EDWARD L. DEEM,

Grievant,

v. DOCKET NO. 96-DEP-221

WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION/WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Edward L. Deem, Grievant, is employed by the West Virginia Division of Environmental Protection (DEP) as an Environmental Inspector. Grievant challenges part of the Workplace Security Policy (Policy) issued by the West Virginia Division of Personnel (Personnel) (See footnote 1) , and which became effective on May 1, 1995. Grievant filed this grievance against DEP on April 15, 1996, alleging:

> The Division of Personnel has violated my constitutional rights and exceeded it's [sic] power in prohibiting the carrying of weapons on personal (non-real) property and/or real property which is not owned, leased, etc. by the State of W[est] V[irginia].

As relief, Grievant seeks to have deleted "that illegal section of the safety policy which prohibits the carrying of weapons on non-real (personal) property and on real property which is not owned, leased, etc. by the State of WV."

Grievant was denied relief at the lower levels of the grievance procedure. At Level IV an evidentiary hearing was held at the Grievance Board's Elkins office on December 10, 1996. The case became mature for decision on January 16, 1997, with receipt of Grievant's post-hearing submission. Respondent did not file apost-hearing submission.

PRELIMINARY ISSUE

Respondents made a motion to dismiss this grievance based on res judicata. (See footnote 2) Grievant had filed a similar grievance which had progressed to Level IV, and was styled Deem v. W. Va. Div. of Env. Protection, Docket No. 95-CLER-544 (Deem I). Grievant requested that that grievance be dismissed without prejudice, before a hearing was held. The undersigned

Administrative Law Judge granted that motion on May 9, 1996. Res judicata does not apply, in this case, because Deem I was dismissed without prejudice. “The 'without prejudice' condition permits a plaintiff to refile the complaint as if it had never been filed.” Mendez v. Elliot, 45 F.3d 75 (4th Cir. 1995); State ex. rel. Charleston Area Medical Center, Inc. v. Kaufman, 197 W. Va. 282, 475 S.E.2d 374 (1996). Therefore, Respondents' motion to dismiss is **DENIED**.

The following findings of fact are derived from the record.

FINDINGS OF FACT

1. Grievant is an Environmental Inspector. His duties include the inspection of quarries, and active and inactive coal operations.

2. Grievant often inspects mines and quarries in remote areas by himself.

3. Grievant's state-issued cellular telephone is often inoperable when he is in remote areas.

4. Wild animals, which may have rabies, may frequent abandoned mines and quarries that Grievant is required to inspect.

5. Once a groundhog approached Grievant while he was in a remote area inspecting a mine/quarry.

6. Grievant once had a gun pulled on him while closing down a mining operation.

7. Arrangements can be made with law enforcement agencies to provide an officer to accompany a state inspector to potentially dangerous locations.

DISCUSSION

Grievant challenges part of the Workplace Security Policy (Policy) issued by Personnel which became effective on May 1, 1995. He may contest the Policy without establishing a specific instance where the Policy has been applied. However, because his claim does not flow from a specific factual incident, Grievant has the burden of demonstrating that the Policy is inherently flawed, and that Respondent cannot follow the Policy without violating his rights. See Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan.23, 1996) (See footnote 3) ; Peters v. Raleigh County Bd. of Educ., Docket No. 94- DOE-043 (Sept. 27, 1994).

The Policy which Grievant challenges in this grievance, in pertinent part, provides:

> The State has a responsibility to protect the health, safety, and well-being of employees and the general public; therefore, firearms or dangerous weapons and/or threatening/violent behavior are prohibited in the workplace. The possession of a license or permit to carry a weapon, except as provided in Section III. D., does not constitute an exception of this policy. The policy is intended to supplement, not

> supersede, any existing agency policies on workplace security and safety. Such agency policies, while permitted, shall not enhance or diminish the provisions of this policy.

Exceptions provided in Section III. D., referred to in the Policy, are reproduced below:

> 1. Federal, State, and local government security/law enforcement personnel authorized to possess a firearm while engaged in their official capacity as such.
>
> 2. Cased, or securely wrapped, unloaded hunting equipment, firearms, etc., which are secured in a personal vehicle on State premises.

"Workplace" is defined in the Policy as:

> A worksite where work is performed. The workplace shall include facitilites, property, buildings, offices, structures, automobiles, trucks, trailers, or other means of conveyance, (private or public, while engaged in performance of duties), and parking areas, whether owned or leased by the agency or entity.

Grievant asserts that:

> [b]ecause the workplace is defined so broadly, itviolates West Virginia's public policy as enunciated in the State Constitution: Article 3, Section 22 (Right to Bear Arms for Self-Defense). (See footnote 4) It is also unconstitutional under our court's decision in State ex rel. City of Princeton v. Buckner, 180 W. Va. 457, 377 S.E.2d 139 (1988).

Grievant's "Supplemental Memorandum of Law."

Buckner involved the effect of Article III, Section 22 of the West Virginia Constitution, commonly referred to as "The Right to Keep and Bear Arms Amendment," on the constitutionality of this state's weapons statute, W. Va. Code §61-7-1 [1975], (See footnote 5) which prohibited the carrying of a dangerous or deadly weapon without a license. In Syllabus Point 2 of Buckner, the Supreme Court of Appeals of West Virginia held:

> W. Va. Code, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right ofa person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

Buckner does not stand for the proposition that the "right to bear arms" is permissible in all situations. Grievant cites a number of instances where the legislature has placed restrictions on an individual's "right to bear arms." Level IV, Gr. Ex. 2. However, such restrictions may flow from

governmental bodies other than the state legislature, and may not be embodied in the criminal section of the Code. In Bradley v. Bd. of Directors/Fairmont State College, Docket No. 96-BOD-030 (Jan. 30, 1997), Conclusion of Law number five, Administrative Law Judge Lewis Brewer held that Fairmont State College's

> President did not abuse his discretion in deciding not to allow [g]rievants to carry firearms while on duty as Campus Police Officers, given that Grievants' duties are substantially limited to those services normally provided by unarmed security guards. See Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Moreover, the Policy in question in this case is not as wide- sweeping as W. Va. Code §61-7-1 [1975]. The Policy only prohibits one from possessing dangerous weapons at the workplace, even though workplace may be defined broadly.

Grievant also asserts that "[t]he only statutory authority for [Personnel] to prohibit the right of its employee to carry a

firearm or dangerous weapon in the workplace is found in West Virginia Code §61-7-14", which, in pertinent part, provides:

> Notwithstanding the provisions of this article, anyowner, lessee or other person charged with the care, custody and control of real property may prohibit the carrying openly or concealing of any firearm or deadly weapon on property under his or her domain: Provided, That for purposes of this section "person" means an individual or any entity which may acquire title to real property.

First, Grievant fails to cite any authority for his position that Chapter 61, the criminal section of the Code, limits Personnel's authority to make rules concerning the workplace. Second, Personnel's rule-making authority is derived from W. Va. Code §29-6-10, which provides that it may make any "other rules and administrative regulations, not inconsistent with this article, as may be proper and necessary for its enforcement. Third, Personnel has broad discretion in exercising its administrative authority to issue regulations. See Callaghan v. W. Va. Civil Service Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980); Dooley, supra. Fourth, a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). Finally, the rules promulgated by Personnel are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. See Callaghan, supra; Smith v. W. Va. Div. of Corrections, Docket No. 94-

CORR-624 (Mar.
2, 1995). Grievant failed to prove that Personnel was without authority to create and enforce its Workplace Security policy.

Although Grievant feels that he should be able to carry a firearm when he is working in the field, he has failed to prove, by a preponderance of the evidence, that the Policy in question is unreasonable, arbitrary and capricious, or fails to conform with authorizing legislation. In a nutshell, Grievant's basis for his belief that he should be able to carry a firearm, or other dangerous weapon, is based on two encounters: one with a groundhog, and the other with an owner/operator of a mine who pulled a gun on him. Grievant was not injured in either instance. These two facts, or the evidence found in the record, do not create a right for Grievant to carry a gun, nor prove by a preponderance of the evidence that the Policy is unreasonable.

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

CONCLUSIONS OF LAW

1. “The 'without prejudice' condition [in a dismissal order] permits a plaintiff to refile the complaint as if it had never been filed.” Mendez v. Elliot, 45 F.3d 75 (4th Cir. 1995); State ex. rel. Charleston Area Medical Center, Inc. v. Kaufman, 197 W. Va. 282, 475 S.E.2d 374 (1996).

2. In nondisciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of
the evidence. Unrue v. W. Va. Dept. of Highways, Docket No. 95- DOH-287 (Jan. 22, 1996).

3. A government agency's determination regarding matters within its expertise is entitled to substantial weight. PrincetonCommunity Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993).

4. The rules promulgated by Personnel are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. See Callaghan, supra; Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Mar. 2, 1995).

5. Grievant failed to prove by a preponderance of the evidence that the Workplace Security Policy issued by the West Virginia Division of Personnel is constitutionally defective.

Accordingly, the grievance is **DENIED**.

Any party 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: October 23, 1997 _____

JEFFREY N. WEATHERHOLT ADMINISTRATIVE LAW JUDGE

Footnote: 1

Personnel was made a party at Level III.

Footnote: 2

Res judicata, or claim preclusion, "generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action." State v. Miller, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995) (citing Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308, 313 (1980); In re Estate of McIntosh, 144 W. Va. 583, 109 S.E.2d 153 (1959)). "A claim is barred by res judicata when the prior action involves identical claims and the same parties or their privies." Id. In other words, as summarized by the United States Supreme Court: "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552, 559 n.5 (1979).

Footnote: 3

Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996), found that the Workplace Security Policy did not deprive grievants of their right to be free from unreasonable search and seizure.

Footnote: 4

Article III, Section 22 of the West Virginia Constitution succinctly states: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."

Footnote: 5

W. Va. Code, 61-7-1 [1975] provided in pertinent part:

If any person, without a state license therefor or except as provided elsewhere in this article and other provisions of this Code, carry about his person any revolver or pistol, dirk, bowie knife, slung shot [sic], razor, billy, metallic or other false knuckles, or other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail not less than six nor more than twelve months for the first offense; but upon the conviction of the same person for the second offense in this State, he shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years, and, in either case, shall be fined not less than fifty dollars nor more than two hundred dollar.