LARRY FARLEY,

Grievant,

v. DOCKET NO. 96-PEDTA-204

WEST VIRGINIA PARKWAYS AUTHORITY,

Respondent.

DECISION

Grievant Larry Farley filed a grievance on or about November 14, 1995, alleging that Respondent violated its policy #1-7, regarding nepotism, in promoting another employee to be foreman of Barrier A when that foreman's wife also works at Barrier A. He seeks as relief recision of the other employee's promotion. The grievance was denied at levels I, II, and III. By agreement of the parties, this grievance was submitted for decision based upon the record developed below. The grievance became mature for decision on November 1, 1996, when the parties' proposed findings of fact and conclusions of law were to be submitted. This grievance was reassigned to the undersigned Administrative Law Judge for administrative reasons on January 30, 1997.

The facts are found to be as follows:

FINDINGS OF FACT

1 1. Mr. Farley is an employee of the Respondent, and currently is assigned to Toll Barrier A.

2 2. John Arvai and Rebecca Arvai are employed by Respondent, assigned to Toll Barrier A, and have been so employed since 1986and 1987, respectively.

3 3. John Arvai and Rebecca Arvai were married to each other on or about July 22, 1989.

4 4. John Arvai was promoted to the position of shift foreman at Toll Barrier A.

5 5. John Arvai is assigned to the midnight shift, Shift 1; while Rebecca Arvai is assigned to the afternoon shift, Shift 3.

6 6. On several occasions, John Arvai and Rebecca Arvai have worked the same shift. (Level III

hearing transcript, p. 40, 89).

7 7. John Arvai audits the work of employees, which regularly includes Rebecca Arvai's work. (Level III hearing transcript, pp. 89, 92, 95-96, e.g.)

8 8. Respondent's personnel policy #I-7 ("policy") became effective June 15, 1992, and addresses nepotism.

9 9. "Nepotism" is defined by the policy as "the act of showing favoritism to family members..., the bestowal of patronage by... appointing others to positions by reason of blood or marital relationships..."

10 10. The policy specifically states, "no employee shall review or audit the work of a relative..." 11 11. The anti-nepotism policy contains a "grandfather clause" provision which appears to exempt those already employed in a prohibited relationship on the effective date of the policy from being transferred.

DISCUSSION

This is not a disciplinary case, and accordingly, the grievant bears the burden of proving his claims by a preponderance of the evidence. W.Va. Code §29-6A-6. The grievant has failed to show that he has standing to contest Mr. Arvai's employment status, or the way in which Respondent applies its policy. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996).

In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant "must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W.Va. 779, 253 S.E.2d 54 (W.Va. 1979). Without some allegation of personal injury, Mr. Farley is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied its statute in selecting an employee, wherethe grievant is not personally harmed, there is no cognizable grievance. Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1,

1994); Mills v. W. Va. Dept. of Trans., Docket No. 92-DOH-053 (Apr. 24, 1992).

Here, Mr. Farley has not alleged any injury. Mr. Farley has failed to identify any property or liberty interest affected. Mr. Farley has not indicated that he has suffered discriminatory application of the nepotism policy. Mr. Farley has not alleged favorable treatment either of or by Mr. Arvai which has resulted in some detriment to Mr. Farley personally. While other employees may have suffered discriminatory treatment or some other injury, and thus be arguably entitled to grieve Respondent's application of its policy, such is not Mr. Farley's position. One person cannot grieve on behalf of another party. Hall v. Mercer County Bd. of Educ., Docket No. 94-27-1099 (Mar. 20, 1995). Mr. Farley is thus prohibited from pursuing this grievance on behalf of any other employee who may have some personal stake in the outcome.

Mr. Farley has not indicated that he was either qualified for or interested in obtaining the foreman's position. This Board has previously held, in similar circumstances, that to pursue the issue of whether another employee was properly put into a position, the grievant "must show that [he or she] was 'adversely affected' by that employment decision..." Lewis v. Mercer County Bd. of Educ., Docket No 94-27-603 (Feb. 23, 1995). Most recently, it has been held that the grievant was without standing to challenge theappointment of an individual as Acting Director of Human Resources, even where the actions of the Director may impact the grievant. Cremeans, supra. In Cremeans, the grievant alleged that the provisional appointment had exceeded the maximum time period allowed by statute and policy. It was found that the grievant did not have standing to challenge the Acting Director's ongoing appointment, as he did not allege that he was either qualified for or interested in the position, although he may have standing to grieve specific actions taken by the Acting Director. The same situation exists in this case, as the grievant has not requested the opportunity to be appointed to the foreman position, and the outcome of this grievance is generally governed by that decision.

In this case, there is some potential for Mr. Arvai to encourage or provide preferential treatment for his wife, through his auditing of her work and occasional supervision in emergency situations. However, Mr. Farley has not alleged that any such unfair treatment by Mr. Arvai has occurred, nor has he explained how his own interests might be affected even if it did. Even assuming that Mr. Farley can be affected by some nepotistic action on Mr. Arvai's part, it is a purely speculative harm at this point. The mere speculative possibility that some future occurrence could affect the grievant is

not sufficient to give standing. Pomphrey, supra. "[U]nless there is an allegation and showing that another employee's performance and/or conduct substantially interferes with the grievant's ability to perform his own duties..., the grievant has no standing to complain." Jarrell v. Raleigh County Bd. ofEduc., Docket No. 95-41-479 (July 8, 1996). 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 basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n., Docket No. 95-PSC-501 (Jan. 31, 1996).

Mr. Farley objects to a general inconsistency or unfairness in the Respondent's application of its policy. However, such a general "injury" is one suffered by any citizen when a governmental agency fails to adhere to its own policies and procedures. While such an interest may support standing in some other action, such as declaratory judgment or mandamus, such is insufficient to give standing in the grievance procedure. As found in Jarrell, supra, a general claim of unfairness is insufficient to give standing under W.Va. Code §29-6A-1 et seq. See also Cremeans, supra. The availability of the grievance procedure is restricted to "affected state employees." W.Va. Code §29-6A-2(i). It is not available to address injury to the interests of ordinary citizens. There must be some nexus between the employment relationship and the interests affected. Here, that nexus does not exist.

Even if he had proper standing, Mr. Farley is not entitled to the relief requested. Here, grievant has requested only that Mr. Arvai's promotion be rescinded. "An employee does not ordinarily have standing in the grievance procedure to protest the employmentstatus of a fellow employee unless harm is shown. W.Va. Code §18- 29-2(a); See Shobe v. Latimer, [supra]." Lyons, supra. As no harm to an employment interest of Mr. Farley's has been alleged, he is not entitled to the requested relief. "When the relief sought by a grievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons, supra, citations omitted.

In addition to the foregoing, the following conclusions of law are appropriately made:

CONCLUSIONS OF LAW

1 1. In a non-disciplinary case, the grievant bears the burden of proving his claims by a preponderance of the evidence. W.Va. Code §29-6A-6.

2 2. To have standing to pursue a grievance, the grievant must allege and prove a personal stake in the outcome, which consists of some harm to his own employment situation or some other injury-in-fact. See, Shobe v. Latimer, 253 S.E.2d 54 (W.Va. 1979); Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996).

3 3. There must be a nexus between the interest affected and the grievant's own employment situation, as the grievance procedure is not available to address the complaints of ordinary citizens.

4 4. A general claim of unfairness is insufficient to give standing. Jarrell v. Raleigh County Bd. of Educ., Docket No. 95- 41-479 (July 8, 1996).

5 5. Even if the policy has been misapplied, there is nocognizable grievance where the grievant has suffered no personal harm. Cremeans, supra; Pomphrey v. Monroe Co. Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W.Va. Dept. of Trans., Docket No. 92-DOH-053 (Apr. 24, 1992).

6 6. Mr. Farley failed to show that he is an "affected" employee within the meaning of W.Va. Code §29-6A-2(i), and Mr. Farley has neither alleged nor proved that he has any personal stake in the outcome of this grievance; thus, he is without standing to pursue it.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of the county in which the grievance occurred. 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.

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Dated: February 21, 1997 **JENNIFER J.MEEKS**

Administrative Law Judge