JOHN TOTH, et. al,

v.

Docket No. 97-CORR-62

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievants (See footnote 1) are employed by the West Virginia Division of Corrections (CORR) as Correctional Officers assigned to the Anthony Correctional Center (ACC or Center). They filed a grievance at Level I on July 10, 1996, alleging that CORR was exposing them to unnecessary risk by prohibiting officers from carrying handcuffs. Their supervisor was without authority to grant relief, and the grievance was denied at Levels II and III. Appeal to Level IV was made February 10, 1997, and a hearing was held June 12, 1997. The parties submitted proposed findings of fact and conclusions of law by August 19, 1997.

Background

There is essentially no dispute over the facts of the case. ACC is a minimum security facility operated by CORR pursuant to its authority under W.Va.Code §§25-4-1 et seq., to "provide appropriate facilities for the housing of youthful male offenders convicted of or pleading guilty to violation of law before courts with original jurisdiction or juvenile courts, who are amenable to discipline other than in close confinement." The facility houses offenders ranging from eighteen to twenty-three years of age; most, if not all, are considered "low-risk." The sentencing Court typically reserves the right to place the offender in a more restrictive facility if their conduct at ACC does notconform to standards.

ACC is composed of a several dormitories, a gymnasium, and administrative, classroom and maintenance buildings. Movement within the facility is not severely restricted. Correctional Officers use two-way radios to stay in constant contact with their co-workers and superiors. Officers generally travel together within the facility, and are rarely alone with more than one or two offenders. Despite

that certain buildings are as much as two hundred yards apart, the configuration of the facility is such that an officer can still respond quickly to another officer's call for assistance. “Security” officers patrol the facility at intervals.

When responding to an offender's aggressive behavior, ACC Correctional Officers are generally required to use verbal commands and varying degrees of physical contact before resorting to mechanical restraints. There have been very few incidents at the Center during the past eighteen years, and perhaps longer, where handcuffs were needed.

Prior to July 1996, Shift Commanders, usually Captains, Lieutenants or Sergeants, carried handcuffs. They either responded directly to an officer's request for restraints or saw that another officer took them. Per CORR policy, only the Shift Commander may authorize the use of handcuffs; policy mandates that mechanical restraints “be stored in a secure but readily accessible depository outside inmate housing and activity areas.”

In July 1996, ACC Superintendent James Rubenstein learned that other officers were carrying handcuffs. He discussed the frequency with which they had been used in the past with at least one ranking officer, and ultimately concluded that it was not consistent with ACC's treatment philosophy or necessary to allow any officer to carry restraints. The Superintendent directed that all handcuffs be stored in a locked file cabinet on the second floor of the gymnasium building in an areadesignated as the Correctional Officer's office. The distance between this building and other areas most frequented by offenders is as much as two hundred yards.

Officers in need of restraints must still contact the Shift Commander. An officer with approval to use restraints may now be required to open at least three locked doors, and relock two before proceeding to the area where they are needed. The time needed to report an offender in need of handcuffs, obtain authorization, retrieve them, and return to the area varies with the proximity of the area to the CO's office, the number of staff persons involved, and the location and/or availability of the Shift Commander. New construction underway at ACC will eventually reconfigure the facility, and provide new, and perhaps more accessible, location for storing restraints.

Argument

The grievants do not contend, at least not seriously, that ACC statistics on the use of handcuffs and assaults on officers during the facility's history support their claim that they are at risk when not

carrying restraints. Grievant Toth could recall only ten instances during his eighteen years at the facility when restraints were needed. The grievants' claim is that it is inherently unsafe for officers to be without handcuffs at any time, and that CORR, has a duty, if only under W.Va Code 29-6A-2(i), to refrain from practices “constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.”

While the grievants cite CORR's policy on the storage of handcuffs, and complain generally about the “accessibility” of the present system, it is clear that they are not seeking a relocation of the current storage area or proposing any arrangement which does not entail authorization for all officers to carry restraints. There is no serious dispute between the parties that the configuration of buildings at ACC, the movement of offenders and officers within the facility, and other variables make itdifficult, if not impossible, to establish a central, secure location for handcuffs which is readily accessible to all areas where the need for physical restraint might reasonably be expected.

CORR does not dispute that there are inherent risks in a Correctional Officer's duties, but denies that the prohibition against officers carrying handcuffs increases those risks. The agency asserts that the policy is consistent with its philosophy on the treatment of young, low-risk, offenders and accepted standards for minimum security facilities.

Findings and Conclusions

CORR is bound to follow the regulations it establishes. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977). It is accepted that CORR's policy on the storage of restraints is primarily aimed at officer safety, and that questions regarding the interpretation of the provision for a “readily accessible depository” and the agency's attempts to comply should be resolved accordingly. The policy does not purport to place physical plant or other constraints above an officer's well-being.

It is also accepted that when deciding to prohibit officers from carrying handcuffs, Superintendent Rubenstein understood that ACC's treatment philosophy and officer safety were interrelated issues. The record supports that he reviewed CORR policy and ACC's record on the use of restraints, and consulted with officials at other correctional facilities before reaching a decision. It is clear from the Superintendent's Level IV testimony, that he believes that offenders would perceive officers carrying handcuffs as confrontational and otherwise inconsistent with an informal, non-threatening approach to rehabilitation. He essentially conceded that he made a subjective determination that if the new arrangement entailed inherent risks for officers, those risks were outweighed by the negative

perceptions to be drawn from officers armed with restraints.

To the extent that CORR contends that the current location of handcuffs at ACC substantiallycomplies with its policy, and does not entail unnecessary risk to officers, the evidence does not support the claim. A depository which is as much as one hundred yards from areas where handcuffs might be needed, and requires access through three locked doors is not “readily accessible.”

It is not conjecture on the grievants' part to say that the likelihood of injury to an officer trying to subdue and handcuff a physically aggressive offender increases proportionately to the time it takes to retrieve handcuffs. During a tour of the facility, the undersigned determined that it could take as much as fifteen minutes for an officer to obtain permission to use restraints, and deliver them to the officer in need. While ACC's history on the use of handcuffs demonstrates that there have been few incidents where handcuff were needed, and supports that the risk to officers is infrequent, it does not disprove the grievants' assertions that other incidents will occur, and that it is inherently dangerous for an officer to wait more than a few seconds to apply restraints to an aggressive offender.

The undersigned concludes that Superintendent Rubenstein's reasons for the prohibition against officers carrying handcuffs are, to a large extent, illusory, and that, they are outweighed by concerns over officer safety, in any event. There seems to be little substantive difference between the negative inferences an offender may draw from an officer who can obtain and use restraints within five to ten minutes, and the perceptions to be made from an officer carrying handcuffs concealed on his or her person. The undersigned doubts that ACC's rehabilitation aims would be impaired to any degree by a rule which provides that aggressive physical behavior will entail a quick response from officers armed with restraints.

Further, as noted, the evidence establishes that because of the current layout of the Center, it is not possible to designate locations for handcuffs which are accessible to all areas whereoffenders are present without building several, and perhaps numerous, secure, free-standing, receptacles near those areas. From a practical and legal standpoint, it appears that until new construction is completed at the facility, permission for ACC Correctional Officer to carry handcuffs is the safest course for staff, and the approach most consistent with ACC treatment philosophy.

Accordingly, the grievance is **GRANTED** to the extent that the West Virginia Division of Corrections is hereby **ORDERED** to permit all qualified ACC Correctional Officers to carry handcuffs.

At its discretion, CORR may require that the restraints be concealed on the officers. Once current construction is completed, ACC officials may review the design of the new physical plant, suspend or abolish all policies on the storage and/or use of handcuffs, and establish new policies and/or depositories.

Any party of the West Virginia Division of Personnel 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.

_____ **JERRY A. WRIGHT**

ADMINISTRATIVE LAW JUDGE

Dated: November 19, 1997

Footnote: 1 *John Toth, Rondall Hawkins, Mark Christian, Carlton Stalnaker, Denny Cochran, Johnny Richmond, James Alford, Martin Corbiser, Travis Colonius, Lewis Halterman, Henry Casto, Pat Sullivan, E.R. Beverage, Joy Wade, Pat Brown, Jimmie Hammons, James Vines, Charles Shelton, Thomas Harper, Tony Pennington, Carla Workman, and Alma Blevins.*