THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

RANDY MILLS,

Grievant,

v. **Docket No. 06-RJA-256**

Denise M. Spatafore

Administrative Law Judge

REGIONAL JAIL AND CORRECTIONAL

FACILITY AUTHORITY/EASTERN

REGIONAL JAIL,

Respondent.

DECISION

This grievance was filed directly at level four by Randy Mills ("Grievant") on July 27, 2006, as the result of an unpaid suspension imposed by his employer, the Regional Jail and Correctional Facility Authority ("RJA"). During a telephone conference conducted on September 6, 2006, Grievant, appearing pro se, and RJA, appearing by counsel, Chad Cardinal, agreed to place this matter in abeyance, pending the outcome of an investigation into the incident which gave rise to this grievance. After several months passed and the investigation still had not concluded, the parties agreed to have a hearing conducted regarding the issue of the propriety of the suspension. That hearing was held on March 14, 2007, with all parties and witnesses appearing by telephone. (See footnote 1) Upon receipt of the parties' post-hearing submissions on April 4, 2007, this matter became mature for decision.

Synopsis

Grievant, a correctional officer, was involved in an incident on July 17, 2006, during which force was used to restrain an inmate. The day following the incident, the inmate died, possibly due to injuries received during the altercation with Grievant. Therefore, Respondent suspended Grievant without pay until the State Police and RJA could conduct investigations into the incident. Grievant contends that his suspension was unjustified and should have been for a set period of time, rather than continuing for these many months. RJA provided evidence that the police investigation is still ongoing, and Grievant's polygraph test had been scheduled, justifying continuation of the suspension. Based upon federal, state, and administrative case law, an indefinite suspension during a criminal investigation is permitted.

Findings of Fact

1. Grievant is employed by RJA at the Eastern Regional Jail as a Correctional Officer 2.

2. On July 16, 2006, in his capacity as a correctional officer, Grievant was involved in an incident during which physical force was used to restrain an inmate, David Marshall.

3. Several hours after the incident during which he was restrained, Mr. Marshall was found dead in his cell.

4. On July 19, 2006, Grievant was notified by John L. King, RJA Chief of Operations, that he was being suspended without pay “until the outcome of a criminal investigation and any subsequent internal investigation can be completed” regarding the death of Mr. Marshall. 5. RJA Policy and Procedure Statement 3036 discusses the procedure for conducting internal investigations, providing, in part:

> Depending upon the severity of the allegations against a staff member, said staff member may be placed on non-disciplinary suspension from duty, without pay, for a period of time pending the outcome of an investigation of said allegations.

a.

> The purpose of said non-disciplinary suspension is to preserve the integrity of the investigation, protect the accused from further allegations, protect the accuser from retaliation or retribution, and protect the security of the facility, staff, inmates and the general public.

b.

> If allegations for which a staff member is suspended without pay are found, through investigation, to be groundless, the staff member will be reinstated to duty with reimbursement for wages lost as a result of the suspension.

c.

> If the allegations for which a staff member is suspended are found to be true, or any other evidence of wrongdoing is proven during an investigation, the staff member will be subject to disciplinary action based upon the investigation results, up to and including dismissal from employment.

6. By letter dated March 14, 2007, the Martinsburg Detachment of the West Virginia State Police verified that the investigation surrounding the death of David Marshall was still ongoing, and followup interviews with witnesses were being conducted.

7. A polygraph test was scheduled for Grievant during the month of April, 2007, which has apparently been completed, although the results have not been released.

8. RJA's internal investigation is pending, depending upon the outcome of the criminal investigation, at which time a decision will be made as to whether to return Grievant to his position, with full back pay, or take disciplinary action against him.

Discussion

The propriety of an indefinite suspension without pay was discussed in *Blaney v. Wood County Board of Education*, Docket No. 03-54-169 (Jan. 16, 2004). Citing a decision of the Merit Systems Protection Board, a federal employment law tribunal, it was noted:

> The most essential criterion of an action, if it is to meet the definition of 'suspension' . . . is that it be 'temporary.' Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension.

Id. (Citing *Martin v. Customs Serv.*, 12 MSPR 12, 10 MSPB 568 (1982)). The administrative law judge in *Blaney*, *supra*, concluded that it was not improper for a board of education to suspend an employee indefinitely, without pay, pending a criminal investigation into the charges against him.

The federal courts have also consistently upheld indefinite suspensions without pay. *See Engdahl v. Dept. of Navy*, 900 F.2d 1572 (Fed. Cir. 1990), *aff'd, Engdahl v. Dept. of Navy*, 40 MSPR 660

(1989); *Brown v. Dept. of Justice*, 715 F.2d 662 (D.C. Cir. 1983); *Jankowitz v. United States*, 533 F.2d 538 (Ct. Cl. 1976). In *Engdahl*, it was recognized that:

> No doubt, [the employee] has significant interests that were substantively affected. Suspension for cause without pay is likely to cut off subsistence income and to prevent one from obtaining other gainful employment. Although temporary, such a suspension has great practical impact on the employee.

Nonetheless, the Court went on to say that the government's interests were far more substantial and upheld the suspension without pay. In addition, the West Virginia Supreme Court of Appeals has upheld an indefinite suspension without pay in the case of a judgewho was indicted, pending the final disposition of the criminal charges, or until the underlying disciplinary proceeding had been completed. *See In Re Atkinson*, 193 W. Va. 358, 456 S.E.2d 202 (1995).

Grievant's frustration at the length of this unpaid suspension is certainly understandable. There is also no doubt that, especially if Grievant is absolved of any culpability in Mr. Marshall's death, it is certainly a regrettable situation for him to have remained on suspension for such a long period of time. However, the fact remains that a death has occurred, possibly due to Grievant's actions, which is not a matter to be taken lightly. Respondent's policy provides for an unpaid suspension while an investigation is conducted, and there is no time limit to the length of the suspension or the investigation. In light of the recent communication from the State Police, indicating that the matter is still being investigated, it is not unreasonable for Respondent to continue to keep Grievant away from the facility until a proper decision may be made as to whether this incident should result in disciplinary action.

The following conclusions of law support this Decision.

Conclusions of Law

1. An employer may indefinitely suspend an employee without pay, so long as the suspension is temporary and will be terminated by the completion of an investigation or trial. *Blaney v. Wood County Board of Education*, Docket No. 03-54-169 (Jan. 16, 2004) (Citing *Martin v. Customs Serv.*, 12 MSPR 12, 10 MSPB 568 (1982). 2. Based upon Federal and State case law, and previous Grievance Board decisions, Grievant's indefinite suspension without pay is neither a violation of statute, nor arbitrary, capricious, or an abuse of discretion.

Accordingly, this grievance is **DENIED.**

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

Date: April 30, 2007

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Prior to the hearing, Grievant retained counsel, Christopher J. Prezioso.