SAMUEL DOSS, ET AL., .

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Grievant, .

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v. . Docket No. 94-PSC-155

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WEST VIRGINIA PUBLIC SERVICE COMMISSION, .

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Employer. .

D E C I S I O N

Samuel Doss, Gary Miller, Gary Hellems, Patrick Barker, Robert Runner, Lee Dean and Ronald Adkins (hereinafter Grievants) filed this grievance pursuant to the provisions of West Virginia Code §29-6A-1-et seq., the Grievance Procedure for State Employees, on February 14, 1994, alleging as follows:

> Meal expense for single day travel (when there is not an overnight stay). Reference to State of West Virginia Travel Regulations - Pages 20 and 21. I would like reimbursement from (10-26-92 to present).

Based upon a review of the record, it is apparent that Grievants are not alleging a current violation of the applicable travel regulations but that their employer had engaged in either favoritism or discrimination with regard to the approval of singleday meal expense reimbursement for other employees. Grievants' claim was denied at the lower three levels of the grievance procedure and appealed to level four on April 28, 1994. After several unsuccessful attempts to schedule an evidentiary hearing in this matter, the parties agreed that a decision could be issued based solely

upon the record developed below supplemented only by proposed findings of fact and conclusions of law. A briefing schedule was set and the case became mature for decision on July 8, 1994.

The following findings of fact have been properly deduced from the evidentiary record developed in the case. Grievant Doss was the only grievant who testified at the level three hearing.

Findings of Fact

1. Grievants are Utility Inspectors within the Motor Carrier Section of the Transportation Division of the Public Service Commission (hereinafter PSC).

2. Grievants work out of their homes which are not located within Charleston, West Virginia. On occasion, Grievants are required to travel to an office in Charleston to perform part of their duties. This office is generally staffed with a secretary and has one phone line to handle questions from the PSC's constituents.

3. Grievants are required to travel as a part of their daily routines because their jobs consist mainly of performing roadside inspections of trucks.

4. Grievants' normal work hours are 9:00 a.m. to 5:00 p.m.

5. Prior to October 1992, Grievants received reimbursement for meal expenses incurred during normal business hours.

6. After October 1992, employees of the Motor Carrier Section were informed that there would not be any further reimbursement for meal expenses unless the traveler was required to stay overnight at his destination.

7. In October 1993, Grievant Doss submitted for approval a request for reimbursement for meal expenses incurred between October 1992 and October 1993. This request was denied. He later made a similar request for expenses incurred between October 1993 and February 1994 which was also denied.

8. Pursuant to the State's Travel Regulations effective May 1, 1992, promulgated by the Travel Management Office, only those employees recognized as having been granted "approved travel status" are eligible for meal expense reimbursement. The travel regulations were interpreted to mean that only those individuals who were granted permission to travel away from their "official work station" in order to perform various duties or assignments and whose job does not normally require travel to the stated destination were granted meal reimbursement; i.e., itinerant employees like

Grievants did not normally qualify for meal expense reimbursement because their day-to-day duties required travel.

9. Wayne Crowder is the manager of the PSC's Administration Section and assumed the duties of that position in January 1993. One of Mr. Crowder's duties is to approve meal expensereimbursement requests based upon the "approved travel status" determination.

10. The PSC employs field inspectors in its Gas Pipeline Safety Section of the Transportation Division. These employees are also required to travel as a normal, day-to-day part of their position.

11. The Gas Pipeline Safety Section inspectors also have an office in Charleston and, like the motor carrier inspectors, many of the pipeline inspectors work out of their home and not out of this assigned office.

12. At least one employee of the Gas Pipeline Safety Section was given meal expense reimbursement for daily travel after October 1992. This employee was granted such reimbursement because his section continued to forward requests to Mr. Crowder's office and Mr. Crowder did not investigate to determine if the requests were valid under to the State's travel regulations. Mr. Crowder believed that this employee normally worked out of the Charleston office when he actually works out of his home which is not located in Charleston.

13. The employees of the Gas Pipeline Safety Section are no longer awarded meal expense reimbursement unless they are on "approved travel status" as contemplated by the applicable travel regulations.

14. This grievance was filed after Mr. Doss learned that one employee in the Gas Pipeline Safety Section had been receiving meal expense reimbursement as late as February 7, 1994.

Discussion

Grievants simply contend that the PSC has showed favoritism to employees of the Gas Pipeline Safety Section by having granted them meal expense reimbursement during a period in which they were not entitled to such benefit pursuant to the applicable travel regulations; therefore, they argue that they should now be reimbursed for their expenses incurred during the same time period. The PSC affirms that certain employees of the Gas Pipeline Safety Section were granted meal expense reimbursement which they were not entitled to receive but contends that this mistake cannot be used

as a basis for extending the same benefits to Grievants which were justifiably denied. It also contends that the grievance was untimely filed pursuant to W. Va. Code §29-6A-4(a) because Grievants were aware that they were not receiving meal expense reimbursement as of October 1993.

Respondent's timeliness defense can be dispensed with rather quickly. Grievants' complaint is not that they have improperly been denied meal expense reimbursement under the applicable travel regulations, and therefore, they should be granted said reimbursement for a violation which they were aware of in October 1993. Their claim is that at least one of the PSC's employees has been given preferential treatment and their requested remedy is that they receive meal expense reimbursement because such reimbursement would negate the difference in treatment. The ten-day time limit governing the filing of Grievants' claim began to run on the date they became aware of the alleged preferentialtreatment. Based upon the limited testimony on this issue, it is determined that the instant complaint was timely filed on February 14, 1994, five days after Grievants became aware of the alleged preferential treatment. Therefore, Respondent's affirmative defense is **DENIED**.

In response to the merits of Grievants' claim, "favoritism" is defined by Code §29-6A-2(h) as the "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Assuming arguendo that Mr. Crowder's treatment of the pipeline inspectors with regard to having granted their requests for meal expense reimbursement can be considered favoritism under the Grievance Procedure for State Employees, Grievants still would not be entitled to the same treatment. (See footnote 1) Typically, when favoritism is found, a cease and desist order is the appropriate remedy, especially when the complained of treatment is contrary to some established rule, policy, regulation or statute. In this case, the evidence establishes that the employees who improperly received meal expense reimbursement no longer profit from Mr. Crowder's mistake. Therefore, Grievants' complaint is moot because a cease and desist order could provide no further relief. Further, even if the claim for reimbursement is not considered moot, there is no viable legaltheory under which Grievants' can rely that would entitle them to the remedy that they seek as the remedy itself is illegal. Grievants have not demonstrated that they were ever entitled to reimbursement under the applicable guidelines for the periods in which their requests were denied.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. The instant grievance was timely filed pursuant to the provisions of W. Va. Code §29-6A-4(a). Therefore, the Respondent's affirmative defense of timeliness is hereby **DENIED**.

2. Moot questions or grievances which call for an advisory opinion are not cognizable under the Grievance Procedure for State Employees, W. Va. Code §29-6A-1 et seq. See, Crookshanks v. W. Va. Div. of Rehab. Serv., Docket No. 89-RS-597 (Jan. 11, 1990).

3. Grievants' complaint in the instant case is moot.

Therefore, this grievance is hereby **DENIED**.

Any party or 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 partymust 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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ALBERT C. DUNN, JR.

Administrative Law Judge

October 19, 1994

Footnote: 1It is very doubtful that favoritism could be found to exist as that term is defined under the Grievance Procedure as the employees at question do not appear to be similarly situated in that they are not supervised by the same individuals and the decision at issue was not made by the same agents of the Respondent.