RHONDA NOLAN,

Grievant,

v. DOCKET NO. 04-HHR-191

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/MILDRED

MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

On April 12, 2004, Grievant Rhonda Nolan filed a grievance against her employer, the Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital ("MMBH" or "Respondent"), claiming:

> On Friday, April 9, 2004, a Guard had my car towed from the parking lot of Mildred Mitchell-Bateman Hospital without proper authorization to do so and without contacting: his immediate supervisor, Jackie Vannatter, Security Supervisor; Jack Sells, Director of Operations, or the Administrator-on-Call, Sherry Hedges, Director of Fiscal Services. My car had broken down and would not start and I had informed Jackie Vannatter of this fact. Mr. Vannatter, in turn, informed Jack Sells and both agreed that the car's presence on the lot would not pose a problem. As a result of the Guard's action, I had to pay $100.00 . . . to retrieve my car from Charlie Thompson's Towing Service.

As relief, Grievant seeks, "I wish to be reimbursed by the hospital for the $100.00 charge that I had to pay to get my car back as a result of the Guard's improper and unauthorized actions."

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on September 2, 2004. Grievant appeared *pro se*. Respondent was represented by Robert Miller, Assistant Attorney General. The matter became mature for decision on September 30, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

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

FINDINGS OF FACT

1. Grievant is employed by Respondent. On a date approximately three weeks prior to April 9, 2004, Grievant's son came to see her at her workplace, MMBH. He was driving a car owned by Grievant, but one he normally uses for himself.

2. The car broke down on the hospital grounds, due to a defunct alternator.

3. Grievant approached Security Supervisor Jackie Vannatter, and asked if it would be permitted that she leave the car on the lot until she could get the new part and get it repaired. Mr. Vannatter spoke with Jack Sells, Director of Operations, who supervises both grounds and security. Since the car was parked in an out-of-the-way spot, Grievant was given permission to leave it there.

4. Who owned the car and that the car was allowed to be on the lot was not communicated to the other security personnel, although Bill Watson, a guard who works on the midnight shift, agreed to help Grievant get the part needed and to fix it for her. Normally, Mr. Vannatter would leave a notice on the bulletin board if there was something all the guards needed to know.

5. It took a few weeks for Grievant to save the money for a used alternator, and when one was located, it did not work, so she had to get a new one. Meanwhile, JohnHerrera, a security guard, observed the car on the lot for this extended period of time, and saw someone at the car on occasion.

6. Mr. Herrera had the hospital operator call the State Police to see if they could determine the owner from the license plate number, but was told they had to have an officer there before they could do that. He also called the hospital floor and asked if anyone knew whose car it was, but nobody did.

7. When he could not determine the owner of the car, Mr. Herrera called Thompson's Auto Service and had the car towed away, on April 9, 2004.

8. Grievant noticed the car was gone, and asked Mr. Herrera about it, at which time he found out who owned it. Grievant had to pay $100 to recover the car from the towing service's impoundment.

9. MMBH Policy No. 20 covers “Monitoring and Inspection Activities,” and sets out the procedure for the security department to follow when an unauthorized vehicle is found on the grounds. Guards are to document the vehicle in their daily report, noting the license number, make, model and color.

10. MMBH Policy No. 14 is the facility's parking and traffic regulations, and provides that “Only

those vehicles belonging to visitors or staff of Bateman Hospital will be permitted to park on hospital grounds."

11. No policy, rule or regulation gave Mr. Herrera, nor any guard, the authority to have a vehicle towed from the lot. He was disciplined for his actions.

DISCUSSION

Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving, by a preponderance of the evidence, a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which she works. *See Unruev. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). As a preliminary matter, Respondent asserts Grievant has failed to allege a claim that constitutes a grievance within the meaning of the grievance procedure.

West Virginia Code § 29-6A-2(i) defines "grievance" as

> 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.

At first blush, Respondent's assertion that this was not a grievable event appears to be correct. The grievance procedure was designed as a way to resolve problems that arise within the context of a grievant's employment, and there is only a very slim nexus between Grievant's car being towed and her employment. Mr. Herrera's actions in having her car towed were *ultra vires,* (See footnote 1) and therefore are considered non-binding on the agency. *Adkins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-020 (Apr. 1, 2002). However, Mr. Herrera's actions were not the only factor to be considered, and the *ultra vires* defense does not excuse every violation of policy or practice by an agency's employees or agents.

Respondent admits not only that it gave Grievant permission to leave her car until it could be repaired, but also that Mr. Herrera had no authority to have the car towed. Hissupervisors, the same persons who gave Grievant permission to leave her car at the facility, failed to follow their own

practice in keeping the watch informed. The root cause of this event was a breakdown in communications, not the culminating act of the security guard.

Further, Respondent has enacted Policies 14 and 20, which are operational procedures for the facility, but also regulate the conduct of employees in using the parking facilities. Had permitting policy been followed by the agency, Grievant would likely have had a parking pass to place on her car, which at the very least would have allowed Mr. Herrera to identify the owner. Under the policies, employees' vehicles are “authorized” to be parked on the lot. It should also be noted that Grievant properly sought and obtained permission from the persons in charge of the parking lot, and who, since Grievant worked in housekeeping, were also in her chain of command.

Under these limited, specific and unique circumstances, Grievant has established that the towing of her car was, an “otherwise aggrieved application of unwritten policies or practices of their employer.” Respondent has failed to show the actions it took were permitted by its policies and practices. Further W. Va. Code § 29-6A-5(b) permits the undersigned to grant relief determined to be “fair and equitable,” and the relief Grievant requests is just that. (See footnote 2)

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which she works. Her claim must be proven by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that her claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Boylan v. W. Va. Dep't of Transportation*, Docket No. 94-DOH-211 (Oct. 25, 1994); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. “'Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts.' *Franz v. Dep't of Health and Human Resources*, Docket No. 99-HHR-228 (Nov. 30, 1998). *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991).” *Adkins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-020 (Apr. 1, 2002); *Roncaglione v. W. Va. Bureau of*

Employment Prog./Fiscal and Admin. Management Div., Docket No. 99-BEP-498 (Apr. 28, 2000).

3. Grievant has established by a preponderance of the evidence an "aggrieved application of unwritten policies or practices of their employer," and has therefore stated a claim within the jurisdiction of the Grievance Board.

4. Grievant has proven Respondent improperly had her car towed away from her place of employment after giving her permission to leave it there. For the foregoing reasons, this grievance is **GRANTED**. Respondent is ordered to reimburse Grievant $100.00, plus interest from April 9, 2004, to cover her out-of-pocket expenses to get her car out of impoundment.

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, and 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court

Date: October 6, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Latin for "beyond powers." This term refers to acts that are outside the scope of a person's lawful authority.

Footnote: 2

It is very surprising to the undersigned that this grievance was even necessary, as Respondent should have recognized that the right thing to do was to pay for its mistake as soon as it happened, or at least at level one.