3-5-2008

DOUG WARDEN
INITIAL ORDER

This contested administrative proceeding was heard on March 5, 2008, before John Hicks, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Civil Service Commission. Kim L. Kirk, Assistant General Counsel for the Tennessee Department of Environment and Conservation ("Department") represented the State. Grievant Doug Warden ("Grievant") was represented by Jeffery S. Frensley of Nashville.

The subject of this proceeding is whether Grievant’s non-selection for promotion is non-grievable pursuant to Department of Human Resources Rule 1120-11-.08(4). After consideration of the entire record and the arguments of counsel, it is DETERMINED that Grievant’s non-selection for promotion is non-grievable pursuant to Department of Human Resources Rule 1120-11-.08(4). This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Grievant is an Environmental Protection Specialist 4 with the Department.

2. During September 2005, the Department interviewed and promoted three employees to Environmental Specialist 6 (EPS6) positions. The Environmental Protection
Specialist 6 position does not require a Department of Human Resources’ Examinations Division written examination to be placed on the promotion register. The applicant’s placement on the register is based completely on a rating of the applicant’s education and work experience.

3. Grievant applied for and was placed on the EPS6 promotion list with several other candidates.

4. It is undisputed that the appropriate candidates on the Department of Human Resources (“TDHR”) promotion register were notified by letter and interviewed for the positions.

5. At the end of the interview, the candidates were advised that there would be a written examination as part of the interview.

6. Each candidate received a face-to-face interview and completed a written examination developed by the Department’s Division of Air Pollution Control.

7. Grievant participated in the interview and written examination but was not a successful candidate for promotion.

8. Grievant appealed alleging that the examination must be in compliance with TDHR Rule 1120-2-.05 regarding examinations.

9. The Department of Human Resources’ Examinations Division is responsible for producing the rank ordered lists of candidates for career service positions. The lists are referred to as the employment registers and promotion registers. Some positions require written examination and others require an examination of the applicant’s education and experience.

10. TDHR Rule 1120-2-.05 defines the process that TDHR utilizes to prepare lists (employment/promotion register) of candidates who are eligible for employment or promotion.
The preparation of the employment/promotion register is the extent of TDHR’s jurisdiction over examinations.

11. TDHR does not have authority to control how a hiring agency structures the promotion process to select a candidate for promotion. The agency may use a written examination as part of the selection process to promote off the TDHR generated promotion register.

CONCLUSIONS OF LAW

1. Rule 1120-2-.05 EXAMINATIONS.

   (1) Notice of Examinations – The Commissioner will give public notice of all examinations, at least two (2) weeks in advance of the closing date for receipt of applications, by posting notices throughout the State. Public notice of examinations will specify the title and salary range of the class of positions, the duties to be performed, the minimum or desirable qualifications required, the final date on which applications will be received, and other conditions of competition, including the relative weights assigned to the various parts in the examination.

2. It is CONCLUDED that The Environmental Protection Specialist 6 position does not require a Department of Human Resources’ Examinations Division written examination to be placed on the employment register. The applicant’s placement on the register is based completely on TDHR’s rating of the applicant’s education and work experience. Once the employment register is generated and provided to the Department, the Department controls the structure and process to select a candidate for employment.

3. Rule 1120-2-.05 EXAMINATIONS.

   (2) Promotional Examinations. Promotional examinations may be limited to employees of an organizational unit or may be open to employees of all organizational units in the career service.
4. It is CONCLUDED that The Environmental Protection Specialist 6 position does not require a Department of Human Resources’ Examinations Division written examination to be placed on the promotion register. The applicant’s placement on the register is based completely on a rating of the applicant’s education and work experience. Once the promotion register is generated and provided to the Department, the Department controls the structure and process to select a candidate for promotion. The Department may determine the need for an examination and the structure and content of the examination.

5. It is CONCLUDED that the examination for the Environmental Protection Specialist 6 position is based completely on a rating of the applicant’s education and work experience.

6. It is CONCLUDED that the Department correctly pulled a promotion register and appropriately interviewed and appropriately selected the candidates for promotion. The record does not demonstrate that the Department violated Rule 1120-2-.05.

7. Rule 1120-11-.08 EXCEPTIONS AND NON-GRIEVABLE MATTERS
   (4) Non selection for promotion when the appointment was in compliance with the rules and the Act.

8. It is CONCLUDED that the Department’s process of selecting the candidates for promotion to the Environmental Specialist 6 positions was in compliance with the rules and the Act and that Grievant’s non-selection for promotion is non-grievable.

9. It is CONCLUDED that Grievant’s non-selection for promotion is non-grievable pursuant to Department of Human Resources Rule 1120-11-.08(4)

10. It is ORDERED that the grievance of Doug Warden for non-selection for promotion is non-grievable pursuant to Department of Human Resources Rule 1120-11-.08(4).
11. It is ORDERED that Grievant’s appeal be DISMISSED.

This Initial Order entered and effective this 22nd day of July, 2008.

_________________________________
John Hicks
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 22nd day of July, 2008.

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Thomas G. Stovall, Director
Administrative Procedures Division