KARLA BAKER, et al.

v. Docket No. 96-DPS-120

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY

DECISION

The grievants, Karla Baker, Myra Windon, and Billie Vance, are employed by the West Virginia Department of Public Safety (DPS) as Civilian Driver Examiners assigned to Area 3, Region 4, which encompasses learner permit and operator license testing stations at Lewisburg, Rainelle, Union, Hinton, Marlinton and Richwood. They filed a grievance at Level I, on or about February 5, 1996, alleging that they should receive overtime pay for certain hours spent traveling to and from the testing sites. The grievants' supervisor was without authority to grant relief, and the grievance was denied at Levels II and III. Appeal to Level IV was made March 29, 1996, and a hearing was held September 7, 1996. Upon the motion of counsel for DPS, the record remained open pending the submission of testimony or affidavit from an agency witness. By letter dated January 21, 1997, the parties were advised that unless the additional evidence was tendered by January 28, 1997, the record would be closed; DPS made no reply. The grievants submittedproposed findings of fact and conclusions of law by February 13, 1997. DPS did not submit proposals (See footnote 1).

Background

There is no dispute over much of the background of the case. The grievants' jobs require that they travel to State Police detachments in Nicholas, Greenbrier, Summers, Monroe, and Pocahontas counties to administer learner permit and operator license tests. All three must report to the particular detachment where the testing will be conducted by 9:00 a.m.; the testing is not completed until 5:00 p.m. DPS requires that the necessary testing equipment and written examinations be locked in the trunk of a state vehicle which is kept at the Lewisburg detachment. Other materials used for testing are secured in a file cabinet inside the detachment. The grievants are not permitted to take the vehicle to their homes.

For the past several years, it has been the grievants' practice to leave their homes early enough to meet at the Lewisburg detachment, leave their personal cars, pick up the equipment and the state

vehicle, and reach the scheduled test site by 9:00 a.m. Some sites are as much as one and one-half hours from Lewisburg. At 5:00 p.m., the grievants return to Lewisburg, and secure the equipment in the state car. They are required to contact at least one detachment by radio when departing Lewisburg and after leaving the test site. The grievants are not compensated for the travel time from Lewisburg to the sites or the return trip.

It does not appear that, when hired, the grievants were informed that Lewisburg or other city would be their headquarters. The record is somewhat unclear, but it is likely that they were advised that they would be required to drive their personal vehicles from their homes to the various test areas,and return, and that they would not be compensated for the travel time or given an allowance for mileage. On infrequent occasions, one or more of the grievants have used their personal vehicle to travel to a test site when they needed to attend to some personal matter before the start or after the end of the work day. On most, if not all, of these occasions, the grievants either sought their supervisor's approval or made him aware of their plans.

The record supports that the agency provided the state vehicle primarily out of recognition that the grievants would incur considerable personal expense if they were using their own vehicles when traveling to and from the test sites, at least the more distant ones. It seems clear that the arrangement was efficient and of benefit to the agency to the extent that Sergeant W. A. Dean, the grievants' supervisor, was relieved of the responsibility of making independent trips transporting the testing equipment and supplies to and from the test sites.

The evidence is conflicting on whether the grievants were ever told by any DPS administrator that they must report to Lewisburg each day and use the state vehicle. The grievants' testimony establishes that they believed they were required to do so. Sergeant Dean's testimony establishes that he and other DPS officials had full knowledge of the arrangement, and never expressed disapproval or directed the grievants to do otherwise.

Argument

The parties agree that if the grievants' jobs require them to be present at the Lewisburg detachment at times prior to the beginning and/or after the end of the 9:00 a.m. to 5:00 p.m. work day, they are entitled to overtime pay under certain portions of the Portal to Portal Act (See footnote 2) amendmentsto the Fair Labor Standards Act. (See footnote 3) The grievants maintain that by imposing

a requirement that the necessary equipment be secured there, the agency has made the detachment their de facto work headquarters. They seek back pay from October 1993.

DPS asserts that, unless the grievants were given a direct order to report and return to the Lewisburg detachment, they were never “required” to do so. The agency makes no arguments regarding the timeliness of the grievance or the relief sought.

Findings and Conclusions

The Portal to Portal Act excludes time spent “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which [the employee] is employed to perform” from the overtime provisions of the Fair Labor Standards Act. It also exempts time consumed on “activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.” These provisions have been interpreted to mean that “[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable [under the Act], if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed.” Steiner v. Mitchell, 350 U.S. 247, 100 L.Ed. 267, 76 S.Ct. 330 (1956). Obviously, if an employee must report to a particular location to obtain the necessary tools before he can begin his principal activities at another location, the time to travel between the two is an integral and indispensable part of those activities. See, Barrentine v. Arkansas-Best Freight system, Inc., 750 F.2d 47 (8th Cir. 1984), cert. denied, 471 U.S. 1054 (1985), (time spent drivingtrucks to maintenance garage prior to drivers' departure on freight routes deemed compensable).

To the extent that it is necessary, it is concluded that the grievants' were more credible and reliable, if only slightly so, than DPS witnesses on the issue of whether they were directed to report and return to the Lewisburg detachment each day. It is also accepted that they were explicitly or implicitly advised that transporting the testing equipment and supplies and ensuring that they were secured overnight at the detachment was a joint responsibility.

In any event, the issue of whether DPS designated Lewisburg as the grievants' headquarters does not turn on the lack of a direct order. The evidence clearly establishes that once the state vehicle was provided, the grievants, with at least the full knowledge and approval of their superiors, consistently

adhered to a schedule and travel arrangements which were beneficial to all parties involved. It is more probable than not that the logic, cost-effectiveness and convenience of having the grievants report to and return to the detachment, caused all to regard the arrangement as the accepted practice if not a standing directive. It is significant that there is no evidence of record that the grievants were ever advised that they should not report to Lewisburg prior to traveling to the test sites.

Further, Steiner, a case involving workers in a hazardous chemical plant seeking pay for time spent on necessary, post-workday showering, makes it clear that the circumstances or nature of the employee's responsibilities may dictate that even an ancillary, mutually beneficial task is so necessary to the performance of the employee's principal duties that it must be considered a part of those duties for the purpose of overtime pay. The shower time was held compensable not because the employer had required it, but because it was essential to staying healthy in a chemical plant. DPS effectively designated the Lewisburg detachment the grievants' headquarters by mandating that thetesting equipment and supplies be secured at the detachment, and otherwise approving of their use of a state vehicle to transport themselves and the equipment to and from the test sites.

Relief

Since DPS raises no timeliness or other affirmative defenses regarding the period for which the grievants claim overtime compensation, none are addressed. At Level IV of the grievance procedure for state employees, it is the duty of the employer and not the Administrative Law Judge to offer defenses which, if substantiated, are dispositive of one or more of the employee's claims or restrictive of the relief sought. See, Steele v. W.Va. Division of Corrections, Docket No. 92-CORR- 048 (Jan. 29, 1993); Adams v. W.Va. Workers' Compensation Fund, Docket No. 90-WCF-175 (Sept. 5, 1991). The grievants have proven by a preponderance of the evidence that they are required to perform duties which are integral and indispensable to their primary functions during hours beyond their designated work day and have been doing so since October 1993. Those hours are compensable under the Fair Labor Standards Act, and the grievants are owed overtime pay and pre- judgment interest for any and all days since October 1993, on which they worked beyond their regular 9:00 a.m. to 5:00 p.m. schedule.

Accordingly, the grievance is **GRANTED**, and the West Virginia Department of Public Safety is hereby **ORDERED** to compensate the grievants consistent with the holdings herein. Any party

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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

Administrative Law Judge

DATE: July 3, 1997

Footnote: 1

The agency's legal position is gleaned from counsel's opening remarks at the Level IV hearing.

Footnote: 2

29 U.S.C. §201, et. seq.

Footnote: 3

29 U.S.C. §251, et. seq.