BETTY J. DOOLEY, et al., .

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Grievants, .

.

v. . Docket No. 95-DOH-214

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION, DIVISION OF .

HIGHWAYS AND DEPARTMENT OF .

ADMINISTRATION, DIVISION OF .

PERSONNEL, .

.

Respondents. .

D E C I S I O N

Betty J. Dooley, Allen Stump, Gideon L. Yarbrough, Kelley W. Thompson, W. T. Gambill, Terry Lively, Virginia McCallister, Robin L. Moss, and Jonathan Bailey (Grievants) have joined in a grievance initiated on May 15, 1995, challenging certain portions of the Workplace Security Policy (Policy) issued by the West Virginia Division of Personnel (Personnel) which became effective on May 1, 1995. As this grievance primarily involves legal issues, rather than a factual dispute, the parties waived this matter to Level IV where a hearing was conducted in this Board's office in Charleston, West Virginia, on August 30, 1995. This grievance became mature for decision upon receipt of post-hearing submissions on September 19, 1995. Personnel enacted the Policy to specifically prohibit firearms and dangerous weapons in the workplace. Grievants do not contest their employer's authority to exclude weapons from the workplace, but argue that certain parts of the Policy violate Grievants' Fourth Amendment right to freedom from unreasonable search and seizure or are otherwise flawed because they do not promote the health and safety of employees and the

general public, the stated intent of the Policy.

The following quoted portions of the Policy are pertinent to resolution of this matter:

II. DEFINITIONS

D. Workplace: A worksite where work is performed. The workplace shall include facilities, property, buildings, offices, structures, automobiles, trucks, trailers, or other means of conveyance (private or public while engaged in performance of duties), and parking areas, whether owned or leased by the agency or entity.

* * *

V. PROCEDURES

A. Workplace Searches

1. Employer's Authority and Responsibility: As a public employer, each appointing authority may open and inspect public properties for a work related purpose; additionally based on a reasonable, good faith, objective suspicion of a public danger, appointing authorities may search not only an employee's work area, locker, or desk but also personal property which may include a briefcase, purse, lunch box, backpack, or car while on the employer's premises.

2. Standards

a. A search of the workplace depends on the circumstances in which a search takes place. Such a search must be based on a reasonable, good faith, objective suspicion, and should have the approval, in advance, of the Appointing Authority or his designee.

b. Criteria for conducting a search:

1) The search is or was justified at the time it is or was con ducted.

2) The search must be reasonably related in scope to the circumstances which led to the search.

c. Only under compelling circumstances will an Agency search an

> employee's person or clothing and such a search shall be conducted in a confidential manner by someone of the same gender and take place in the presence of a witness.
>
> * * * *

G Ex. B.

Also pertinent to resolution of this grievance is W. Va. Code § 29-6A-2(i), which provides:

> "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. (Emphasis added.)

Consistent with W. Va. Code §§ 29-6A-1, et seq., this Board has promulgated Procedural Rules which include: "[t]he Board will, under no circumstances, issue an advisory opinion, i.e., an opinion on an issue not directly before the Board in a grievance." Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.18 (1989).

As of the time of the Level IV hearing, neither Grievants nor any employee within their knowledge had been subjected to a search in accordance with the Policy. Accordingly,Personnel contends that this grievance should be dismissed for failure to state a claim upon which relief can be granted. Similarly, Personnel argues that, under these circumstances, Grievants are merely seeking an unauthorized advisory opinion. Finally, Personnel contends that this Board has no authority to rule upon the constitutionality of the Policy. (See footnote 1)

In support of its contention that this grievance involves a prohibited advisory opinion, Personnel cites to this Board's decisions in Lohr v. West Virginia Department of Corrections, Docket No. 89-CORR-107 (Aug. 25, 1989), and Maxey v. West Virginia Department of Health and Human Resources, Docket No. 92-HHR-504 (Feb. 4, 1993). Lohr is readily distinguishable in that the employee there was challenging a policy which had been rescinded and was no longer in effect at the time the grievance was filed. Obviously, any contentions regarding a moot policy would be merely speculative. Similarly, Maxey involved a matter that was moot by the time of the Level IV hearing. Accordingly, the remedy sought in Maxey, a prohibition against similar conduct in the future, was determined to be either de minimis or so speculative as to call for an advisory opinion.

Grievants' position in this matter is straightforward. Prior to enactment of the Policy they reported for duty subject to search of their persons and personal effects under the same "probable cause" standard applicable to any other citizen protected by the FourthAmendment. As of May 1, 1995, Grievants report for work subject to another standard: "reasonable suspicion" as defined in Personnel's Policy. The undersigned administrative law judge finds that the circumstances under which an employee is subject to search while on duty clearly constitute a "condition of employment" within the meaning of W. Va. Code § 29-6A-2(i). See Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).

Moreover, unlike the grievances in Lohr and Maxey, the Policy Grievants are challenging has been implemented and currently remains in effect. Accordingly, Grievants may challenge the Policy without establishing a specific instance where the Policy has been applied. However, because their claim does not flow from a specific factual incident, Grievants have the burden of demonstrating that the Policy is inherently flawed and their employers cannot follow the Policy without violating their rights. See Peters v. Raleigh County Bd. of Educ., Docket No. 94-DOE-043 (Sept. 27, 1994).

DISCUSSION

In a grievance of this nature, Grievants have the burden of proving each allegation by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88- 015 (Nov. 2, 1988). This grievance primarily contends that the Policy promulgated by the West Virginia Division of Personnel inevitably deprives Grievants' of their right to be free from unreasonable searches and seizures under the Fourth Amendment to the Constitution of the United States. (See footnote 2) In support of their respective positions, both parties cite to thedecision by the United States Supreme Court in O'Connor v. Ortega, 480 U.S. 709 (1987). (See footnote 3) In O'Connor, the Supreme Court clearly stated that "[s]earches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment." Id. at 715. The Court went on to clarify this general proposition by stating:

> Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.

Id. at 717.

The Court noted that due to "the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." Id. at 718. Accordingly, the Court provided general guidance for making such determinations, concluding that public employers are not required to obtain warrants before conducting such searches and that these searches need not be judged by the probable cause standard applicable in other situations. Id. at 719-25. Ultimately, the Court concluded:

> ...[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standardof reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. Id. at 725-26.

Applying the forgoing legal standards to Personnel's Policy, the undersigned administrative law judge finds that Personnel drafted the Policy to comply with the Supreme Court's O'Connor ruling. Indeed, O'Connor is cited as a reference at page five of the Policy. Moreover, O'Connor implicitly encourages public employers to articulate such policies by declaring that "[p]ublic employees' expectations of privacy . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." Id. at 717.

Personnel's Policy was promulgated for the proper work-related purpose of excluding dangerous weapons from the workplace. Under the Policy, all employees are provided with an "Employee Acknowledgement Form" which includes the following statement:

> I acknowledge that . . . I am prohibited from having at my workplace, on my person, or in my vehicle, any firearm or dangerous weapon. I realize that my employer has the right to search my work area, desk, or under compelling circumstances, personal possessions or person for firearms or other weapons when such possession poses a direct threat, and may seize any item deemed necessary.

Thus, employees are placed on notice by a clear policy statement that their expectation of privacy in the items they bring to their workplace has been diminished. (See footnote 4) As indicated by the United States Supreme Court in O'Connor, public employers are not precluded by the Fourth Amendment from implementing such a policy. Grievants further complain that improperly or inadequately trained supervisors conducting a search for a weapon could generate a situation that would be more dangerous than if a properly trained law enforcement official performs the search.

While it might be preferable to limit searches to trained security personnel, Grievants have not demonstrated how the Policy as presently devised violates any particular, law, rule or regulation. Likewise, Grievants have not demonstrated any entitlement to have a disinterested observer present when the search is conducted. The Division of Personnel has broad discretion in exercising its administrative authority to issue regulations of this nature. See Callaghan v. W. Va. Civil Service Comm'n, 273 S.E.2d 72 (W. Va. 1980); Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Feb. 27, 1995).

Grievants also contend that employees have a right to union representation during the course of a search that may lead to disciplinary action by their employer. However, Grievants did not cite any authority for this proposition, and the undersigned administrative law judge is not aware of any legislation which extends such a right to public employees. The Weingarten right to union representation (See footnote 5) available to employees in the private sector under § 8(a)(1) of the National Labor Relations Act, has only been incorporated in the limited context of the statutory grievance procedure for state employees. (See footnote 6) Consistent with the forgoing discussion, the following relevant Findings of Fact and Conclusions of Law are appropriate in this matter.

FINDINGS OF FACT

1. Grievants are employees of the West Virginia Department of Transportation, Division of Highways.

2. On May 1, 1995, the West Virginia Division of Personnel's policy entitled "Workplace Security" became effective, subjecting Grievants to a search of their persons and effects in their public workplace under a standard which does not require probable cause or a warrant issued by a disinterested judicial official.

3. Neither Grievants nor any other state employees had been subjected to a search under the policy as of the Level IV hearing on September 19, 1995.

CONCLUSIONS OF LAW

1. Searches and seizures by government employers or supervisors of the private property of their employees are subject to the restraints of the Fourth Amendment. O'Connor v. Ortega, 480 U.S. 709, 715 (1987).

2. Due to the great variety of work environments in state employment, the question whether an employee has a reasonable expectation of privacy must be addressed on a case- by-case basis. Id.

at 718.

3. "In determining the appropriate standard for a search conducted by a public employer in areas in which an employee has a reasonable expectation of privacy, what is a reasonable search depends on the context within which the search takes place, and requires balancing the employee's legitimate expectation of privacy against the government's needfor supervision, control, and the efficient operation of the workplace. Requiring an employer to obtain a warrant whenever the employer wishes to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unreasonable. Moreover, requiring a probable cause standard for searches of the type at issue here would impose intolerable burdens on public employers. Their intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this standard, both the inception and the scope of the intrusion must be reasonable." Syl. Pt. 2, Id. at 710.

4. The West Virginia Division of Personnel's Workplace Security Policy implemented on May 1, 1995, does not deprive Grievants of their right to be free from unreasonable search and seizure. Id.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision "to the circuit court of the county in which the grievance occurred" and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: January 23, 1996

Footnote: 1

Because of the outcome of this grievance, it is not necessary to address this issue in detail. This Grievance Board has previously determined that the broad authority to adjudicate employee grievances extended by W. Va. Code §§ 29-6A-1,

et seq., and 18-29-1, et seq., does not extend to declaring legislative acts unconstitutional. See, e.g., Wilson v. W. Va. Dept. of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). However, the Policy at issue here is a declaration by an executive agency, not a legislative act, and separation of powers principles are therefore not implicated. Accordingly, adjudication of this dispute effectuates the purpose of the state employee grievance procedure as set forth in W. Va. Code § 29-6A-1.

Footnote: 2

The Constitution of West Virginia contains a parallel provision in § 6. The Supreme Court of Appeals of West Virginia has traditionally construed this provision in harmony withthe federal constitution. See State v. Duvernoy, 156 W. Va. 494, 195 S.E.2d 631 (1973).

Footnote: 3

Grievants also cite to United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951). However, it appears that the ruling in Blok was distinguished, if not implicitly overruled, by the Supreme Court in O'Connor.

Footnote: 4

A similar policy involving searching employees' lockers was upheld in American Postal Workers v. U. S. Postal Service, 871 F.2d 556 (6th Cir. 1989). Accord, United States v. Sihler, 562 F.2d 349 (5th Cir. 1977); Chicago Fire Fighters Union v. City of Chicago, 717 F. Supp. 1314 (N.D. Ill. 1989); Chenkin v. Bellevue Hosp. Center, 479 F. Supp. 207 (S.D. N.Y. 1979).

Footnote: 5

Named after the United States Supreme Court's holding in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

Footnote: 6

"A grievant may be represented by an employee organization representative, legal counsel, or any other person, including a fellow employee, in the preparation or presentation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure: Provided, That at level one of such grievance, as set forth in section four [§ 29-6A-4] of this article, a grievant may have only one such representative." W. Va. Code § 29-6A-3(f).