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**JEAN ANN MIRMELSTEIN**

**v.**

**DOCKET NO. 91-RJA-323**

**WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY/  
WEST VIRGINIA REGIONAL JAIL and CORRECTIONAL  
FACILITY AUTHORITY**

**DECISION**

Grievant, Jean Ann Mirmelstein, is employed by the West Virginia Regional Jail and Correctional Facility Authority (Respondent) at the Eastern Regional Jail (ERJ) in Martinsburg and is classified as a Correctional Officer II. Ms. Mirmelstein filed a level four grievance appeal on July 24, 1991, in which she alleged that she had been denied a promotion to the rank of corporal at the Eastern Regional Jail contrary to Respondent's policy. Both Grievant's immediate supervisor and the administrator of the Eastern Regional Jail previously determined that they were without authority to grant the requested relief; the matter was denied at level three. An evidentiary hearing was conducted at level four on October 10, 1991; proposed findings of

facts and conclusions of law were submitted by November 8, 1991, completing the record for decision.

Grievant was initially employed by Respondent in April 1989. In January 1991, Grievant was one of twelve correctional officers who participated in the promotional process vying for three positions of corporal. This was the first time the promotional process had been conducted utilizing the procedure set forth in Respondent's Policy and Procedure Statement No. 3038, effective November 13, 1990. The applicants were reviewed in six categories: an interview before the evaluation board, promotional examination, longevity, performance evaluations, education/training, and previous experience. When the composite scores were calculated for all the applicants Grievant was ranked fifth on the eligibility list. After the three corporal positions were filled Grievant retained a rank of second on the list, immediately following John Leisure.

In February 1991, Respondent announced that two additional positions of corporal would be available in March. Applications were again accepted and the promotional process was again utilized to review the candidates for promotion. Those employees who had participated in the prior application process were given the option of retaining their composite score or starting from scratch and undergoing the review again. Grievant choose to be reevaluated and received a somewhat lower score than she had in January leaving her ranked third for promotion. S.R. Markle, a new

applicant, received the highest composite score of all the applicants; he and Mr. Leisure were subsequently promoted the two positions of corporal.

Grievant cites Policy and Procedure Statement No. 3038, Section D.2 as the basis of her complaint. That Section provides

Officers who participate in the promotional system shall be rank ordered on a promotional list according to the officer's composite score, as determined by the competitive process. Such list may be valid for a period of six (6) months from the date of issue, and may be utilized during that period to fill subsequent vacancies in the appropriate rank. All appointments from this list shall be in strict rank order.

Grievant asserts that this statement required Respondent to maintain for six months the eligibility list it established in January and that by doing so she would have been entitled to one of the promotions in March. Grievant argues that the decision by Respondent to reopen the application process resulted in its functioning contrary to the stated intent that it should ensure consistency, predictability in providing uniformed staff the opportunity for long-term career advancement.

Grievant cites a second violation of Policy 3038 at Section D.4(d) which requires that the Selection and Review Board notify each applicant in writing of his or her individual numerical values for scores used in promotional consideration. Grievant asserts that she has never been given that information which would have assisted her in

making a fully-informed decision as to whether she should have retested for the second round of promotions.

Grievant argues that in addition to these policy violations the decision to reopen the application process in March was an arbitrary and capricious action and an unwarranted abuse of discretion by Respondent's Executive Director. She asserts that she had relied in good faith on the Career Progression system and that Respondent's improper action denied her the promotion to which she was entitled.

Respondent denies that it either altered the promotional procedure or acted contrary to its guidelines when filling the two positions in March. Specifically, Respondent asserts that Section D.2 of Policy 3038 contains no language prohibiting the addition of qualified officers to the eligibility list. On the contrary, Respondent argues that it was entirely within its discretion to add to the existing list of employees eligible for promotion and cites usage of the word may in the policy, i.e. "[s]uch list may be valid for a period of six (6) months from the date of issue, and may be utilized during that period to fill subsequent vacancies in the appropriate rank" (emphasis added). Respondent adds that the policy only requires that promotions be awarded in strict rank order determined by the officers' composite scores.

Respondent noted that the decision to allow additional employees to apply for promotion was not a spur of the moment change in policy but had been contemplated as

evidenced by Executive Director Billy Burke's letter to Grievant dated January 31, 1991. Director Burke advised Grievant that her composite score did not place her in one of the three vacancies but that she would hold the second position on the register. He went on to state "[i]f additional applicants are tested and placed upon the register of eligibility, your relative position on the register may change depending upon the overall composite scores." Respondent further argues that Policy No. 3038 provides that "[s]cheduling for promotional testing will be at the discretion of the Executive Director or designee" and that the continuous addition of new candidates is necessary to ensure that the most qualified individuals are promoted.

Respondent acknowledges that the policy requires the disclosure to the applicants of their scores but asserts that its failure to do so was harmless error. Respondent justifies this position by noting that all of the applicants were treated consistently and that Grievant was not prejudiced or disadvantaged to any greater degree than any other officer on the eligibility list. Respondent also asserts that the decision to not provide the individuals with their scores was based upon advice received from the West Virginia Division of Personnel and "should not be construed as an intentional concealment or deviation of the scoring used in the promotional process."

Grievant incorrectly interprets Policy No. 3038 to provide rules for promotion by which the Respondent must

abide. In reference to the introductory section identified as "Policy" the Respondent states that it cannot be held to a strict application of the Career Progression System and that the policy had been "developed to serve as a guideline for career advancement and should not be considered as binding on the Authority or its agents." Section D.2 promotes the purpose that it served only as a guideline by stating that the promotional list may be valid for a period of six months and may be used during that time to fill vacancies. Although Section D.4 (d) would appear to make the disclosure of scores to applicants mandatory, that provision too would only be a guideline as defined by the Policy section.

The promulgation of policies and procedures which serve only as guidelines and allow such expansive discretion may well be inadequate, as evidenced herein, to fulfill the intent of the Authority to provide a system for promotion ensuring "consistency, predictability, and review of designated procedures." However, because the policy is defined only as a guideline and the duration and use of the promotional list is discretionary rather than mandatory, Grievant has no entitlement to retain her place on the first eligibility list and Respondent is not prohibited from updating the list at any time.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

### Findings of Fact

1. Grievant was employed by the West Virginia Regional Jail Authority and Correctional Facility Authority in April 1989 and is presently classified as a Correctional Officer II.

2. In January 1991 Grievant was one of twelve applicants for three positions of corporal. Grievant's overall score rated her fifth leaving her second on the eligibility list.

3. In February 1991 Respondent announced two additional vacancies for corporal and reopened the promotional process to allow recently-eligible employees to apply for the positions. Those employees on the eligibility list were allowed to retest which Grievant did.

4. Following the second application/evaluation process Grievant was ranked third in eligibility.

5. The applicants were not given their individual scores after either evaluation.

### Conclusions of Law

1. A grievant seeking relief pursuant to W.Va. Code §§29-6A-1 et seq. must prove all of the allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116

(June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. Respondent's Career Progression policy serves only as a guideline and states that the revision and the use of the promotion eligibility list is discretionary with the Authority; therefore, Grievant had no right to retain her previous ranking on the list and the Respondent is not prohibited from re-testing and admitting new applicants at its discretion.

3. Respondent must provide applicants for promotion with their individual scores assigned and considered by the Selection and Review Board.

Accordingly, the grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED February 27, 1992

Sue Keller

SUE KELLER  
SENIOR ADMINISTRATIVE  
LAW JUDGE