THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SUSAN J. KERSHNER,
Grievant,

v. **Docket No. 2008-1862-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant, Susan J. Kershner, filed a grievance against her employer, Department of Environmental Protection ("DEP"), on July 7, 2008. The statement of grievance reads, "The requirement that we must sign an open end waiver for release of our driving record stating all personal information."

For relief, Grievant seeks:

> I ask that the Secretary rule that we can obtain a certified copy from DMV and submit it for review each year or an amended form that does not have full personel [sic] information. As it is, this data is ripe for identity theft.

A level three hearing was held in the Grievance Board's Beckley Office on March 31, 2009. Grievant was represented by Fred Tucker, WVSEU/UMWA Representative, and Respondent was represented by Raymond Franks, General Counsel. This case became mature on April 30, 2009, upon the parties' submission of findings of fact and conclusions of law.

Synopsis

Grievant asserts that requiring her to sign a waiver that has her driver's license number, name, last four digits of her social security number, and birth date leave her at risk for identity theft.

Respondent asserts the form is needed to obtain Grievant's driver's record. Respondent avers since Grievant has a state vehicle to assist in her job duties, it is imperative, for insurance purposes, that it be able to obtain and review her driver's record yearly. Lastly, Respondent argues the forms are kept by its Human Resources Department in a locked cabinet and are treated as confidential information.

Because Grievant has not suffered a personal injury, she is without standing to pursue this grievance, and it must be denied.

Findings of Fact

1. Grievant is employed as an Environmental Inspector for the Division of Water and Waste Management and is assigned to DEP's Oak Hill Office.

2. At times, Grievant is required to travel throughout a specified inspection area, and as such, she is permitted to drive a state vehicle.

3. In 2001, Grievant completed and signed a State Owned Vehicle Assignment and Lease Agreement whereby she provided her driver's license number and agreed to the terms of the lease.

4. Among other lease terms, the agreement requires Grievant to acknowledge that Respondent will verify all driver information with the Division of Motor Vehicles ("DMV").

5. State owned vehicles are under the control of the Department of Administration ("DOA"). DOA's procedural rule 148 C.S.R. 3 § 8.6, requires the employee have a valid license and that his/her drivers' record be reviewed by Travel Management.

6. In 2002, Board of Risk and Insurance Management (BRIM) met with DEP's Safety Manager and Fleet Manager for a loss control visit. In a letter memorializing that

visit, BRIM recommended that DEP review employee DMV records prior to employee being hired and annually thereafter for all persons permitted to operate owned or leased vehicles.

7. BRIM recommended this again at the 2003 loss control visit.

8. Then on September 21, 2004, BRIM announced it was implementing Loss Control Standards of Participation. In accordance with that initiative, BRIM assesses credits or surcharges to DEP's insurance premiums depending on how rigorously the agency adheres to the Standards, including reviewing employees drivers' records annually. A high degree of compliance earns DEP a 6% premium credit. Falling below the compliance level results in a 15% surcharge. DEP attempts to comply as completely as possible.

9. As a result of completing the waiver form to allow Respondent to obtain DMV records, no employee's identity has been stolen.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

Grievant asserts having her complete a waiver for her driver's record puts her at risk for identity theft. "Without some allegation of personal injury, a grievant is without standing to pursue the grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb.

28, 1990); *Beard v. Bd. of Directors/Shepherd College*, Docket No. 99-BOD-268 (Apr. 27, 2000); *Elliott v. Randolph County Bd. of Educ.,* Docket No. 98-42-304 (May 26, 1999); *Farley v. W. Va. Parkways Econ. Dev. Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). 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, 2002).

By Grievant's own testimony, she has suffered no injury, but instead has a philosophical disagreement with DEP's decision to have employees with state owned vehicles complete the waiver.[1] While the undersigned completely understands her concern, Grievant was unable to sufficiently explain the difference between this form and any other employment form that contains private information. She explained she felt Human Resources took privacy issues more seriously than the Fleet Manager. That concern should be alleviated because Respondent presented testimony that Human Resources maintains all of the waivers.

Grievant has suggested that she be allowed to obtain her own DMV records and provide them to Respondent. Ms. Hughes, Privacy Officer, testified this would be a cumbersome undertaking for Respondent. First, Respondent would have to ensure the accuracy of each record for 366 employees. Second, Ms. Hughes testified there can be difficulty obtaining required documentation from employees. Lastly, there was speculation

[1]Respondent's attorney did not raise this issue at the hearing or in his Findings of Fact and Conclusions of Law.

that employees would not want to pay the cost of obtaining those records.

Respondent has attempted to safeguard the information, much like all other personal information placed on personnel forms. Grievant has failed to allege any personal injury. Therefore this grievance must be denied.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. "Without some allegation of personal injury, a grievant is without standing to pursue the grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Beard v. Bd. of Directors/Shepherd College*, Docket No. 99-BOD-268 (Apr. 27, 2000); *Elliott v. Randolph County Bd. of Educ.,* Docket No. 98-42-304 (May 26, 1999); *Farley v. W. Va. Parkways Econ. Dev. Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). 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, 2002).

3. Grievant has failed to allege a personal injury, so she is without standing to file a grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: May 18, 2009

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Wendy A. Campbell
Administrative Law Judge