CARL D. MOTEN,

Grievant,

v. **DOCKET NO. 96-10-246**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Carl D. Moten, initiated this grievance pursuant to the provisions of W. Va. Code §§ 18-29-1, et seq., alleging that he was denied overtime pay for hours he worked in excess of forty hours per week. Following denials at the lower levels, the grievance was appealed to level four on June 26, 1996. After initially scheduling the matter for hearing, the parties agreed to submit the matter on the record developed below, supplemented by written submissions which were received by December 16, 1996. This grievance was reassigned to the undersigned for administrative reasons on August 21, 1997.

The following findings of fact are made based upon a preponderance of the evidence of record, including the transcript of testimony taken at level two, along with all documentary evidence admitted.

Findings of Fact

1. Grievant is employed by Respondent as a bus operator.
2. During the week of May 8-12, 1996, Grievant worked the following hours:

   May 8--6 hours, 35 minutes

   May 9--10 hours, 15 minutes (including an extra duty assignment)

   May 10--8 hours, 50 minutes May 11--7 hours, 50 minutes

   May 12--4 hours, 35 minutes

For each day worked, Grievant was also entitled to a paid one-half hour lunch, totalling two and one half hours for the week.

3. The hours listed above total 40 hours, 35 minutes worked by Grievant during the week of May 8-12, 1996.

4. On his time sheet for the week of May 8-12, Grievant listed one additional hour of work for completion of his monthly report. He did not specify on the time sheet which day he performed this task.

5. Grievant did not remember when he completed the monthly report, other than some time during the week in question. (See footnote 1)

6. Most of the monthly report is completed on a daily basis, such as mileage and fuel calculations, and other information on the report remains constant every month. The only additional information required from Grievant at the end of the month was his total mileage, total fuel, and beginning and ending odometer readings, all of which were obtained from the daily records. He also had to break his mileage down into loaded and empty miles each day, which he testified did not vary from month to month.

7. Grievant is required to conduct a pre- and post-trip inspection on his bus every day, for which he is allotted one half hour in the morning and one half hour in the afternoon. The hours listed in Finding of Fact # 2, above, include this daily inspection hour. 8. Grievant did not know how long his daily inspections actually took.

9. Grievant spent over seven hours during the week of May 8-12 reviewing tapes of the activities which took place on his bus. He was not ordered to review these tapes by any person in a supervisory capacity, nor was it his assigned responsibility to do so, unless a potential disciplinary incident merited it. Grievant admitted he was not reviewing tapes during that week because of any problems on his bus.

10. Grievant did not include the hours spent reviewing tapes on his time sheet for the week of May 8-12.

11. Grievant was paid by Respondent for one hour and fifteen minutes of overtime during the week of May 8-12. (See footnote 2)

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of

proving each element of his grievance by a preponderance of the evidence. W. Va. Code § 18-29- 6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). The parties agree that, pursuant to the provisions of Code § 21-5C-3, Grievant is entitled to additional compensation for any hours worked in excess of a forty-hour work week. (See footnote 3) In addition, there does not appear to beany contention on Grievant's part that he has not been properly compensated for the extra duty assignment he performed during the week in question. (See footnote 4)

With regard to additional hours he is claiming for the week in issue, Grievant has not met his burden of proof. A preponderance of the evidence means "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 819 (6th ed. 1991). Grievant's evidence regarding the one hour it allegedly took him to complete his monthly report is quite speculative, and it hardly rises to the level of "more probable than not." When asked during the level two hearing when he completed the report during the week of May 8, he stated he did not know. Moreover, Grievant's time sheet merely includes the additional hour at the bottom of the week's listing of daily hours, also failing to designate on which day or during what hour the monthly report was filled out. L II, Gr. Ex. 1. On any day when Grievant engaged in activities other than his normal bus runs, he listed the type of activity and the time during which it was performed. Since he did not do so with the monthly report, this raises serious questions as to how long this activity actually took.

Respondent presented the testimony of David Clagg, Coordinator of Transportation and Custodial Services, who characterized the daily hour allotted to bus drivers for inspection as a "gift," because it provides more than ample time for the drivers' inspection. In fact, Grievant was specifically asked how long his daily inspections normally take, and he did not know. This is quite interesting, in light of the fact that it is an activity he has performed every day for years. Grievant's"Daily Walk-Around Inspection Report" contains a list of various features of the bus, including oil, water, fuel, lights, etc., which are checked off if there are no problems. L II, Adm. Ex. 1. According to Grievant's testimony, and as is obvious from the daily report, unless there is an apparent mechanical problem, Grievant merely draws a line through the

entire list to indicate that there are no repairs or adjustments needed. The only other thing he does daily to complete this report is record his daily mileage at the top of the chart. It is difficult to believe that this could take an hour every day.

Since Grievant was given an hour every day for inspection time, which time he cannot account for, along with his inability to explain when and how he completed his monthly report, he has not proven by a preponderance of the evidence that he is entitled to an additional hour's credit of work time during the week in question.

Grievant also claims he should be compensated for the seven and one half hours he spent reviewing videotapes of the activities which took place on his bus. The evidence shows that Grievant did this entirely on a voluntary basis. He attempted to claim that he reviewed the tapes daily because the mechanic who installed the camera on his bus said he should. There can certainly be no dispute that Grievant does not take orders from a mechanic, and he admitted that no supervisor or principal ordered him to review tapes during the week of May 8-12. Mr. Clagg explained that the cameras were installed on some buses to corroborate evidence when incidents occur which may require discipline. In such cases, it is the bus operator's responsibility to fill out an incident report, and, if told to do so by the principal, review the tape for the applicable day. Otherwise, bus operators have no responsibility or duty to review tapes, and it is not considered work for which they are compensated, unless they are ordered to do so. "Hours worked" for which employees are due compensation can include work which an employer does not request but allows to occur. Such work is included as compensable time if the employer knows or has reason to know the work is being performed, even if away from the employer's premises. Moss v. Barbour County Bd. of Educ., Docket No. 88-01-259 (Jan. 31, 1990). There was no evidence presented in this grievance which shows that Respondent had any knowledge that Grievant was viewing the videotapes on a daily basis, whether or not incidents occurred on his bus. He is not entitled to any compensation for performing this task.

Accordingly, Grievant has only proven that he worked an additional thirty-five minutes during the week in question, for which he is entitled to overtime pay. However, the parties have agreed that Grievant has already been paid for one hour and fifteen minutes of overtime for that week. As noted earlier in this Decision, this was obviously based upon a

miscalculation of Grievant's work hours. Moreover, it seems to include the hour that Grievant alleged he spent on the monthly report, which Respondent has contested at all levels of the grievance procedure. In fact, the level two decision contains conclusions of law both to the effect that Grievant was paid for one hour and fifteen minutes of overtime and also that he was not entitled to an additional hour of work time credit for completing the monthly report. Thus, it seems that Grievant has already received overtime pay to which he did not prove entitlement. However, since Respondent has not argued that Grievant received pay to which he was not entitled and has not asked for reimbursement, Grievant will not be ordered to repay the amount he received erroneously.

In accordance with the foregoing findings and discussion, the following conclusions of law are made in this matter.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. An employee who works more than forty hours during a work week is entitled to receive extra compensation for the extra hours worked at a rate of one and one half times the employee's regular rate of pay. W. Va. Code § 21-5C-3.

3. Grievant proved by a preponderance of the evidence that he worked forty hours and thirty-five minutes during the week of May 8-12, 1996.

4. Grievant did not prove by a preponderance of the evidence that he is entitled to any extra pay or additional work time credit for completing his monthly report during the week of May 8-12, 1996.

5. Grievant was not required to view videotapes, and his employer had no reason to know he was performing this activity, so he is not entitled to any extra compensation therefor. See Moss v. Barbour County Bd. of Educ., Docket No. 88-01-259 (Jan. 31, 1990).

6. Grievant has been paid for the overtime hours he proved he worked during the week in question.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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 § 18-29-7. Neither the West Virginia Education andState 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.

DATE: September 10, 1997 _____ V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Although not explained in the record, it appears that the monthly report was required to be completed during this particular week, even though it was not technically at the end of an actual calendar month.

Footnote: 2

This amount was obviously based upon a miscalculation of the hours Grievant listed on his time sheet for the week. Even if the one hour Grievant claimed for completion of the monthly report is counted, that totals 41 hours, 35 minutes, so he would have qualified for 1 hour, 35 minutes of overtime pay, instead of 1 hour and 15 minutes.

Footnote: 3

It has previously been determined that this Grievance Board has jurisdiction over claims arising under state and federal wage and hour laws, including Code §§ 21-5C-1, et seq. Belcher v. W. Va. Dept. of Trans., Docket No. 94-DOH-341 (Apr. 27, 1995).

Footnote: 4

Code § 18A-4-8a provides for an hourly wage for employees engaged in performing extra duty assignments.