RICHARD SIMMS,

Grievant,

v. **DOCKET NO. 03-CORR-137**

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant Richard Simms filed this grievance against Division of Corrections/Anthony Correctional Center, Respondent, on April 1, 2003, stating: “P. D. 129.13 Grooming policy for uniformed staff Part B, Part C2 do not follow guidelines set by the W. V. Division of Personnel Policy #DOP-P3 Agency Dress Codes.” Grievant stated the relief sought as: “That Policy Directive 129.13 be revised to the guidelines of DOP-P3. In order that beards and goatees would be the choice of the individual correctional officer, to be worn or not.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on August 5, 2003. Grievant was represented by coworker Dennis Brackman, and Respondent was represented by counsel, Charles Houdyschell, Jr., Assistant Attorney General. This matter became mature for decision on October 1, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a uniformed correctional officer at Anthony Correctional Center.

2. Division of Corrections (DOC) Policy Directive (PD) 129.13, issued on December 1, 1999, is

entitled “Grooming Policy of Uniformed Staff.” Level three Grievant's Exhibit No. 2.

3. PD 129.13 provides that grooming standards for all correctional institutions/facilities/centers will be in compliance with a requirement that, for male Correctional Officers, “Beards are not permitted, unless approved by the Chief Correctional Officer.” Level three Grievant's Exhibit No. 2.

4. Approval for beards must be based on a medical requirement supported by a physician's written explanation, and approval is for a one-month period, renewable upon receipt of updated medical information. Level three Grievant's Exhibit No. 2.

5. Mustaches must be neatly trimmed, tapered and tidy. No portion of the mustache may cover the upper lip or extend sideways beyond a vertical line, drawn upward from the corner of the mouth. Handlebar mustaches and goatees are prohibited. Level three Grievant's Exhibit No. 2.

6. West Virginia Division of Personnel Policy DOP-P3, “Agency Dress Codes,” states, in part:

> The purpose of this policy is to communicate basic principles regarding written standards of dress and to establish appropriate guidelines appointing authorities should consider when regulating dress standards of its employees. This policy does not require the approval of the Division of Personnel prior to the establishment of a dress policy by any department, division or governmental sub-unit under the jurisdiction of the Division of Personnel.
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> . . .
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> 1. Personal grooming practices are oftentimes defended by employees on racial, cultural, or religious reasons, so it is essential for any standards to be attuned to current morality, attitudes and legal precedent and thus are to be considered on particular facts and circumstances, which may change.
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> 2. In the absence of a formal policy which mandates specific requirements, it shall be within the discretion of the appointing authority to determine the standards to be applied.
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> . . .
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> 4. Several religions prohibit shaving and a number of African-Americans suffers from pseudo folliculitis barbae (a skin condition that makes shaving painful). However, employees who may be required to wear protective masks to keep out poisonous fumes may be prohibited from growing a beard because of the obvious threat a beard

would pose to an employee's health and safety.

. . .

7. Uniformed personnel, and field personnel who have duties unrelated to a business office, could have different regulations or guidelines.

Level three Grievant's Exhibit No. 1.

7. Non-uniformed DOC staff have a different grooming policy, and are permitted some facial hair, even though they also come into contact with inmates on occasion.

DISCUSSION

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant contends Respondent's grooming policy impermissibly prohibits beards and goatees, as it does not conform to DOP guidelines, and also impedes an individual's right to self-expression. Respondent argues the policy is proper and necessary, and that the DOP policy is merely a guideline, and not mandatory. Grievant presented almost no evidence other than the two policies in question, (See footnote 1) called no witnesses, did not testify himself, and did not submit any written argument at any level of the proceedings. Grievant presented no authority or precedent establishing an entitlement to wear a beard with his uniform. Accordingly, the only analysis needed to resolve Grievant's first contention is to read Respondent's policy in *pari materia* with DOP's policy. Doing so, it is clear DOP's policy does not prohibit the restrictions embodied in the DOC policy, as the DOP's policy is merely a guideline, or a list of recommended matters to be considered when an agency develops a written dress policy.

Grievant's argument that the DOC policy restricts his freedom of expression is not wholly without merit, but it will not carry the day. Grievant's representative argued at level three that “Greenbrier County is a relatively rural county that is steeped in hunting tradition and cultural practices during hunting season, you're almost required to grow a beard.”

"The United States Supreme Court has recognized that citizens have a 'liberty' interest in matters relating to their personal appearance. Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976). However, the Court in Kelley concluded that one's right to dress as they deem fit and to determine their own appearance implicates only a general substantive liberty interest which does not rise to the level of a fundamental right. Id. at 425 U.S. 244-245. Because the right to dress as one sees fit is not a fundamental right, any restrictions placed upon one's choice of dress are to bejudged under a 'rational basis' test to determine if the regulation can be branded as arbitrary. The Employer may defeat the challenge to its dress code by showing that it has a reasonable and rational basis for restricting Grievant's manner of dress in order to meet a legitimate end. Id. at 425 U.S. 247-248." Burdette v. W. Va. Pub. Serv. Comm'n, Docket No. 93-PSC-132 (Nov. 16, 1993). "Under the rational basis test, a law will be sustained so long as it 'is rationally related to a legitimate state interest.' Appalachian Power, 195 W. Va. at 594, 466 S.E.2d at 445 (quoting Cleburne Living Ctr., Inc., 473 U.S. at 440, 105 S. Ct. at 3254, 87 L. Ed. 2d at 320)." Sale v. Goldman, 208 W. Va. 186, 539 S.E.2d. 446 (2000).

Kelley, *supra*, also required the challenger of a policy to show it was arbitrary. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See* Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, *supra* (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). Warden Scott Patterson testified on Respondent's behalf that the policy covered a legitimate security concern for uniformed correctional officers, and also promotes to inmates and the public a professional and respectable appearance among uniformed officers. Although the warden conceded Anthony Correctional Center does not have in its inventory self-contained breathing apparatuses, with which wearing a beard may interfere in case a fire or noxious gases necessitates

their use, the Policy is agency-wide, and covers all correctional institutions. The undersigned finds Respondent's policy to be reasonably based on rational concerns of Respondent. Grievant has not shown respondent's policy is irrational or arbitrary.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. “The United States Supreme Court has recognized that citizens have a 'liberty' interest in matters relating to their personal appearance. Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976). However, the Court in Kelley concluded that one's right to dress as they deem fit and to determine their own appearance implicates only a general substantive liberty interest which does not rise to the level of a fundamental right. Id. at 425 U.S. 244-245. Because the right to dress as one sees fit is not a fundamental right, any restrictions placed upon one's choice of dress are to be judged under a 'rational basis' test to determine if the regulation can be branded as arbitrary. The Employer may defeat the challenge to its dress code by showing that it hasa reasonable and rational basis for restricting Grievant's manner of dress in order to meet a legitimate end. Id. at 425 U.S. 247-248.” Burdette v. W. Va. Pub. Serv. Comm'n, Docket No. 93-PSC-132 (Nov. 16, 1993). Kelley, *supra*, also required the challenger of a policy to show it was arbitrary.

3. “Under the rational basis test, a law will be sustained so long as it 'is rationally related to a legitimate state interest.' Appalachian Power, 195 W. Va. at 594, 466 S.E.2d at 445 (quoting Cleburne Living Ctr., Inc., 473 U.S. at 440, 105 S. Ct. at 3254, 87 L. Ed. 2d at 320).” Sale v. Goldman, 208 W. Va. 186, 539 S.E.2d. 446 (2000).

4. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See* Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June

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5. Grievant failed to meet his burden of proving Respondent's policy was irrational or arbitrary, or contrary to DOP policy. For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the county in which the grievable event took place. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: October 21, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant's other evidence was a newspaper clipping from The Charleston Gazette, February 24, 1995, that mentions that Guards are allowed to wear beards at Huttonsville Correctional Center, in the context of a lawsuit by Muslim prisoners who were petitioning for the right to grow beards. The article is utterly irrelevant as it predates the Grooming Policy and probative of nothing.