly wrong.

Grievant offered a sample interview and writing sample for a Corporal position from the Mt. Olive Correctional Complex in order to show that Anthony's process was flawed. The Mt. Olive questionnaire puts forth questions regarding specific operational procedureswith which the applicants should be familiar. The sample responses and scores section provides the applicant will receive 5 points if able to list all of the points or procedures for that specific operational process, and then subtracting points for the inability to list all of the factors. Grievant maintains Anthony should have a questionnaire like Mt. Olive's, because it completely removes the subjectivity factor.

Anthony counters that all the Mt. Olive questionnaire requires from an applicant is the ability to memorize and regurgitate information found in the facilities operational manuals. Anthony does not believe that type of testing adequately allows a candidate to demonstrate leadership skills, critical thinking, and problem-solving, especially in this instance, where the position is a higher-level leadership position. Anthony concedes Mt. Olive's test is more “structured” in the sense that any applicant will be able to receive a top score if he or she can memorize everything in the manual, but denies this is a better testing tool, or that the word “structured” within the Promotions Policy refers to rote memorization of material.

Finally, Grievant relies on previous Grievance Board decisions which he purports show that Anthony's promotion process is not structured and flawed. The first case Grievant relies on is White v. W. Va. Div. of Corr., Docket No. 98-CORR-423 (Feb. 3, 1999). In White, the grievant applied for a promotion at Anthony. However, at the time of that selection, Anthony did not comply with the procedures set forth in Corrections' Promotion Policy in a number of factors. The Administrative Law

Judge, noting that an agency must abide by the procedures it properly establishes to conduct its affairs, found that Corrections failed to comply with the requirements of its own policies by omitting several procedures which were designed to assure objective and consistent scoring duringthe selection process for the position. White, *supra*; Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959); Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Pauls v. Bd. of Directors/West Liberty State College, Docket No. 98-BOD-242 (Nov. 30, 1998); Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271, (Oct. 15, 1997); Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997); Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995).

Of course, since that time, Anthony has adopted and complied with the procedures set forth in the Promotion Policy, as clearly evidenced by the steps taken in this case. Therefore, any reliance on White is misplaced, and fails to demonstrate any flaw in Anthony's selection process as it applies to the subject position.

Grievant also relies on this Grievance Board's decision in Toth v. W. Va. Div. of Corr., Docket No. 98-CORR-344D (Feb. 2, 1999). The grievant alleged he was wrongly denied promotion to Lieutenant in Toth, but also filed a notice of default with Corrections on the processing of his grievance. Grievant's default claim was granted, and Corrections was provided a level four hearing to show the relief granted was clearly wrong or contrary to law, pursuant to W. Va. Code § 29-6A-3(a)(2). The Administrative Law Judge found that, as Grievant met the minimum qualifications for the position, and Corrections had failed to assert any other legitimate reason why Grievant should not receive the promotion, it would not be clearly wrong or contrary to law to grant the relief requested. The Order Granting Default was subsequently overturned by the Circuit Court of Greenbrier County, CA 99-C-22 (July 18, 2000), finding no default occurred, and was remanded back to Corrections. The case was heard again at level three on July 28, 2000, and a level three decision issued August 21, 2000. The level three hearing examiner found that the grievant had an overall score slightly higher than the successful applicant. The determining factor in not selecting grievant was his receipt of a previous disciplinary action. The examiner found that Corrections Policy Directive 413.01 “does not provide for consideration of a candidate's disciplinary record as part of its criteria for selection of officers for promotion,” and granted the grievance based upon the grievant's higher score. LIV G. Ex. 2.

While the Toth case is interesting, there is nothing in either the Order Granting Default or the level

three decision which is applicable to the case at hand. Neither the Order or the decision stand for the proposition that Anthony's promotion process is inherently flawed. In fact, the Promotion Policy in place at that time, 413.01, has been replaced by the current policy, 132.02. Interestingly, the previous policy 413.01, which was in effect when White, *supra*, was decided, included the requirement that the writing exercise be "*completely objective* and measurable through a point system." LIV G. Ex. 2 (emphasis added). The current policy 132.02 deleted the "completely objective" criterion, providing only that the "written exercise shall be measurable through a point system." LIII Corrections Ex. 2. Apparently, after White, Corrections made a conscious decision to provide more room, not less, as Grievant claims, for somewhat subjective determinations on the part of the board members.

Clearly, Grievant is frustrated because he was unsuccessful in his bid for promotion. Nevertheless, he has failed to demonstrate that Anthony violated or disregarded any of the Promotion Policy provisions, or that he was the victim of favoritism in not being selected. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee asdemonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
>
> (c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. *See* Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

All of the evidence demonstrates the other two candidates were asked the same questions and given the same written exercise as Grievant. Merely succeeding in a job contest does not result in favoritism towards the successful candidate.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden fo proving his allegations 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); Howell v. W. Va. Dept. of Health and Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as “evidencewhich 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.” Hundley v. W. Va. Div. of Corr., Docket No. 98-CORR-218 (1998).

2. Grievant has failed to demonstrate any violation, misapplication, or misinterpretation of any rule or regulation governing promotions for Correctional Officers.

3. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

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legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. *See* Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

4. Grievant has failed to establish a claim of favoritism.

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. 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 8, 2003

Footnote: 1

The tape recording made a level three was mostly inaudible, and the Decision rendered herein relies on the most part from the level three and four exhibits and level four testimony.