GLEN L. COOK, et al.,

Grievants,

v. **Docket No. 03-DNR-045**

DIVISION OF NATURAL RESOURCES,

Respondent.

DECISION

Grievants initiated this proceeding on September 19, 2002, alleging their employer has violated certain policies of the Division of Natural Resources ("DNR"). As relief, Grievants request that DNR "rescind memorandum and any and all policies requiring officers give preferential treatment to certain individuals." The grievance was denied at level one on September 26, 2002, and at level two on October 11, 2002. A level three hearing was held on February 4, 2003, and the grievance was denied in a decision dated March 19, 2003. (See footnote 1) A level four hearing was held on June 13, 2003, where Grievants were represented by Grievant Cook, and DNR was represented by Kelley Goes, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 7, 2003.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed in DNR's Law Enforcement Section as Conservation Officers.

2. On September 6, 2002, DNR Director Ed Hamrick issued a memorandum to Colonel Jim Fields, Chief of the Law Enforcement Section. The subject of the memorandum was a pending circuit court case which had interpreted a particular statute as creating criminal trespass liability for a hunter whose hunting dog enters posted private property. Director Hamrick disagreed with the interpretation, and instructed Colonel Fields that DNR personnel should continue to enforce the statute pursuant to his belief, until a final ruling was issued in the appeal of that decision.

3. By memorandum dated September 30, 2002, Director Hamrick advised Colonel Fields that the September 6, 2002, memorandum was rescinded, because the circuit court decision had not been appealed. He directed that the statute in question should be enforced as interpreted by the court, so that a hunter whose dog enters posted property could be prosecuted for criminal trespass.

4. DNR's Policy No. XVII provides that vehicle mounted dog “strike cages” are permitted for use by hunters. The dogs are placed in the cages, which are attached to the outside of the vehicle, and are released in order to pursue game.

5. Strike cages are largely used by bear hunters, but their use is not limited to any specific group of hunters.

6. Actual hunting from a moving vehicle is prohibited by DNR regulations and/or state law. However, use of the dogs in strike cages, which allows hunters to find game while still in the vehicle, is allowed.

Discussion

___As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievants disagree with the two policies, and DNR's interpretation of those policies, as set forth above. They believe that the strike cage policy forces them to provide advantages to bear hunters which are not given to other hunters. However, there is no evidence which indicates that other hunters have not been allowed to use strike cages, and the policy clearly does not limit its provisions to bear hunters. As to the criminal trespass case, Grievants disagreed with the Director's decision not to initially follow the circuit court's decision, but it is undisputed that the memorandum was later rescinded. Grievants have provided no evidence as to how they have been adversely affected by the Director's decisions in this regard.

The jurisdiction of this Grievance Board is limited to matters arising from the “misapplication or a misinterpretation of the statutes, policies, . . . under which . . . employees work,” and includes issues regarding compensation, hours, terms and conditions of employment, along with discriminatory practices or policies and harassment or favoritism. It also encompasses “any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the

health and safety of the employees." W. Va. Code § 29-6A-2(i).

In the instant case, Grievants have expressed disagreement with DNR's policies, but they have not established how the policies have adversely affected them personally.In Wilds v. West Virginia Department of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991), it was found a grievant had standing to pursue a grievance against a practice that he alleged was "a substantial detriment to or interference with. . . [his] health and safety." The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees. . ." Id. "The 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); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998).

State employees do not get to make policy and must abide by policies which do not involve illegal or prohibited activities which would violate the grievance statute. See Patterson v. Parkways Economic Development and Tourism Auth., Docket No. 99-PEDTA- 448 (Dec. 15, 2000); Smith v. Parkways Economic Development and Tourism Auth., Docket No. 00-PEDTA-133 (July 7, 2000); Farley et al. v. Parkways Economic Development and Tourism Auth., Docket No. 00-PEDTA-015 (June 22, 2000); McCoy/Domingues v. Parkways Economic Development and Tourism Auth., Docket No. 99-PEDTA-074 (July 19, 1999). Although Grievants in this case have a strong disagreement with DNR's policies, they have not established personal harm as a result of the policies discussed. Accordingly, they have no standing to pursue this grievance.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ.& State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "The 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); Smith v. W. Va. Parkways

Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998).

3. Grievants have suffered no personal harm as a result of DNR's policies, and they do not have standing to pursue this grievance.

Accordingly, this 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, and 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.

Date: July 11, 2003 _____ **DENISE M. SPATAFORE**

Administrative Law Judge

Footnote: 1

Grievants had alleged that a default occurred at level three, which was denied by Order of this Grievance Board dated May 5, 2003.