THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLEN COOK,
Grievant,

v. **DOCKET NO. 2009-0801-CONS**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Glen Cook, filed five grievances against his employer, the Division of Natural Resources, on July 1, 2008, August 4, 2008, September 2, 2008, September 17, 2008, and October 14, 2008, respectively.

The statement of grievance for the first grievance reads, "Letter from Colonel Murphy denying me a copy of a taped PSU interview in violation of General Order VII." As relief Grievant sought:

> Be provided a copy of taped interview in compliance with General Order VII, return General Orders to before changes made on 5/27/05 to allow for discovery, promulgate regulations pertaining to PSU operational procedures and progressive discipline, cease harassment, discrimination and reprisals.

The parties agreed to waive levels one and two. On July 10, 2008, Respondent filed a Motion to Dismiss this grievance, which Motion was denied by the undersigned Administrative Law Judge on January 8, 2009.

The statement of grievance for the second grievance reads:

> Allow[ed] another Conservation Officer to audio record a Professional Standards Unit (PSU) interview and not permit me to do the same, harassing, discriminating and showing reprisals against me; and in violation of General Order VII-7-4, provide me with a copy of the tape recording they

made of the interview.

As relief in the second grievance, Grievant sought:

> Cease harassment, discrimination and reprisals against me; provide me a copy of the taped PSU interview which was recorded by the Interviewer during the said interview; permit me and all other Conservation Officers in the future to audio record PSU and other interviews if they desire; compensation for violating my rights and failing to provide me requested information; punitive damages and disciplinary action against those who have shown harassment, discrimination and reprisals against me; cause the Department to establish a set Standard Operating Procedure for investigations and disciplinary action which must have Legislative approval to be changed or altered.[1]

A hearing was held at level one on this grievance on August 15, 2008, and a decision denying the grievance was issued at level one on August 18, 2008. Grievant appealed to level two on September 2, 2008.

The statement of grievance for the third grievance reads:

> Receipt of a letter on 08/16/08 from Colonel Murphy advising that a PSU investigation was complete, which did not notify me whether or not disciplinary action is forthcoming, and if disciplinary action is forthcoming, so notify the employee and advise that the matter is closed or if disciplinary action is forthcoming, so notify the employee, in violation of General Order Number VII-7-18(9).

The relief sought in the third grievance was similar to that sought in the second grievance, except that Grievant did not address the issue of recording interviews or obtaining a copy of any tape, and he added "comply with General Order VII-7-18(9)," and that the Standard

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[1] It is clear that neither Respondent nor the undersigned has the authority to require the Legislature to approve any Standard Operating Procedure or rule proposed by Respondent, and this requested relief will not be addressed. Further, the Grievance Board does not award punitive or tort-like damages. *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006).

Operating Procedure "gives the same rights and protection to Conservation Officers as other police officers." A hearing was held at level one on this grievance on September 24, 2008, and a level one decision denying the grievance was issued on October 8, 2008. Grievant appealed to level two on October 20, 2008.

The statement of grievance for the fourth grievance reads:

> Professional Standards Unit Interview on August 26, 2008, where the interviewer failed to apprise me of the nature of the complaint in violation of General Order VII-7-1; refused to provide me a copy of the interview tape, in violation of General Order VII-7-4; advised me that I could not consult with legal counsel after the interview without first obtaining specific permission through the Colonel by going through my chain of command, in violation of General Order VII-7-5; refused to allow me to record the interview in violation of General Order XVIII and WV Code 62-1D-3(c)(2); violating my constitution[al] rights.

The relief sought in the fourth grievance was also similar to that sought in the second grievance, except there was no mention of the interview recordings, Grievant sought "compensation for harassment, discrimination and reprisals against me," that standard operating procedures be established "for Conservation Officers and Supervisors in the Department," and that the General Orders be rewritten "to allow for rights of employees and establish legislative rules regarding discipline and Professionals Standards Investigations." A level one hearing was held on October 28, 2008, and a level one decision denying the grievance was issued on November 5, 2008. Grievant appealed to level two on November 17, 2008.

The statement of grievance for the fifth grievance reads, "[n]ew [G]eneral Orders, effective 10/01/08, some which violate the rights of Conservation Officers and some which discriminate against me." As relief Grievant sought:

> Declare particular General Orders discriminatory and unconstitutional; cause

> the Department to change the General Orders to provide for proper employee rights and a standard operating procedure with employee representation regarding General Orders and Standard Operating Procedures, cease harassment, discrimination and reprisals against me; disciplinary action against supervisors who have shown harassment, discrimination, or reprisals against me and compensation for harassment, discrimination and reprisals.

A hearing was held at level one on October 28, 2008, and a level one decision denying the grievance was issued on November 6, 2008. Grievant appealed to level two on November 24, 2008.

The four grievances which had been appealed to level two were consolidated, and a mediation session was held on January 15, 2009. Grievant appealed the consolidated grievance to level three on February 5, 2009. At the beginning of the level three hearing, held before the undersigned Administrative Law Judge on June 5, 2009, in Elkins, West Virginia, the parties agreed that the first grievance filed, which had been pending at level three, should be consolidated with the other four grievances, and it was so ordered.[2] Grievant represented himself at level three, and Respondent was represented by William R. Valentino, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on August 3, 2009.[3]

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[2] The Order of Consolidation entered in this matter had also erroneously included a Docket No. 2009-0700-DOC. No such Docket Number existed at the time, and the Order was not intended to combine the first grievance, which was Docket No. 2009-0007-DOC, with the other four grievances, as the first grievance was already at level three.

[3] Attached to Grievant's Proposed Findings of Fact was a transcript of a hearing held on July 30, 2007, before Jack McClung, which is identified only as a level three grievance hearing in the matter of Glen Cook v. Division of Natural Resources, Law Enforcement Section, a two-page document which is entitled Notations of Discrepancies in testimony in Grievance Hearing 07/30/07, and a CD labeled 2009-0801-CONS. These

Synopsis

Grievant is a Conservation Officer employed by the Division of Natural Resources. The various issues in this consolidated grievance arose primarily out of Grievant's disagreement with Respondent's General Orders, and Respondent's interpretation of its General Orders. In several instances, Grievant's reading of the General Orders was incorrect, as was his reading of a statute he cited in support of his asserted right to record an investigatory interview. Where the General Orders were ambiguous, Respondent's interpretation was entitled to deference. Many of Grievant's complaints about changes in General Orders had not affected Grievant in any way, and represented merely a philosophical disagreement with his employer's rules, which is not grievable. Finally, the changes in the General Orders were not discriminatory, as they apply to all DNR officers.

The following Findings of Fact are made based upon the evidence developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Division of Natural Resources ("DNR") as a Conservation Officer.

2. On June 2, 2008, Grievant was interviewed by Lt. Mike Waugh, also an employee of DNR, in connection with a Professional Standards Unit ("PSU") investigation Lt. Waugh was conducting which had resulted from a complaint filed against Grievant. Lt.

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three items were not identified, authenticated, or marked as exhibits at the level three hearing on this matter, nor did Respondent have the opportunity to make any objections to their admission on the record. The record in this matter is closed, and Grievant has not asked that it be reopened to place these items into evidence, nor did he present any reason why it should be reopened to admit these items. Accordingly, these three items will not be considered by the undersigned.

Waugh recorded the interview. Grievant asked to also record the interview and was told he could not record it.

3. On June 2, 2008, Grievant requested a copy of the audio tape of the interview conducted by Lt. Waugh. By letter dated June 10, 2008, Colonel D.E. Murphy, Chief of DNR's Law Enforcement Section, advised Grievant that he could listen to the audio tape when the investigation was completed. DNR declined to make a copy of the tape for Grievant.

4. In mid-August, 2008, Colonel Murphy sent Grievant a letter advising him that the investigation of a complaint against him had been completed. The letter did not state whether any disciplinary action would be forthcoming as a result of the investigation.

5. On August 26, 2008, Sergeant Charles Robert Johnson, an investigator with DNR's PSU, interviewed Grievant as part of a PSU investigation of another complaint filed against Grievant. At the beginning of the interview Sergeant Johnson advised Grievant that he was investigating the complaint made by Terry Suder, which he had spoken to him about in July. Sergeant Johnson had told Grievant in July that Mr. Suder claimed Grievant had harassed him.

6. Sergeant Johnson had the complaint with him during the interview on August 26, 2008. Grievant did not ask to review the complaint.

7. Sergeant Johnson told Grievant at some point during or after the interview on August 26, 2008, that he could not contact an attorney without first obtaining permission from Colonel Murphy. Grievant did not seek permission from Colonel Murphy to contact an attorney, nor did he attempt to contact an attorney. The record does not reflect that Grievant had any interest in contacting an attorney.

8. During the interview on August 26, 2008, Grievant asked Sergeant Johnson for a copy of the Garrity warning he signed. Sergeant Johnson did not give Grievant a copy, but believed it would be provided to Grievant by someone else. Grievant was later provided with a copy of the Garrity warning he had signed.

9. DNR's General Orders apply to all officers. Changes made to the General Orders likewise apply to all officers.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). 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." *Leichliter v. W. Va. Dep't of Health and Human Res.*, 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.*

This consolidated matter presents several issues, each of which will be addressed in a separate section.

1. First Grievance - Denial of Copy of Interview Tape

The first grievance resulted from an interview of Grievant conducted by Lt. Waugh in June 2008. Grievant had asked to record the interview, and Lt. Waugh refused to allow

him to do so. Although Grievant argued at the level three hearing that state law and DNR General Orders allow him to record fellow officers, that is not the issue in this grievance. The statement of grievance complains that DNR refused to provide him with his own copy of the interview recording made by Lt. Waugh. Grievant argued that General Order VII-7-4[4] states that Respondent is to provide him with a copy of the interview tape. Respondent allowed Grievant to listen to the tape, but denied that it was required to provide Grievant with his own copy of the tape. Grievant also alleged in grievance number four that he was entitled to a copy of the interview tape.[5]

DNR's General Order No. VII is entitled, "Professional Standards Administrative and Internal Investigations." General Order No. VII at 7-4 addresses what access an employee will be provided to a taped interview. It provides as follows:

> During an administrative or internal investigation, all interviews shall be tape recorded (when appropriate), on either audio or video tape, and the tape shall be included in the case file as an exhibit. *Copies of the original tape(s) shall be made available only to the employee who made the statement* with the understanding that the employee will not disclose the contents of either; unless the employee is required to disclose as a means of defending themselves. Any breach of this procedure is an offense that may subject the employee to disciplinary action.

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[4] No testimony was presented to explain what a General Order is; however, Respondent's counsel described a General Order as an Order from the Chief of the Law Enforcement Section of DNR, which has been reduced to writing, and applies to all officers.

[5] Grievant repeatedly referred to the Freedom of Information Act in his argument. As the undersigned explained to Grievant more than once during the course of this proceeding, the Grievance Board does not interpret or enforce the Freedom of Information Act. That Act is not a statute applicable to the employee/employer relationship. *See* W. VA. CODE § 6C-2-2.

(Emphasis added.) General Order No. VII, at 5-2 states:[6]

> Case files shall be stored by the Unit in a secured environment and with access restricted to the Chief, his designee(s), members of the Unit, and to a court of competent jurisdiction under written order. Items in the possession of investigators or secretaries working outside of the Unit office shall be stored and handled in a manner that will ensure their confidentiality and integrity. Further, *no duplicate copies of any item pertaining to a Unit investigation shall be made, retained, or disseminated by any employee, investigator, or secretary outside of the Unit, except at the direction of the Chief.*

(Emphasis added.)

Grievant presented only his own view, which was that the General Orders said he was entitled to a copy of the tape. Grievant did not indicate that he has any special expertise in interpreting General Orders, or that he was involved in the development of this General Order. Respondent did not present any testimony regarding the interpretation of this General Order.

> When the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own rules and regulations. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). Where the language in a rule or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own regulations or classification specifications. *See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth.*, Docket No. 97-PEDTA- 420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency,* 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-MBOT- 978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993).

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[6] The parties did not make this portion of General Order VII a part of the record. However, the entire text of General Order VII was provided to the undersigned by Respondent's counsel on August 1, 2008, for use by the undersigned in ruling upon Respondent's Motion to Dismiss. As this document has been retained in the file, the undersigned finds it appropriate to refer to this document.

Peacock/Stemple v. W. Va. Div. of Corrections, Docket No. 01-CORR-542 (Jan. 15, 2002).

This General Order does not clearly answer the question presented. It is clear that the purpose of the sections of General Order VII quoted above are to protect the integrity of the investigatory file. It is also clear that only the Chief can allow the tape recording of an interview to be copied. After that, the General Order is not clear on whether an employee is entitled to his own copy of a tape recording. The General Order states that a copy of the original tape "shall be made available" to the employee, under certain conditions. DNR reads its General Order to mean that the employee can listen to the tape. The undersigned cannot find this interpretation to be unreasonable, particularly given the concern with maintaining the integrity of the file. By allowing the employee to listen to the tape recording, it has been made available to him. Had the General Order stated that the employee shall be provided with a copy of the tape, this language would more clearly indicate an intent for the employee to have his own copy.

Part of Grievant's requested relief should also be addressed at this time, as similar relief was requested in each grievance. Grievant requested that the undersigned "return General Orders to before changes made on 5/27/05 to allow for discovery, promulgate regulations pertaining to PSU operational procedures and progressive discipline." This type of relief is not generally available through the grievance procedure.

> [I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *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).

> 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. *See Skaff, supra*.

Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

2. Second Grievance - Discrimination

Grievant claimed it was discriminatory for Lt. Waugh to allow another officer to record the interview he conducted, when he had not allowed Grievant to record the interview he conducted with him. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant testified that, on May 27, 2008, shortly after Lt. Waugh had declined to allow him to record the interview with him, a fellow employee had been allowed to record an interview of him conducted by Lt. Waugh. Lt. Waugh was investigating a complaint filed

against this employee. This testimony was based upon a conversation Grievant had with Sergeant Stephen Antolini, who was the employee under investigation. Sergeant Antolini was not called to testify by Grievant, nor was Lt. Waugh. Grievant testified that he was not aware of the content of the interview. The record contains no additional information regarding this event.

Grievant's testimony is hearsay. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[7] *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

Grievant did not explain why he did not call Sergeant Antolini or Lt. Waugh to testify. Sergeant Antolini was not under oath when he made these statements to Grievant, and he did not provide a written statement. This limited hearsay testimony cannot form the basis

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[7] The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice,* 5 MSBP 150 (1981).

to support Grievant's claim of discrimination. Grievant pointed out that Respondent did not present any evidence that this had not occurred. The burden was upon Grievant to prove his claims, not upon Respondent to prove that it did not happen.

Even were the undersigned to give Grievant's hearsay testimony any weight, there is insufficient evidence regarding Sergeant Antolini's interview for the undersigned to evaluate and compare the circumstances of Sergeant Antolini's interview to Grievant's.

3. Third Grievance - Letter Deficient

Grievant asserted that the letter advising him that the investigation of a complaint against him had been completed was deficient and in violation of General Order VII-7-18(9), because it did not state whether any disciplinary action would be taken against him as a result of the investigation. Grievant did not explain at any point how he was harmed by this. Respondent argued that the General Order pointed to by Grievant does not require that an employee be notified as to whether disciplinary action will be taken at the same time the employee is notified that an investigation has been completed, and in fact, this would not be practical, as the decision as to whether discipline should be imposed would not likely be made immediately after the investigation had been completed, and in fact, Respondent could not impose discipline upon Grievant without first giving Grievant the opportunity to respond. Respondent further argued that this grievance is moot because Grievant has now been notified as to whether any disciplinary action would follow.

General Order VII-7-18(9) provides as follows:

> Upon completion of the investigation and review by the Unit Coordinator and the Chief, or his designee, the Chief, or his designee, shall notify the employee that the investigation is complete. If no disciplinary action if forthcoming, the employee shall be so notified and advised that the matter is closed. If disciplinary action is forthcoming, the employee shall be notified.

> All disciplinary and personnel actions shall be in accordance with Division of Personnel guidelines.

This provision does not require notification to the employee in writing, nor does it state that all the required notifications must be given at the same time. DNR chose to notify the Grievant in writing that the investigation had been completed, apparently before a determination had been made on the issue of discipline. Moreover, Grievant did not suffer any harm by not being notified of any disciplinary measures at the same time as he was notified that the investigation had been completed.

4. Fourth Grievance - August 26, 2008 Interview

The fourth grievance alleges that various actions taken by Sergeant Johnson during the August 26, 2008 interview were in violation of either General Order VII, W. VA. CODE § 62-1D-3(c)(2), or Grievant's Constitutional rights. Grievant did not identify specific Constitutional rights which he asserted had been violated. Grievant's contentions will be addressed separately.

. Whether Investigator Advised Grievant of the Nature of the Complaint

General Order VII-7-1 provides as follows:

> Prior to an employee being questioned in connection with an internal or administrative investigation, the employee shall be appri[s]ed of the nature of the allegations in the complaint, the name of the investigator assigned to the case, and the names of all persons present during the interview session.

Grievant asserts that this provision was not followed by Sergeant Johnson during the August 26, 2008 interview. His argument appears to be two-fold. First, that Sergeant Johnson did not tell him anything regarding the complaint at the beginning of the interview, and second, that if Sergeant Johnson had told him the complaint was that Grievant had

harassed the complainant, this was not sufficient detail to meet the requirement of disclosure of the nature of the complaint.

In July 2008, Sergeant Johnson advised Grievant that he was investigating a complaint made by Terry Suder that Grievant had harassed him. At the beginning of the interview Sergeant Johnson advised Grievant that the interview was part of the investigation of the complaint made by Mr. Suder which he had previously discussed with him.

Grievant testified, "[w]ell, I know Mr. Suder - what the events that occurred, but as to the specific charges and the nature of the complaint, I don't know if he complained I was rude; if I violated his rights, I don't know what he complained about." Level One Transcript, October 28, 2008, at p. 5. Grievant did not recall Sergeant Johnson telling him that Mr. Suder was claiming harassment. Grievant acknowledged in his testimony that advising him that Mr. Suder was claiming harassment would be advising him of the nature of the complaint. Level One Transcript, October 28, 2008, at p. 6.

The undersigned concludes that Sergeant Johnson advised Grievant at the beginning of the interview that the interview was in connection with the complaint made by Mr. Suder which he had previously spoken to him about, and that Sergeant Johnson had told Grievant in July that Mr. Suder was alleging harassment. While Sergeant Johnson may not have reiterated at the beginning of the interview that he was investigating a complaint of harassment, Grievant was aware of this. The failure to again advise Grievant that the complaint was that Grievant had harassed the complainant is a mere technical violation which did not prejudice Grievant in any way. Grievant was fully aware that Sergeant Johnson was investigating a complaint of harassment made by Mr. Suder, and

was specifically aware of the incident which generated the complaint. Sergeant Johnson further stated that he had the complaint itself with him during the interview, and Grievant did not ask to see it.

As to whether Grievant was sufficiently advised of the complaint, the General Order does not require the investigator to disclose the details of the complaint. It just requires that he disclose the "nature" of the complaint. In this case, Sergeant Johnson believed the nature of the complaint was that Grievant was alleged to have harassed Mr. Suder, and this is what he told Grievant. This is certainly a reasonable interpretation of this general term.

. Limitation on Right to Counsel

Grievant was told by Sergeant Johnson that he could not consult with legal counsel after the interview without first obtaining permission from Colonel Murphy. While the undersigned questions whether DNR can require Grievant to obtain permission from Colonel Murphy before consulting an attorney,[8] the undersigned declines to address this issue, as Grievant is merely seeking an advisory opinion. The record developed in this case makes it clear that Grievant did not wish to consult an attorney[9], so this directive did not affect him in any way. "The Grievance Board does not issue advisory opinions. *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); 156 C.S.R. 1

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[8] The undersigned would refer the parties to *Knight v. Dep't of Health and Human Resources*, Docket No. 2008-0981-DHHR (Aug. 6, 2009), for a discussion of whether an employee has a right to representation during an investigatory interview.

[9] Grievant's answers to the questions posed by Respondent's counsel regarding whether Grievant was prevented from contacting an attorney were circular and argumentative, leading the undersigned to this conclusion.

§ 6.21 (2008)." *Daniel v. Fayette County Bd. of Educ.*, Docket No. 2008-1762-FayED (July 13, 2009).

. Right to Record the Interview

Grievant was not allowed by Sergeant Johnson to record the August 26, 2008 interview. Grievant relied on WEST VIRGINIA CODE § 62-1D-3 and General Order XVIII to support his argument that he has a right to record the interview of an official investigation. Neither provision confers such a right. Chapter 62 of the WEST VIRGINIA CODE deals with criminal activity. WEST VIRGINIA CODE § 62-1D-3 defines when it is unlawful to intercept conversations by electronic means, and states that such acts are felonies. This CODE SECTION then contrasts what types of electronic interceptions of conversations are not illegal, and are not, therefore, considered to be felonies. Just because a CODE SECTION says an act is legal, it does not mean that an employee has a right to engage in this activity at work. DNR has the authority to tell its employees that they may not record investigatory interviews, and that the recording made by the investigator is the official record.

General Order XVIII-1-2 states, among other things, that "it shall be a violation of this General Order" for a DNR employee to record a fellow employee without their knowledge and/or consent. It does not say that an employee has the *right* to record a fellow employee if that employee has knowledge of the recording. It just says that if such a recording is made, it is not a violation of this General Order. Grievant has not demonstrated that he had a right to record the investigatory interview.

. Failure of Investigator to Provide Copy of Garrity Warning

While not in his statement of grievance, Grievant complained during the course of

the hearings that Sergeant Johnson had not given him a copy of the Garrity Warning he signed.[10] Respondent did not object to adding this complaint to the grievance, but pointed out that Grievant has now been provided with this document.

Grievant presented nothing to support his argument that DNR was required to provide him with a copy of this document, other than General Order VII-7-6, and the undersigned has found no such requirement. Grievant's reading of this General Order is incorrect. General Order VII-7-6 clearly states that the investigator "*may* give a copy of the warning form to the employee." (Emphasis added.) This General Order gives the investigator the discretion to provide this document to the employee, or not. It does not require him to provide a copy of the Garrity warning to the employee. Nonetheless, Grievant has now been provided with a copy of this warning.

Fifth Grievance - New General Orders

The fifth grievance challenges new General Orders as discriminatory and violating the rights of officers.[11] Grievant asserted first, that changes had been made to certain General Orders as a result of grievances he had filed. Grievant gave examples of changes which went back to grievances he had filed in 2005. In his Proposed Findings of Fact Grievant stated that the General Orders had been changed "soon thereafter." The issue

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[10] The parties did not explain exactly what the Garrity warning used by DNR states. A Garrity warning generally refers to the requirement that "a public employer performing an internal investigation of a public officer must inform that officer he can be disciplined for refusing to answer questions, but that anything he does say cannot be used against him in subsequent criminal proceedings." *Tolley v. W. Va. Div. of Natural Res.*, Docket No. 94-DNR-629 (May 18, 1995). This warning's origins are in *Garrity v. New Jersey*, 385 U.S. 493 (1967).

[11] The parties did not provide the undersigned with a copy of the new General Orders for comparison.

in this grievance is whether the "new" General Orders are discriminatory, not whether changes made in 2005 were discriminatory.

Before delving into the specific examples of changes, the undersigned will point out that General Orders apply across the board to all DNR officers. When a change in a General Order is made, all officers are subject to the change in the General Order, not just Grievant. While Grievant has claimed discrimination with regard to the changes in the General Order, Grievant would be subject to the same treatment as any other DNR officer, and his claim of discrimination cannot be sustained.

Colonel Murphy testified that every year a committee is appointed to review all the General Orders, and to bring recommendations for changes to him. He stated that changes to the General Orders are made based on operational needs of the department and situations which have arisen which demonstrated that the General Orders needed to be more clear. The latter is certainly the case with any changes made to General Order VII where it addresses making a copy of the interview tape available to an employee. Grievant asserted that this General Order had been changed to add the words "for review" after the words "made available," as a result of his grievance, and he may well be correct. As discussed above, this General Order was not clear, and adding the words "for review" makes the intent of the agency more clear. This, however, is not a discriminatory or retaliatory act toward Grievant. It is an effort to clarify the existing orders.

One example given by Grievant was that General Order XVIII-1-2 had been changed as a result of any grievances addressed in this decision. The new General Order was apparently changed to read that a fellow employee may be recorded only with his knowledge and consent, whereas before it read "knowledge and/or consent." As noted

above, this General Order did not give Grievant the right to record an investigatory interview, so it is difficult to imagine that this language was changed as a result any grievance.

Grievant asserted that the General Orders had been changed regarding transfers and reassignments, which was a point he had brought up in a grievance. The record is unclear regarding exactly what Grievant had challenged, and how the General Order was changed. Further, as was the case with several of Grievant's other complaints about changes in the General Orders, Grievant did not demonstrate how any such change impacted him.

> A philosophical disagreement with a policy does not in and of itself equate to an adverse impact. *McDonald, et al., v. Hancock County Bd. of Educ.*, Docket No. 15-88-055-3 (Sept. 30, 1988). "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. VA. CODE § 29-6A-2(I).[12] *See Ball v. Dept. of Highways*, Docket No. 96-DOH-141 (July 31, 1997)." *Rice v. Dept. of Transp./Division of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). In *Farley v. West Virginia Parkways Authority,* Docket No. 96-PEDTA-204 (Feb. 21, 1997), the grievant was not allowed to grieve the alleged misapplication of a nepotism policy, even though it was possible that if one employee provided preferential treatment for his spouse, this could impact the grievant. However, this had not occurred, and such a potential action was found too speculative.
>
> > The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees. . ." *Wilds v. W. Va. Dept. of Highways*, Docket No. 90-DOH-446 (Jan. 23, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the

[12] W. VA. CODE § 6C-2-2(i)(1)(v) similarly states a grievance includes "[a]ny action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee, or the health and safety of the employee."

> basis that such decisions would be merely advisory." *Khoury v. Public Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996).

Id.

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

Finally, Grievant complained about changes to the General Orders which apparently added a requirement that an injured officer be nominated for a Purple Heart award within one year of the injury, although the record is not clear as to exactly what the change in the General Order was. Grievant stated he is the only current DNR officer affected by this change, and asserted that the purpose of this change is to preclude him from receiving this award. Grievant presented no evidence to support this latter assertion, but obviously harbors some animosity toward his employer regarding this issue. Grievant was injured in 1994. It appears from the record that perhaps Grievant has already gone through some committee review regarding this award, and/or a license plate, without success. Whether Grievant could, in fact, be nominated for this award again, notwithstanding the General Order, was not addressed by the parties, but obviously many years have passed since the injury. While Grievant may well be the only current DNR officer personally affected by this change at the moment, any change in the General Orders regarding this matter applies to all officers, and is not discriminatory.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov.

29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

> 2. When the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own rules and regulations., Docket No. 95-22-494 (June 28, 1996). Where the language in a rule or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own regulations or classification specifications. *See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth.*, Docket No. 97-PEDTA-420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency,* 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-MBOT- 978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993).

Peacock/Stemple v. W. Va. Div. of Corrections, Docket No. 01-CORR-542 (Jan. 15, 2002).

3. Grievant did not demonstrate that he was entitled to a copy of the tapes of the investigatory interviews by PSU investigators.

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. The Grievance Board has applied the following factors in assessing hearsay

testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[13] *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

6. Grievant did not demonstrate that he had been discriminated against by Respondent.

7. Grievant did not demonstrate that Respondent violated its own procedures by not advising him whether disciplinary action would be forthcoming at the same time it advised him that an investigation of a complaint against him had been completed, nor did he demonstrate he had suffered any harm because of this.

8. Grievant did not demonstrate that Sergeant Johnson conducted the interview on August 26, 2008, in violation of General Order VII-7-1.

9. "The Grievance Board does not issue advisory opinions. *Bragg v. Dep't of*

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[13] The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice,* 5 MSBP 150 (1981).

Health & Human Res., Docket No. 03-HHR-348 (May 28, 2004); 156 C.S.R. 1 § 6.21 (2008)." *Daniel v. Fayette County Bd. of Educ.*, Docket No. 2008-1762-FayED (July 13, 2009).

10. Grievant's request for a ruling on whether DNR could require him to obtain permission from Colonel Murphy before contacting an attorney is a request for an advisory opinion.

11. Neither WEST VIRGINIA CODE § 62-1D-3 nor General Order XVIII confer any rights on employees, nor do they operate to preclude an employer from telling its employees that they may not record investigatory interviews, and that the recording made by the investigator is the official record.

12. Investigator Johnson was not required to provide Grievant with a copy of the Garrity warning he signed.

13. "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *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)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

14. A grievant must demonstrate that a policy or procedure has adversely affected him in some way.

> A philosophical disagreement with a policy does not in and of itself equate to an adverse impact. *McDonald, et al., v. Hancock County Bd. of Educ.*,

> Docket No. 15-88-055-3 (Sept. 30, 1988). "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. VA. CODE § 29-6A-2(I).[14] *See Ball v. Dept. of Highways*, Docket No. 96-DOH-141 (July 31, 1997)." *Rice v. Dept. of Transp./Division of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

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

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: September 22, 2009

[14] W. VA. CODE § 6C-2-2(i)(1)(v) similarly states a grievance includes "[a]ny action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee, or the health and safety of the employee."