**WILLIAM BRADLEY, et al.,**

**Grievants,**

**v.** **DOCKET NO. 96-BOD-030**

**BOARD OF DIRECTORS,**
**FAIRMONT STATE COLLEGE,**

**Respondent.**

## D E C I S I O N

On October 16, 1995, Grievants (See footnote 1) initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Fairmont State College (FSC) has improperly denied their request to be bonded and issued firearms for use in the performance of their duties as Campus Police Officers. A Level I response issued by Charles Turbanic, Director of FSC's Physical Plant, indicated that handguns had been ordered for "safety training purposes," and that some firearms training would be provided on an unspecified future date. Not satisfied with this response, Grievants appealed to Level II where a hearing was conducted on December 21, 1995. Thereafter, on January 12, 1996, FSC President Robert J. Dillman denied the grievance on its merits, but directed a "task force" to investigate the situation, and make recommendations regarding use of firearms by campussecurity officers. (See footnote 2) As authorized by W. Va. Code § 18-29-4(c), Grievant waived Level III, appealing to Level IV on January 23, 1996. Following a series of continuances, each of which was granted for good cause, a Level IV evidentiary hearing was conducted at FSC on May 14, 1996. The parties elected to submit post-hearing proposed findings of fact and conclusions of law. In accordance with the briefing schedule established, this matter became mature for decision upon receipt of FSC's reply brief on September 10, 1996.

## DISCUSSION

In support of their grievance, Grievants presented testimony from Lorin Elder, who has served as Chief of Security at FSC since 1991. He noted that most state-operated colleges and universities in West Virginia, excepting West Virginia University at Parkersburg and the Osteopathic School, arm their campus security officers, at least part of the time. See G Ex A. (See footnote 3)

As Grievants' immediate supervisor, Chief Elder believes that carrying a firearm is necessary to protect both the officers and the campus population they are assigned to safeguard. He asserted that a Campus Police Officer would be unable to control a dangerous situation involving an armed violator, unless the officer is properly armed. Inhis opinion, the safety of the officer and those persons the officer is assigned to protect is impaired unless the officer is armed.

Each Grievant is classified as a Campus Police Officer I. (See footnote 4) They are generally responsible for ensuring the security and safety of the college community and facilities by physically patrolling designated areas, and enforcing institutional security regulations and procedures. Further, they exercise general law enforcement authority to protect persons and property from injury, harm or damage. G Ex C. New hires are expected to have already completed the West Virginia State Police Academy Basic Police Training Course and have the ability to obtain licensure to carry firearms. See G Ex C. In addition, Chief Elder recounted that all FSC Police Officers have undergone a criminal background check.

FSC's Security Handbook (Handbook) contains information on the duties and responsibilities of Campus Police Officers. G Ex D at 3. The Handbook provides that Grievants are "responsible for enforcing College rules and regulations, state and local laws," and have a general duty of protecting life and property while detecting and apprehending offenders. See G Ex C at 5, 11. The Handbook stipulates that Grievants will not carry firearms while on duty. G Ex D at 32.

The Handbook also instructs that, in the event a violator resists apprehension, Grievants are to contact an appropriate law enforcement agency, as they do not have the capability of enforcing their arrest upon an armed or resisting offender. G Ex C at 12. FSC Police Officers are able to contact Fairmont City Police by radio 24 hours a day. FairmontCity Police and the Marion County Sheriff's Department are both located within approximately 1.4 miles of the FSC campus.

Dean VanBibber, an Assistant Professor in FSC's Criminal Justice Department, serves as the Faculty Advisor to the Student Security Force (SSF) at FSC. The SSF augments the Campus Police Officers, patrolling the campus in pairs after dark to check doors and windows, and to report

suspicious activities. SSF members have no arrest authority and are equipped only with radios and flashlights. Professor VanBibber previously served as a township police officer and Chief of Police in Pennsylvania. He also has experience as a security consultant, advisor on executive protection, and private investigator. In Professor VanBibber's opinion, Grievants face potentially significant problems performing their assigned duties, should they encounter an armed perpetrator. On cross-examination, Professor VanBibber acknowledged that not all state institutions of higher education in Pennsylvania arm their campus police officers. Otis Cox is similarly employed in FSC's Criminal Justice and Business departments as an Assistant Professor. Professor Cox was previously employed by the Federal Bureau of Investigation as a Special Agent for 26 years. He holds a license as a Certified Police Instructor. During his FBI career, Professor Cox was shot and stabbed in separate incidents arresting felons. In his opinion, he would have been killed in either instance, had he not been armed. Further, in Professor Cox' opinion, there is a conflict between the Handbook and FSC's position vacancy announcement for Campus Police Officer I. He observed that the job posting indicates that Grievants are hired as police officers while the Handbook indicates they are employed as security guards. Professor Cox acknowledged that, as security guards, Grievants would be able to perform their duties without firearms. The FSC Security Police maintain a log of reportable crimes, consistent with the Federal Bureau of Investigation's Uniform Crime Reports. In 1995, there was one crime involving a weapons violation and, during the January through April 1996 reporting period, one additional reported weapons violation. Chief Elder indicated that neither of those violations involved firearms. He testified that Fairmont City Police are regularly called to assist Campus Police Officers in DUI apprehensions, but this is based upon FSC's lack of breath-testing equipment. (See footnote 5) There was no evidence to quantify the frequency of violators resisting arrest or brandishing a weapon where outside law enforcement personnel had to be called to the scene. However, Professor Cox discussed a recent incident where the Fairmont Police arrested an FSC student for discharging a firearm at a residence near the campus.

Jerry Helmick, who has served as Captain of the Glenville State College Police Department for the past twenty-nine years, testified that he has been carrying a firearm since he was first hired. Further, although his officers occasionally require backup from the Glenville City Police, the city police more frequently call on one of his officers for assistance. In Mr. Helmick's opinion, all Campus Police Officers should be provided firearms to protect themselves and college personnel. Mr. Helmick

neither described nor quantified any situations where he required a firearm while working on campus.

FSC called Theodore Offutt, Chief of Police for the City of Fairmont, West Virginia, to testify regarding his position on arming the FSC Police Officers. Chief Offutt has served in his present capacity for 5 years, having been a police officer in Fairmont for 20 years. All police officers currently employed by the City of Fairmont have completed the West Virginia State Police Academy Basic Police Training Course. Because some of FSC's officers are exempt from this training requirement, Chief Offutt believes they should not be issued firearms. He further explained that, because his officers and FSC's officers had not received the same training, he would not call for assistance from FSC's officers, even if they were armed.

Chief Offutt further opined that FSC has not yet experienced the level of serious crime which has affected other higher education institutions in and out of West Virginia. However, he noted that any traffic stop or arrest has the potential to develop into a dangerous situation for the arresting officer. Traffic stops are one of the top two situations where armed police officers are injured, the other being domestic violence calls. Thus, he has recommended to Chief Elder that FSC's officers do not attempt late-night traffic stops without the assistance of the Fairmont Police.

Following the Level II hearing in this matter, a Firearms Task Force Committee, consisting of classified staff, faculty and students, was appointed. The Task Force ultimately recommended that FSC's Campus Police Officers not be armed. As part of this process, the Task Force conducted a survey of the employees, faculty and students. A majority of persons participating in the survey indicated that they preferred the Campus Police Officers not be allowed to carry firearms on duty.

W. Va. Code § 18B-4-5 provides as follows:

> The governing boards are hereby authorized to appoint bona fide residents of this state to act as security officers upon any premises owned or leased by the state of West Virginia and under the jurisdiction of the governing boards, subject to the conditions and restrictions hereafter imposed. Before performing duties as a security officer in any county, eachperson so appointed shall qualify therefor in the same manner as is required of county officers by the taking and filing of an oath of office as required by article one [§ 6-1-1 et seq.], chapter six of this code and by posting an official bond as required by article two [§ 6-2-1 et seq.], chapter six of this code. No security officer shall have authority to carry a gun or any other dangerous weapon until a license therefor has been obtained in the manner prescribed by section two [§ 61-7-2], article seven, chapter sixty-one of this code.
>
> It shall be the duty of any person so appointed and qualified to preserve law and order on any premises under the jurisdiction of the governing boards and on any other street, road or thoroughfare, except controlled access and open country highways,

> adjacent to or passing through such premises, to which the person may be assigned by the president or other administrative head of the state institution of higher education. For this purpose the security officer shall be deemed to be a law-enforcement officer in accordance with the provisions of section one [§ 30-29-1], article twenty- nine, chapter thirty of this code and, as to offenses committed within any area so assigned, have and may exercise all the powers and authority and shall be subject to all the requirements and responsibilities of a law- enforcement officer; Provided, That the supervisor of any security officer employed on the effective date of this section may exempt such officer from any law enforcement training required in said article. The assignment of security officers to the duties authorized by this section shall not be deemed to supersede in any way the authority or duty of other peace officers to preserve law and order on such premises. In addition, the security officers appointed under provisions of this section shall have authority to assist local peace officers on public highways in the control of traffic in and around premises owned by the state of West Virginia whenever such traffic is generated as a result of athletic or other activities conducted or sponsored by a state institution of higher education and when such assistance has been requested by the local peace officers.
>
> The salary of all such security officers shall be paid by the appropriate governing board. Each state institution may furnish each such security officer with an official uniform to be worn while on duty and shall furnish and require each such officer while on duty to wear a shield with an appropriate inscription and to carry credentials certifying to the person's identity and authority as a security officer.
>
> The governing boards may at their pleasure revoke the authority of any security officer. The president or other administrative head of the state institution of higher education shall report the termination of employment of a security officer by filing a notice to that effect in the office of the clerk of each county in which the security officer's oath of office was filed, and in the case of a security officer licensed to carry a gun or other dangerous weapon,by notifying the clerk of the circuit court of the county in which the license therefor was granted.

The following portions of W. Va. Code § 30-29-1 are also pertinent to this grievance:

> "Law enforcement officer" means any duly authorized member of a law-enforcement agency who is authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof, other than parking ordinances, and shall include those persons employed as security officers at state institutions of higher education in accordance with the provisions of section five [§ 18B-4-5], article four, chapter eighteen-b of this code, although these institutions may not be considered law-enforcement agencies.

Under the State College System of West Virginia Board of Directors' Administrative Rule governing "Presidential Appointments, Responsibilities and Evaluation," a college president is the chief executive of the institution with "final institutional level authority and responsibility for every personnel action at the institution." 131 C.S.R. 59 §§ 3.4, 3.5 (1993). The parties agree that, to the

extent Grievants' employer has discretion on arming them, FSC's President is the proper authority to exercise that discretion.

This grievance involves a clear but contentious issue. Grievants contend that because they are employed as security officers authorized by state law to carry weapons, FSC should provide them with appropriate firearms, such as a handgun typically issued to other police officers in West Virginia, as a condition of employing them to do police work. Concomitantly, Grievants assert that their employer's failure to provide appropriate equipment in the form of firearms represents a policy constituting a substantial detriment to their job performance, health and safety prohibited by W. Va. Code § 18-29-2(a). (See footnote 6) FSCsubmits that although authority to arm its security officers certainly exists, whether to exercise that authority is left to the sound discretion of the college president and, given the totality of the circumstances, FSC's president has not abused his discretion by declining to issue firearms to Grievants. Likewise, FSC disagrees that failure to arm Grievants unduly affects their safety.

The first issue to be dealt with is whether FSC's decision not to issue firearms to Grievants is "illegal." Although W. Va. Code §§ 18B-4-5 and 30-29-1 authorize Campus Police Officers to carry firearms and exercise the same arrest authority as other law enforcement officers, no Code provision mandates that FSC arm Grievants. When read in para materia, it is apparent that the statutes leave that decision to the discretion of the individual institution.

In order to prevail under their argument that failure to provide firearms violates Grievants' rights under W. Va. Code § 18-29-2(a), Grievants must demonstrate that such action poses a substantial detriment to their health and safety or the health and safety of others, or to their effective job performance. Grievants' expert witnesses established that routine police work, particularly late-night traffic stops and attempting to arrest armed felons, is inherently dangerous work, and becomes even more hazardous if the officer is not properly armed and trained.

However, the record indicates that Grievants spend the majority of their time performing duties which are appropriate for unarmed security guards, are explicitly cautioned in their Handbook to call for assistance whenever they encounter resistance, and maintain constant radio contact with the Fairmont City Police. Thus, although Grievants have authority by statute to make arrests on campus, their employer has directed them notto exercise that authority under certain circumstances. Most significantly, Grievants did not establish that they encounter situations such as their experts

described, calling for immediate intervention by an armed police officer, without waiting for local law enforcement personnel to be called to the scene, on even an infrequent basis.

Prior decisions of this Grievance Board finding that employees are entitled to relief under W. Va. Code § 18-29-2(a) have involved chronic situations which meet the statutory "substantial detriment" standard. See York v. Mingo County Bd. of Educ., Docket No. 95- 29-519 (Apr. 23, 1996); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996). This does not mean that the potential for a dangerous situation will never arise, or that Grievants could not be seriously injured or killed while performing their duties in strict compliance with the Handbook. However, it is clear that FBI agents, sheriff's deputies and municipal police officers encounter situations requiring use of deadly force with far greater frequency than police officers assigned to FSC. According to a preponderance of the evidence, Grievants' assigned duties do not place them in situations calling for a firearm on more than an occasional basis. Therefore, lack of a firearm is not a substantial detriment to either the performance of their duties or to their health and safety and the health and safety of others. For these same reasons, the decisions from other jurisdictions which Grievants cite in support of their position are readily distinguishable.

If FSC is not required by law to furnish firearms to Grievants, the only issue remaining is whether FSC's failure to furnish appropriate firearms while assigning them to perform traditional police duties, in addition to the duties normally performed by unarmed security guards, represents either an abuse of discretion, or an arbitrary and capricious action. In determining the appropriate equipment to furnish its employees in order toperform their assigned duties, some deference must be given to the FSC President's judgment that firearms are not necessary for Campus Police Officers at this time. The arbitrary and capricious standard does not allow an administrative law judge to simply substitute his judgment for that of the FSC President. See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

In this context, notwithstanding Grievants' well-founded concerns, FSC has established a rational basis for its decision. Although community sentiment may not override a legal obligation, it appears that a representative sampling of the FSC community supports maintaining the status quo on firearms for Campus Police Officers. The FSC President made a good faith determination that the level of

security appropriate to protection of the persons and property on FSC's campus does not require the presence of an armed police force. That decision has not been shown to be an abuse of his discretion. See Bedford, supra.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

## FINDINGS OF FACT

1. Grievants are employed by Respondent Fairmont State College (FSC) as Campus Police Officers.

2. Since 1992, persons hired or promoted to Campus Police Officer positions at FSC have been required to complete successfully the West Virginia State Police AcademyBasic Police Training Course and have the ability to obtain a license to carry firearms. See W. Va. Code § 18B-5-4; G Ex C.

3. Grievants are tasked with exercising general law enforcement authority to protect persons and property from injury, harm or damage. G Ex C. However, they are instructed to call for assistance from local law enforcement personnel if they encounter a suspect who is armed, or resists lawful apprehension. See G Ex D at 12, 30.

4. Local law enforcement agencies to be called for assistance include the Fairmont Police Department, Marion County Sheriff's Department and West Virginia State Police, in that order of priority. The Fairmont City Police and Marion County Sheriff offices are located approximately 1.4 miles from the FSC campus.

5. Grievants are provided with a two-way radio while on duty enabling them to maintain constant communications with the Fairmont City Police.

6. Grievants are prohibited from carrying firearms while on duty. G Ex D at 8, 32.

7. A survey of FSC students, faculty and employees conducted in April 1996 by the "Firearms Task Force Committee" revealed that a majority of those responding preferred that FSC Campus Police Officers not be allowed to carry firearms while on duty.

8. Grievants' duties primarily involve activities that may appropriately be performed by unarmed security guards.

9. Most Campus Police Officers at other state-supported colleges and universities are permitted

by their college or university president to carry firearms while on duty. However, at one location, Campus Police Officers carry firearms only at night.

10. At no time have any FSC Campus Police Officers been issued firearms.

## CONCLUSIONS OF LAW

1. In a grievance of this nature, grievants have the burden of proving each of the allegations in their complaint by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Carter v. Bd. of Directors, Docket No. 95-BOD-148 (Aug. 29, 1995).

2. When read in para materia, W. Va. Code §§ 30-29-1 and 18B-5-4 grant Campus Police Officers the same arrest authority as any other law-enforcement officers, and permit such officers to carry firearms in the performance of their duties, but their employing institution is not required to arm such security personnel.

3. W. Va. Code § 18-29-2(a) permits an employee to obtain relief from any action, policy or practice of their employer constituting a substantial detriment to or interference with effective job performance or the health and safety of students or employees. See York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996).

4. Grievants failed to demonstrate that FSC's refusal to issue firearms for their use while on duty as Campus Police Officers constitutes a substantial detriment to or interference with effective performance of their duties or to the health and safety of Grievants or the FSC campus population. See York, supra; Guerin, supra.

5. FSC's President did not abuse his discretion in deciding not to allow Grievants 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).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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.

**LEWIS G. BREWER**

**ADMINISTRATIVE LAW JUDGE**

**Dated: January 28, 1997**

---

*Footnote: 1*

*William Bradley, Dave Cross, Dale Rice, William Rogers, Sheila Warnick, Orville Barnhart, and Charles Williams.*

---

*Footnote: 2*

*This process, which was not completed until after the Level IV hearing, did not result in a change in FSC's position on the merits of the grievance.*

---

*Footnote: 3*

*Although this document essentially consists of hearsay, the formal rules of evidence do not apply in proceedings before this Grievance Board. W. Va. Code § 18-29-6. Moreover, the undersigned administrative law judge notes that this same evidence was presented at Level II, and Respondent had ample opportunity to rebut this evidence at Level IV. Respondent's failure to present evidence to dispute the facts asserted by Chief Elder establishes those facts by a preponderance of the evidence.*

---

*Footnote: 4*

*Grievants' positions are also referred to in some documents as "Campus Security Officers." It appears that the titles are interchangeable.*

---

*Footnote: 5*

*There are only two locations in Marion County where state-certified breath tests for intoxication are conducted.*

---

*Footnote: 6*

*Grievants do not contend that they should be issued firearms without completing the appropriate training, as required by Code, or in compliance with reasonable training and proficiency standards adopted by FSC.*