THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DENNIS BRACKMAN,

Grievant,

v. DOCKET NO. 05-CORR-350

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

This is a consolidation of three grievances filed by Grievant Dennis Brackman, challenging what he alleges are discriminatory and arbitrary hiring and promotion practices of his employer, the Division of Corrections/Anthony Correctional Center (ACC), Respondent. He seeks promotion to Lieutenant, with all attendant back pay and benefits. He also seeks unspecified sanction of ACC Warden Scott Patterson, but as this type of relief is not available through the grievance process, the appropriateness of such sanctions will not be discussed further.

A level four hearing was held in the Grievance Board's Beckley office on March 30, 2006. Grievant was represented by Clifford Brackman and Respondent was represented by counsel, John H. Boothroyd, Assistant Attorney General. The matter became mature for decision on May 1, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

In each of his grievances, Grievant claims he has been discriminated against because of his age and because of his efforts representing other employees in thegrievance process. He claims a lieutenant position was reposted several times only because he would have been the successful applicant, but Warden Scott Patterson did not want to promote him because of his age and grievance activity. He claims his prior grievances should have given notice of his interest in the position despite his not applying when the position was posted a fifth time. In a related issue, Grievant claims he should have been temporarily upgraded to the lieutenant position, prior to its being permanently

filled, instead of another employee.

Respondent claims there has been no discrimination, and that it followed the applicable policies and statutes.

Based on a preponderance of the evidence adduced at level four and contained in the lower-level record (See footnote 1) , I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed as a Sergeant, Correctional Officer 4 (CO4), at ACC.

2. In March 2005, Respondent posted a position for a Lieutenant, CO5. At the time, Grievant was a Corporal, CO3. Although he applied for the position and the Sergeant position that was posted at the same time, he had not passed the Lieutenant examination, and was not selected for the position.

3. Grievant was selected to fill the open Sergeant position at that time. 4. For the Lieutenant position, there were only two qualified applicants, out of seven total.

5. Because the qualified applicant pool for the Lieutenant position was so small, Warden Scott Patterson elected to repost the position rather than fill it.

6. The Lieutenant position was reposted in May 2005. Grievant took and passed the Lieutenant examination, and applied for the position. However, there were again only two qualified applicants, including Grievant.

7. Warden Patterson again elected to repost the position due to the small applicant pool. The posting went up in July 2005, Grievant applied, and for a third time there were only two qualified applicants. Warden Patterson again decided to repost.

8. Effective August 1, 2005, Department of Corrections Policy Directive 132.02, Correctional Officer Promotion, was revised. Under this policy revision, which governs hiring practices, “If there are two (2) or less [sic] applicants for the position, the Warden/Administrator/designee may choose to re-post the position one (1) time only.” Policy Directive 132.02 § V.B., Grievant's Exhibit No. 7.

9. Warden Patterson reposted the Lieutenant position on August 11, 2005, after the new Policy Directive took effect.

10. Grievant did not affirmatively apply for the position after the August posting, and did not contact the Human Resources office to communicate his interest in the position, as he had for the

prior postings. He was not included in the applicant pool. 11. Grievant had filed grievances concerning his non-selection after the prior repostings, and Warden Patterson knew he wanted the Lieutenant position.

12. Although each posting listed as a requirement that applicants submit a formal application to Kimberly Wiley in ACC's Human Resources Office, in practice internal applicants only needed to communicate their interest in each posting to her informally, either in person or by phone. Grievant had only submitted an application form for the first posting, and for subsequent postings, except for the August posting, he called Ms. Wiley's office and left a message indicating his interest.

13. After the August reposting, there were two qualified applicants. Because the new policy directive stated a position could only be reposted once, and this one had been posted five times, Warden Patterson offered the position to the qualified applicant who had the highest score after the interview process. This person, who had also applied under all the prior postings, declined the position, and it was offered to the other applicant, who accepted.

14. Sergeant John Robinson was one of the applicants under the August Posting. He did not submit an application, but did indicate his interest to Ms. Wiley in person. Sgt. Robinson's job duties required him to frequently be in the Human Resources Office area when Ms. Wiley was working. After the August posting went up, she saw Sgt. Robinson and asked him if he was going to apply. When he said yes, she noted his interest. She did not ask anyone else if they wanted to apply for the job.

15. Grievant worked a different shift than Ms. Wiley, and did not work in her area of the facility. They rarely saw each other at work. 16. ACC has four shifts, each one assigned one lieutenant and one sergeant. During the times pertinent to this grievance, there were only three lieutenant positions filled, leaving one vacant.

17. The sergeant's position on the shift with the lieutenant vacancy was filled by Harvey Kincaid. Because he had been serving as Operations Officer for his shift in lieu of the lieutenant normally assigned to that position, he filed a reallocation request along with a position description form, seeking the lieutenant's spot.

18. Wayne Armstrong, Human Resources Director for the Division of Corrections reviewed the request, and determined that occasionally serving as Operations Officer was a normal duty for a Sergeant, and denied the reallocation request. Sergeant Kincaid was offered a temporary upgrade

and five percent salary increase, effective September 16, 2005 to March 16, 2005 or whenever the lieutenant position was permanently filled. The temporary upgrade ended October 16, 2005, when the new lieutenant took over.

19. Grievant was not offered a temporary upgrade opportunity.

Discussion

This Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. (See footnote 2) In order to overturn his employer's selection decision, Grievant must prove all of his claims bya preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. (See footnote 3)

A. REPOSTING OF LIEUTENANT POSITION

Although Grievant claims the motive for the discrimination he alleges is based on his age and grievance activity, the West Virginia Supreme Court of Appeals has recently narrowed the scope of discrimination claims brought under the grievance procedure, to eliminate any consideration of whether the basis of the discrimination was a protected factor. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. Now, “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *(See footnote 4)* In order to meet this burden, the Grievant must show: (See footnote 5)

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

This decision is based on the broad employment-related definition of “discrimination” found in W. Va.

Code § 29-6A-2(d): “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.”

Grievant has not met his burden of showing he was similarly situated to any other employee who was treated differently. It should be stated at this point that Grievant's credibility is so lacking that his testimony about what happened is unreliable for evidentiary purposes. He made several statements in the record that either contradict his own statements, or are such gross mischaracterizations of actuality that his entire version of the events that he grieves is untrustworthy. For example, at level three, he stated that he applied for the final job posting “under the same basis [he] applied for it three times.” (See footnote 6) In fact, he did not even know it was posted until after the announcement closed, and he made no affirmative communication to anyone about his interest under the posting. Instead, he assumed, *post facto*, that his grievance challenging the prior repostings would be taken as interest in the final posting. He also claims the Division of Personnel Administrative Rule contains misdemeanor penalties, including jail time, for violations of its provisions. (See footnote 7)

Warden Patterson's demeanor also calls his credibility into question. He is clearly hostile to Grievant and frustrated by Grievant's frequent utilization of thegrievance procedure. His testimony was obstructive and uninformative, but fortunately the material facts of he case are self-evident to a large extent. It is apparent he would probably rather not promote Grievant, but there is no evidence he violated any rule, law or policy in this instance. However, it would behoove all parties to pay heed to the fact that the grievance procedure is intended to allow parties to resolve differences at the lowest possible level, and that a cooperative effort rather than an adversarial one would best accomplish this goal, and would better foster an efficient and collegial work environment.

The simple facts of the matter as admitted in evidence show no similarly- situated employees who were treated differently. In each case the job was reposted, it was reposted for all the other applicants as well. In the case of the final posting, Grievant was not similarly situated to the applicants who affirmatively applied for the position under that posting. Certainly Warden Patterson knew of Grievant's continued interest in promotion to Lieutenant, but he cannot be faulted for Grievant's failure to make the very minimal effort of applying. Had he included Grievant in the interview pool, all the other applicants likely would have had a claim for favoritism.

Respondent's revision of the posting policy was reasonably interpreted by Warden Patterson, even if his interpretation was not precisely as intended by the policy's author. It was made clear by

the policy that the intended effect was to prohibit prolonged searches for candidates and to avoid repeated postings such as happened with this position. There is no evidence in the record that the situation in which Warden Patterson was embroiled was even contemplated by the policy. Nevertheless,his decision to read the requirement that positions only be reposted once as preventing him from reposting a 6th time was not arbitrary or unreasonable.

Finally, Grievant offered no proof by which to compare his qualifications to the other candidates for the position, so it is impossible to conclude he would have been selected had he been included in the applicant pool.

B. TEMPORARY APPOINTMENT TO LIEUTENANT POSITION

Grievant's claim that he should have been temporarily upgraded to the lieutenant position instead of Mr. Kincaid has a much more meritorious factual foundation than his other claims, but suffers from a deficiency of proof, and a simple misapplication of law. Grievant charges that Sgt. Kincaid had not passed the lieutenant examination, but offered no proof of the fact. Further, Grievant entirely ignores the fact that there were other employees at ACC interested in the same lieutenant's position, and offers no proof he was the most qualified.

Grievant's reliance on the Division of Personnel Administrative Rule, § 9.5, is entirely misplaced as a basis for claiming Warden Patterson failed to follow proper procedure. That section governs “Temporary Appointments,” which are defined in § 3.92 of the Rule as “The hiring of an employee from a register for a period not to exceed 6 months.” That did not happen. Instead, Sergeant Kincaid benefitted from a “Temporary Classification Upgrade,” which is treated in § 4.8 of the rule as within the discretion of the employer, and is applied to “an employee temporarily performing the duties of a position in a higher pay grade.” Mr. Kincaid was evidently performing the duties that merited the temporary upgrade, and Grievant was not. Under theapplicable rule, therefore, Grievant was not entitled to the upgrade no matter what Sgt. Kincaid's certification status was.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned

Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH- 287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d).

3. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

4. Grievant failed to meet his burden of proving he was similarly situated to any other employee who was treated differently than himself.

5. Grievant failed to prove he applied for the position in question on its final posting.

6. Grievant failed to prove he was entitled to a temporary classification upgrade.

For the foregoing reasons, this grievance is hereby **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 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.

May 31, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

It should be noted the level three record was very poorly developed, and contained little actual evidence. The record contained extensive unsworn testimony of Grievant's representative, unresponsive and obstructive testimony from Warden Patterson, and numerous procedural errors by the grievance evaluator.

Footnote: 2

Skeens-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998).

Footnote: 3

See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 4

Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004).

Footnote: 5

White, supra; Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 6

Transcript, Hearing of Sept. 13, 2005, p. 4.

Footnote: 7

Id., p. 1.