THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TIMOTHY WHITE, et al.,
Grievants,

v. **DOCKET NO. 07-DNR-396**

DIVISION OF NATURAL RESOURCES/
LAW ENFORCEMENT DIVISION,
Respondent.

DECISION

Grievants Timothy White and Stuart Simms filed a grievance against their employer, the Division of Natural Resources/Law Enforcement Division, November 8, 2006, alleging violations of Respondent's residency policy. As relief, Grievants sought:

> That the division of natural resources law enforcement section give all currently employed officers the option of residing and commuting from counties/areas other than their currently assigned areas, according to the same distance restrictions given those select group of officers currently allowed to [do] so, in direct violation of previous and current policy.

Grievants made clear at the level four hearing that they were not seeking as relief that the seven officers who reside outside their assigned counties be made to comply with policy. They want Respondent to adopt a commuting policy. After a conference at level one on November 8, 2006, Grievants' supervisor responded on that date that he could not grant the relief requested. Grievant Carl Young was allowed to join the grievance on November 11, 2006. Grievants appealed to level two, where a conference was held on November 27, 2006. A level two decision was issued on December 1, 2006, denying the grievance, and

Grievants appealed to level three. A level three hearing was held on January 18, 2007, and a level three decision denying the grievance was issued on April 3, 2007.

Grievants appealed to level four on April 10, 2007.[1] A level four hearing was held before the undersigned Administrative Law Judge on October 30, 2008, in Elkins, West Virginia.[2] Grievant was represented by Fred Tucker, WVSEU/UMWA Representative, 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 December 15, 2008.

Synopsis

Grievants are Conservation Officers. All Conservation Officers employed by the Division of Natural Resources are required to establish a residence in their county of assignment. In the late summer of 2005, a rumor circulated that Respondent was going to adopt a policy allowing Officers to establish a residence within 25 miles of the county line, and still allow these Officers to commute from their residence to their work using a

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[1] In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. VA. CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See Executive Order No. 2-07*, May 8, 2007.

[2] A level four hearing was scheduled for June 4, 2008, in Elkins, West Virginia. The parties appeared for the scheduled hearing, but after extensive discussion off the record, the parties agreed to place this grievance in abeyance in order to allow them time to pursue a settlement. The parties were unable to reach a settlement, and the matter was rescheduled for hearing.

state owned vehicle. With the circulation of this rumor of a "commuting policy," a few Officers either moved outside their assigned county, or never moved to their newly assigned county. A commuting policy was never adopted, but these Officers who established residences outside their assigned counties because of the rumor, were given permission to continue to reside outside their counties, so long as they continued in their present assignments. Grievants seek as relief that the undersigned require Respondent to adopt a commuting policy. The undersigned has no authority to grant the relief requested.

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

Findings of Fact

1. Grievants are employed by the Division of Natural Resources/Law Enforcement Division ("DNR") as Conservation Officers.

2. Grievant White has been employed by DNR since July 23, 2001. He is assigned to Nicholas County, and resides in that county. Grievant White does not wish to reside in another county at this time.

3. Grievant Simms has been employed by DNR since November 1989. He is assigned to Nicholas County, and resides in that county. Grievant Simms does not wish to reside in another county at this time.

4. Grievant Young has been employed by DNR since August 2002. He is assigned to Clay County, and resides in that county. Grievant Young did not state that he would move to another county at this time, if he were allowed to do so.

5. DNR Field Officers (Conservation Officers and Sergeants) are required to maintain a primary residence in the county to which they are assigned. They are allowed to use state owned vehicles to commute from their residence to their work site.

6. In the late summer of 2005, DNR was considering adopting a commuting policy, and word spread among DNR personnel that DNR was going to adopt a commuting policy. The policy would have allowed a Field Officer to reside within a 25 mile radius of the county to which he was assigned, and commute to the assigned county each day using a state owned vehicle.

7. Based upon the rumor of the commuting policy, 7 of DNR's 124 Field Officers either moved to areas outside their assigned counties, or did not establish a residence in the county to which they had just been assigned.

8. Later in 2005 or early 2006, the Chief of the Law Enforcement Division of DNR, Colonel James Fields, decided not to adopt a commuting policy, because the price of gasoline made such a policy cost prohibitive, and because such a policy would likely leave some counties without an officer living in the county whom the public could contact.

9. Lieutenant Colonel David Murphy became Acting Chief of DNR's Law Enforcement Division, on June 1, 2006, when Colonel Fields retired. Lieutenant Colonel Murphy became aware that some Field Officers were not living in their assigned counties. Lieutenant Colonel Murphy sent a memorandum to all Field Officers reiterating that DNR does not have a commuting policy, and Officers are required to live in their assigned counties. The memorandum stated that any Officer not in compliance with this requirement must provide justification for his noncompliance with policy.

10. The seven Field Officers who had not established a residence in their assigned counties responded that they had been given permission to reside outside their assigned counties. All but one of these Officers had moved, or never established a residence in the assigned county, because they were told there was going to be a commuting policy. The reason the remaining Officer had not moved was related to a proposed realignment of the assignment. Lieutenant Colonel Murphy spoke with retired Colonel Fields, who advised that the seven Officers had been given permission to continue to reside outside their assigned counties.

11. By separate memoranda, all dated September 26, 2006, Lieutenant Colonel Murphy advised Conservation Officers Bobby L. Cales, John A. Tillery, Dennis K. Feazell, Gabriel W. Wood, and Christopher J. Lester, and Sergeants Stanley K. Hickman and William A. Persinger, Jr., that they would be allowed to continue to reside outside their assigned counties. The stated reason was miscommunication regarding the adoption of a commuting policy, and permission given by the preceding Chief. The memoranda stated that if the Officer moved from their current residence or transferred to another assignment, the Officer would be required to establish his primary residence within the assigned area.

12. Since September 26, 2006, any other Field Officer who has been found to be out of compliance with the residency policy, has been required to establish a primary residence in his assigned county.

Discussion

Grievants have the burden of proving their 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.*[3]

The origin of the requirement that Field Officers establish a primary residence in the area of assignment, is W. VA. CODE § 20-7-1, which provides, in pertinent part, as follows: "[t]he chief conservation officer shall designate the area of primary residence of each conservation officer, including himself or herself." The policy of DNR has been to require Field Officers to establish a primary residence in the county to which they are assigned. Grievants were required to establish a primary residence in their assigned counties, and this requirement has affected each of them at some point in time.

DNR acknowledges that seven Field Officers do not maintain a residence in their assigned counties, as is required. However, Grievants do not want those Officers who are out of compliance with the existing residency policy to be required to move, so that they are in compliance. Nor do Grievants desire to move to another residence at this time. The relief Grievants are seeking is that DNR be ordered to adopt a policy which would allow Field Officers to live in a county other than the one to which they are assigned, and

[3] At the level three hearing, Respondent argued that the grievance was not timely filed. This argument was not pursued at level four, and is deemed abandoned.

commute from that residence, apparently in a state vehicle, to the county of assignment every day. This type of relief is not 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).
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> > 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*.
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> *Board, et al., v. W. Va. Dep't of Health and Human Resources,* Docket No. 99-HHR-329 (Feb. 2, 2000).

Frame v. Dep't of Health and Human Res., Docket No. 00-HHR-240/330 (April 20, 2001). Grievants were unable to present any law, rule or regulation which would mandate that DNR adopt a commuting policy.

W. VA. CODE § 29-6A-5(b) states that administrative law judges

> may . . . provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article. . . .

"Additionally, '[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.' 156 C.S.R. 1 § 6.11."[4] *Robinson/Anderson v. W. Va. Univ.,*

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[4] The most recent version of the Grievance Board's Procedural Rules contains this same provision in § 6.11. 156 C.S.R. 1 § 6.11 (2008).

Docket No. 06-HE-416 (Mar. 31, 2008). In *Robinson/Anderson*, the Respondent filed a motion to dismiss, and the grievance was dismissed because the relief requested was "wholly unavailable" through the grievance procedure. As the relief requested in this grievance is not available through the grievance procedure, the grievance must be denied.[5]

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants have the burden of proving their 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. "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).

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[5] Because the relief requested is not available, it is not necessary to address Grievants' claims of discrimination and favoritism. It will be noted, however, that the action taken by Respondent was accepted by Grievants as the fair thing to do. Grievants made it clear that they believed it would be unfair to ask the seven Field Officers who are not in compliance to incur the expense of moving to their assigned counties.

3. "'A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.' 156 C.S.R. 1 § 6.11." *Robinson/Anderson v. W. Va. Univ.,* Docket No. 06-HE-416 (Mar. 31, 2008).

4. The relief sought by Grievants is not available through the grievance procedure.

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." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 29-6A-7 (*See Footnote 1)*. 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 record can be prepared and properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD
Administrative Law Judge

Date: January 16, 2009