SANDRA SHULTZ, et al.,

Grievants,

v. **DOCKET NO. 02-CORR-221**

DIVISION OF CORRECTIONS/

ST. MARYS CORRECTIONAL CENTER,

Respondent.

DECISION

Grievants (See footnote 1) filed this grievance against Division of Corrections/St. Marys Correctional Center, (Respondent) on April 18, 2002, stating: “I was unfairly denied compensation for being required to report for work early for briefing.” Grievants stated the relief sought as: “Compensated for time spent coming to work early for briefing and/or otherwise made whole, with no retribution. Résumé having additional time to give proper briefings and compensation for that time.”

The grievance having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on July 30, 2003. Grievants were represented by Jack Ferrell of Communications Workers of America, AFL-CIO, and Respondent was represented by Charles Houdyschell, Esq., Assistant Attorney General. This matterbecame mature for decision on September 15, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievants are uniformed and non-uniformed staff employed in various capacities in the Security Division by Respondent at St. Marys Correctional Center (SMCC).

2. Warden William M. Fox issued Post Orders effective November 19, 1998, July 15, 1999, and June 1, 2001, that stated, in part: "1. Obtain briefing. 2. Obtain radio and keys, make sure radio is

working and number of keys accounted for." These orders are to be followed by an officer upon assuming a post at the beginning of a shift.

3. Warden Fox also issued General Security Orders on November 16, 1998, as Operational Procedure No. 1.03, that stated in part: "VI. Staff will receive, obey and pass on to their relief all orders received, incidents/unusual events and will stand their assigned post until [properly] relieved."

4. To implement these orders, many officers were instructed by their supervisors to report to their posts 15 minutes prior to the start of their shifts to receive a briefing by the outgoing officer.

5. Beginning July 31, 2001, SMCC was audited by the U.S. Department of Labor, Wage and Hour Division (DOL), headed by Investigator Bill Ash, to investigate a complaint that staff were not being paid for the time spent in pre-shift briefings.

6. The audit covered a two-year period and ultimately concluded that 113 employees of SMCC, including 27 Grievants, were owed payment for uncompensatedovertime. By July 30, 2002, Respondent had provided the DOL with proof of payment to all but two of these employees (neither of which is a Grievant).

7. To comply with the findings and recommendations of the audit, Warden Fox issued an Order dated October 15, 2001, stating in part:

> 1 * No briefings shall occur before changes of shifts.
>
> 2 * All dissemination of information shall occur following shift changes as the Shift Commanders conduct walk-throughs of the facility (any Red Flag areas will be addressed by priority).
>
> 3 * All staff, after receiving their duty assignment, shall report directly to their assigned Post at the directed shift change time period (Example: 7:00 A.M. to 3:00 P.M. staff shall relieve previous shift at 7:00 A.M.).
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> 4 * Depending upon duty assignment, the previous shift will be relieved of Post prior to picking up keys or exchanging radio batteries, etc.

8. Warden Fox also issued an order effective November 19, 2001, stating, "Please be advised

that due to circumstances outside of our control, we must take the unfortunate action of prohibiting any employee from entering the premises earlier than seven and a half (7½) minutes prior to the start of their scheduled shift and/or scheduled work hours."

9. To determine which employees were entitled to overtime payments, Respondent gave Mr. Ash access to its records and allowed him to speak with employees. Although he did not speak to all employees, he did review the time records of all Security personnel employed by Respondent from August 1, 1999, through August 1, 2001. Respondent did not tell Mr. Ash which records to review, but rather responded to his requests for information based on the parameters he provided. Respondent had no control over Mr. Ash's investigation. 10. The audit determined that staff within the Security Division were under the impression that they were to report to their posts early for a pre-shift briefing, although there was no written order to do so, or to report at specific time prior to their shifts. The Department of Labor found that some workers had been required to report early, and directed SMCC to compensate these staff members for overtime at a rate of 10 minutes per day worked up to 45 minutes per work week. The overtime pay was limited to inside Security Division employees, as Programs Division employees reported directly to their posts.

11. Respondent did not assert that this grievance was untimely filed.

DISCUSSION

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants contend that not all employees who should have been paid for overtime were paid, and that Mr. Ash did not review all the relevant employment records. Respondent contends that it complied fully with the DOL directive and paid each employee identified by Mr. Ash, and that it provided Mr. Ash with full access to its records. It then issued unequivocal orders that staff were not to report for their shifts early and restricted personnel from even being on the premises earlier than seven and one-half minutes prior to the beginning of their shifts, just enough time to get from the gate to their posts.

Grievants' argument is that the DOL's investigator did not properly identify all the employees who

should have been paid overtime, because Respondent did not provide himwith all the necessary records. Grievable matters are defined in W. Va. Code 29-6A-2(i), which states:

> "Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.
>
> Any pension matter or other issue relating to public employees insurance in accordance with article sixteen, chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

[Emphasis added]. The Grievance Board has no jurisdiction over matters in which a grievant's employer is not vested with the authority to act. Since the investigation was undertaken by a federal agency, and Respondent had no control over it or its investigator, the matters about which Grievants complain clearly are matters in which the authority to act are not vested with Respondent, their employer, hence are not grievable.

While the undersigned Administrative Law Judge would have no jurisdiction to review an investigation made by a Federal agency, any misconduct by Respondent, such as concealing records, would be correctable. However, there was no evidence that Respondent did not fully cooperate with the Investigator. Grievants sought to introduce and proffered as evidence weekly sign-in/sign-out sheets for all Grievants showing when they worked. Some Grievants testified that they were not contacted by Mr. Ash. However, Mr. Ash was not called to testify, and the methods he used to conduct his investigationwere not explained. Respondent showed that it cooperated fully with the investigation, had no control over the investigation, and provided Mr. Ash with all records he requested. Grievants' contention that Respondent somehow impeded the investigation by failing to provide records is mere speculation, based on the fact that they did not agree with the outcome of the investigation. Grievants appear to believe they were not included in the DOL investigation because they were not paid overtime or were not contacted by the DOL investigator, but the evidence shows the investigation was made based on the records of all employees affected.

Finally, Grievants argue that the daily briefing periods should be added back to their workdays. They contend that a lack of time to perform post changeovers is a breach of security and makes their

jobs less safe. When coming on to a shift, given the nature of their jobs, it is helpful to know if there have been any problems or unusual happenings, so they know more about what to expect, especially in the case of fomenting trouble. Usually, the officer going off-shift is in too much of a hurry to go home, and the officers coming on feel unprepared without some current knowledge about their posts when the outgoing officer does not have time or take time to brief them. However, the decision to eliminate the briefings was a management decision. While Grievants do have informed and valid opinions on the matter, they presented no evidence to support their contentions. Management's opinion is given much more weight when it comes to setting policy for the facility. “A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve.” Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002). The undersigned has no authority to require an agency to adopt a policy, absent some law, ruleor regulation which mandates such a policy be developed. Frame, et al. v. Dep't of Health and Human Resources/Bureau for Children and Families, Docket No. 00-HHR-240/330, (Apr. 20, 2001); Olson v. Bd. of Trustees, Docket No. 99-BOT-513 (Apr. 5, 2000); Gary and Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999); Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997). While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day- to-day supervision of its workforce. Frame, *supra*. *See* Skaff, *supra*. Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92- HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met this burden. Id.

2. The Grievance Board has no jurisdiction over matters in which a grievant's employer is not vested with the authority to act. W. Va. Code § 29-6A-2(i).

3. Grievants did not meet their burden of proving Respondent improperly impeded the DOL Investigation. 4. A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *See* Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000), citing Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997)." Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 202).

5. The undersigned has no authority to require an agency to adopt a policy, absent some law, rule or regulation which mandates such a policy be developed. Frame, et al. v. Dep't of Health and Human Resources/Bureau for Children and Families, Docket No. 00-HHR-240/330, (Apr. 20, 2001); Olson, *supra*; Gary and Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999); Skaff, *supra*.

6. While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. Frame, *supra*. *See* Skaff, *supra*. Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County o rt he county in which the issue 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 isrequired 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 30, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Sandra Shultz, Greg Maine, Kathy Taylor, Rose Smith, James L. Chapman, Marsha Hicks, Betty Anderson, Victor Cline, William Dailey, Lois Cokeley, Diane Shingler, Scott Smith, Kevin Todd, Jeff Simmons, Brian Metz, Perry Thorne, Chris Harris, Rosemarie Cohenour, Teresa Runnion, Patricia Keller, John P. Smith, Steve Kalinofski, Howard Stoffel, III, Linda Lauer, John White, Sally Baker, James O. Vaughn, Joe Smith, Rosemary Cramer, Duane Collins, Shawn McKee, Betty Metz, Brian Hartwig, Sarah Wilkinson, Bryan Huff, Roger Greathouse, Worden Rustemeyer, Michael Bolen, Robert Metheney, Bert Osborne, Kathy Pratt and Matt Eichner.