MICHAEL HUNDLEY,

Grievant,

v. **Docket No. 97-CORR-197C**

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Michael Hundley (Grievant) was employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer at the Mount Olive Correctional Complex (MOCC), until his dismissal on April 17, 1997. (See footnote 1) He filed this action on October 21, 1996, (See footnote 2) requesting that CORR investigate an incident at MOCC. This grievance was denied at Level I, on October 25, 1996, by Immediate Supervisor Charles Reynolds. This grievance was denied at Level II, on February 4, 1997, by Warden's designee Michael Coleman. It is unclear from the record whether any proceedings took place at Level III.

On April 30, 1997, Grievant brought his grievance to Level IV. A Level IV hearing was scheduled for August 21, 1998, before the undersigned administrative law judge, atthe Grievance Board's Beckley office. Grievant was represented at this hearing by Elaine Harris, and CORR was represented by Assistant Attorney General Leslie K. Tyree. The final testimony in this grievance was taken telephonically, on March 3, 1999. The parties were given until April 27, 1999, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision at that time. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by Corrections as a Correctional Officer until his dismissal on April 17, 1997.

2. On May 15, 1996, Correctional Officer II Deborah VanDyke (VanDyke) needed to enter Pods six and seven of MOCC's Ouilliams II (QII) unit. (See footnote 3) This unit houses extremely dangerous inmates, the "worst of the worst."

3. VanDyke and Officer Delana Sandford (Sandford) looked from the control unit of QII to make sure that all of its inmates were secured in their cells or "cages." All inmates, including Rusty Lassiter (Lassiter) and Bruce White (White), were secured.

4. The cell doors within the Pods are electrically controlled from within the control unit.

5. Lassiter and White have been convicted of numerous serious infractions of MOCC's rules for inmate conduct, including escape attempts. They have committed and/or abetted in the murder of seven or eight inmates.

6. Sandford opened Pod 7. VanDyke entered Pod 7 and delivered sweatpantsto an inmate. Sandford then opened Pod 6, and VanDyke entered it and delivered sweatpants to another inmate.

7. VanDyke then went up to the top tier of Pod 6 to talk to two inmates. While there, she heard a cell door click open downstairs. VanDyke hurried to finish her conversation with the inmates and descended the stairs while trying not to appear afraid.

8. After descending the stairs, VanDyke saw Lassiter standing in the open doorway of his cell. Lassiter said "I'm a free man" before closing his cell door.

9. VanDyke went to the control unit to determine who had opened Lassiter's cell door. Both officers present in the control unit, Sandford and Lieutenant Simmons (Simmons), denied opening the door.

10. VanDyke reported this incident to her supervisor, and assumed that an investigation would follow. She also filed a written incident report.

11. When it appeared that no investigation was being conducted, VanDyke contacted her union representative, Grievant, (See footnote 4) but did not file a grievance for fear of retaliation. VanDyke based her fear of retaliation on the fact that she had testified on behalf of Jack Ferrell (Ferrell) at the level IV hearing concerning his dismissal, and because Sandford had made the complaint that led to Ferrell's dismissal.

12. Executive Assistant Michael Coleman (Coleman) interviewed Sandford and Simmons before concluding that the incident was related in some way to Ferrell's dismissal, and that something was going on other than a desire to report a real incident.

13. Grievant filed this grievance on behalf of VanDyke.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant requests that CORR investigate the incident described in findings of fact two through eight, and that the results of the investigation be given to him.

VanDyke's testimony regarding this incident, at Grievant's Level IV hearing, was consistent and credible. CORR produced no evidence, and called no witnesses, to prove that this incident did not take place as VanDyke said it did. However, because this incident happened to her, and not to Grievant, Grievant has failed to establish that he has the standing required to pursue this grievance.

To have standing to challenge an employer's action, a grievant must ordinarily show that he has been harmed in some way by that action. Super v. Randolph County Bd. of Educ., Docket No. 99-42-043 (Mar. 5, 1999); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998); Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Shobe v. Latimer, 162 W. Va.779, 253 S.E.2d 54 (1979). That is to say, one person cannot prosecute a grievance on behalf of someone else. Hall v. Mercer County Bd. of Educ., Docket No. 94-27-1099 (Mar. 20, 1995).

This Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory. Khoury v. Public Serv. Comm'n., Docket No. 95-PSC-501 (Jan. 31, 1996).

This is not to say that a grievant may not obtain relief from management decisions that constitute a substantial detriment to, or interference with, his health and safety. W. Va. Code § 29-6A-2(i), See

Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997); Ball v. Dep't of Highways, Docket No. 96-DOH-141(July 31, 1997). For example, a grievant's presence at his work site when work-release prisoners drove state vehicles to the site was found sufficient to constitute a grievance as a substantial detriment to or interference with his heallth and safety, where the grievant feared that work-release prisoners could not safely operate such vehicles. Wilds v. W. Va. Dep't. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991). However, these grievances were filed by employees directly affected by the employer's action. That is not the case here, where Grievant seeks to grieve on behalf of his fellow employee.

Grievant argues that he should be able to pursue this grieviance on VanDyke's behalf because he was her union representative. However, Grievant has not cited, and the undersigned has been unable to find, any authority for this. VanDyke testified at Level IV that she did not file this grievance for fear of retaliation, based on the fact that she had testified on behalf of Ferrell at the Level IV hearing concerning his dismissal, and because Sandford had made the complaint that led to Ferrell's dismissal. Her claim of possibleretaliation was not rebutted by any evidence produced by CORR. However, because her concern about possible retaliation was speculative in nature, and because a decision on this issue is not necessary to the outcome of this grievance, this issue will not be addressed.

Although lacking standing, Grievant has described an extremely troubling situation. Clearly, Lassiter's cell door didn't open itself. CORR presented no evidence that it was not opened, or to explain how anyone other than Sandford and Simmons could have opened it. CORR's cursory investigation, which did not even involve interviewing VanDyke or Lassiter, reveals a disturbingly casual attitude toward a life-threatening situation.

Coleman's conclusion that the incident was related in some way to Ferrell's dismissal, and that something was going on other than a desire to report a real incident, appears to be the result of speculation, and not investigation. However, it was VanDyke, and not Grievant, who was threatened, and VanDyke who had standing to file a grievance.

Consistent with the foregoing discussion, the following Conlclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving

his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. To have standing to challenge an employer's action, a grievant must ordinarily show that he has been harmed in some way by that action. Super v. Randolph County Bd.of Educ., Docket No. 99-42-043 (Mar. 5, 1999); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998); Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979).

3. Grievant failed to prove, by a preponderance of the evidence, that he had standing to file this grievance.

Accordingly, the grievance is **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. Any such appeal must be filed within thirty (30) 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.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 4, 1999

Footnote: 1

Grievant has grieved his termination, and other issues, in Hundley v. W. Va. Div. of Corrections, Docket No. 98-CORR-197A, which has not yet been decided.

Footnote: 2

This grievance has been repeatedly delayed. It was originally assigned to Administrative Law Judge (ALJ) Jerry

Wright, who issued an Order Compelling Discovery to CORR on September 4, 1997. This grievance was reassigned for administrative reasons to ALJ Mary Jo Swartz on November 5, 1997. This grievance was again reassigned for administrative reasons to the undersigned on March 18, 1998. A Level IV hearing was scheduled for July 10, 1998, but was continued on CORR's unopposed motion of July 8, 1998. After the Level IV hearing of August 21, 1998, A second day of the Level IV hearing was scheduled for December 22, 1998, but was continued on CORR's unopposed motion of December 11, 1998. A second day of the Level IV hearing was scheduled for February 10, 1999, but was continued by agreement of the parties.

Footnote: 3

This unit is named after the last correctional officer to be killed in the line of duty at the maximum security unit at the former Moundsville Penitentiary.

Footnote: 4

Grievant was a representative of the Communications Workers of America.