STEPHEN FRAME, et al.,

Grievants,

v. DOCKET NO. 00-HHR-240/330

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

Respondent .

D E C I S I O N

Two grievances were filed by Grievants in the Greenbrier County and Nicholas County offices of the Department of Health and Human Resources' ("HHR") Bureau for Children and Families. Both grievances challenged HHR's travel reimbursement policy. The grievances were consolidated at Level IV. At the Level IV hearing, with no objection from Respondent, all Grievants adopted the statement of grievance submitted by the Greenbrier County Grievants, which reads as follows:

> This is in response to the memorandum dated 6-19-2000 from Danny Franco, office of Financial Services. We, D.H.H.R. employees can not operate our privately owned vehicles for a reduced or no payment reimbursement. "If we are covered by Workers compensation" and are being paid by the D.H.H.R. to do the master's bidding we should be reimbursed for all work related mileage.

As relief Grievants sought to have "Travel reimbursement reinstated as it was explained upon being hired by D.H.H.R. and in past practices.. And to be made whole in every way." At the Level IV hearing, Grievants expressed concern about whether they needed a chauffeur's license because they must transport clients, and who should pay for this; whether they needed business insurance, and the high cost of business insurance; and personal liability for an accident while transporting a client. In their post-hearing written argument, Grievants stated that the make whole remedy would include HHR paying for any chauffeur's license they would be required to have in order to transport clients, as well as business insurance for them, and the state providing them with "a certificate of insurance showing proof of non-owned auto liability showing the state has the primary liability if beingsued by

client for injuries sustained in a car wreck." (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievants are employed by HHR's Bureau for Children and Families in the Greenbrier County and Nicholas County offices as Child Protective Service Workers, Family Support Specialists, Protective Service Workers, Social Service Workers, Health and Human Services Aides, and Social Services Supervisors.

2. Grievants are required to have a vehicle as part of their job. Many of the Grievants must transport clients and visit clients in their homes in rural areas on a regularbasis. Many of those who visit clients are assigned client areas near their own homes.

3. On June 19, 2000, Danny Franco, Director of HHR's Office of Financial Services, sent a memorandum to various HHR employees, including all Office Directors, Community Service Managers, and Program Directors, informing them that a Grievance Board decision, dated May 22, 2000, directed HHR "'to insure that all supervisors and employees understand exactly what the Travel Policy entails, and to confirm the Policy is correctly followed.'" He then explained that HHR's Travel Policy provides that employees may not be paid for any mileage until their travel exceeds the mileage they travel each day in their commute to and from the office. HHR's current Travel Policy has been in effect since July 1, 1996, as amended July 1, 1998.

4. Prior to June 19, 2000, employees in the Greenbrier County and Nicholas County HHR offices had for many, many years been paid for all their mileage when traveling for business purposes, that is, they were not required to deduct the mileage equivalent to their normal daily commute mileage. This was contrary to HHR's Travel Policy.

Discussion

Grievants bear the burden of proving their allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

Policy Memorandum 3400, HHR's Travel Policy, issued July 1, 1996, and revised July 1, 1998, provides, in pertinent part:

> Privately Owned Vehicles/Courtesy Vehicles

> Privately owned and courtesy vehicles (vehicles not owned by the traveler) may be used when traveling on state business. Reimbursement will be made at the prevailing rate per mile established by the Travel Management Office (refer to Addendum 3400), excluding normal daily commuting mileage, for actual miles traveled using the shortest practical route to the traveler's destination. This rate is intended to cover all operating costs of the vehicle (including fuel, maintenance, depreciation, insurance, etc.), and no additional reimbursement will be paid. When a traveler leaves from his/her residence, the traveler is to use the shortest distance from departure (headquarters or home) to destination for calculating mileage reimbursement.

(Emphasis added.)

This Grievance Board recently determined that HHR's Travel Policy

> requires that when an employee travels from his home to another designated place of work he cannot be compensated for this mileage unless the distance is greater than his normal daily commute. If the distance is greater than his normal daily commute, the employee is to compensated for the difference between the two.

Gwinn v. Dep't of Health and Human Resources, Docket No. 00-HHR-064 (May 22, 2000). It was this decision which resulted in Mr. Franco's June 19, 2000 memorandum.

Grievants argued they had always been reimbursed for all their mileage, and HHR should not now require them to deduct their normal daily commute mileage when seeking reimbursement, particularly when they are not in the same situation as Grievant Gwinn. He was traveling to an office other than his home office to work on a regular basis, whereas many of the Grievants are traveling on a regular basis on roads which are not well maintained to clients' homes. Grievants are required as part of their jobs to have a vehicle, and they often must transport clients.

Grievants had many questions and concerns. They wondered whether they needed a chauffeur's license, and if they did, who would pay for it. They wondered whether they should purchase business insurance. They wondered whether the state's liability insurance would cover them if they were transporting clients but not being paid mileage, and they were concerned about the liability cap in the state's insurance, and whether theywould be personally liable if a claim or judgement exceeded the cap.

Many of the Grievants testified that the practice for many years had been that they were reimbursed for all their mileage while on business, and they were not required to deduct the mileage equivalent of their normal daily commute. Many testified that they live a substantial distance from the office, and have been assigned clients near their homes for efficiency. They may visit client homes

all day and not qualify for mileage reimbursement if they deduct the normal daily commute mileage. Because of this, and because of liability concerns, many Grievants now drive to the office before they will transport a client or go on home visits, and they return to the office at the end of the day rather than going home from their last stop, to ensure their business mileage will be reimbursed. They opined that this was costing HHR in terms of overtime when they were transporting clients to appointments early or late in the day, which would not have been incurred had they picked up the client before going to the office, or gone directly home in the evening after transporting a client; and it was decreasing efficiency because they were going to the office, rather than starting the day at their homes.

HHR is attempting to find answers to Grievant's questions and concerns, but, as of the date of the Level IV hearing, the agencies with whom HHR employees had consulted regarding these matters outside the expertise of HHR had not provided any answers. Grievant Caruthers testified that she had spoken to someone at the Division of Motor Vehicles who told her she needed a chauffeur's license if she was transporting clients. This may well be true, but no Grievant has obtained a chauffeur's license at this point, asked HHR to pay for it, and been denied reimbursement. Thus, Grievants have not suffered any harm with regard to this area of concern, and this is not a grievable issue at this point in time.

The same is true with regard to Grievants' concern that they should be purchasing business insurance. Testimony was offered by two Grievants that they had been told byinsurance agencies that they should carry business insurance, and Grievant Caruthers testified she talked to someone at the state insurance commissioner's office and was told the same. Only two Grievants testified that they had carried business insurance at one time, or had tried to purchase business insurance. Neither carries it at this time because it was so expensive. No Grievant testified that he or she had asked HHR to pay for business insurance, or reimburse him or her for the cost of business insurance, and been denied. Further, while Grievants raised these two costs as justification for not requiring them to deduct their normal daily commute from their travel mileage, they were not incurring these costs when they were being paid for all their mileage, and they still are not incurring these costs.

As to Grievants' concerns about the state's liability cap, and whether they should have a certificate of insurance, and whether they are covered by the state's insurance when they are transporting a client but not being paid mileage, the only evidence introduced was a copy of a state

insurance policy provided to Grievant Caruthers, and her testimony about what she was told about which insurance would pay first, the state's liability cap, and her personal responsibility for claim over that. No one testified that Grievants are not covered by the state's insurance when their business travel mileage does not exceed their normal daily commute mileage and they do not qualify to receive any travel money; Grievants merely speculated that they would not be. The undersigned is not going to interpret the insurance policy placed into evidence, based upon the hearsay testimony of Grievant Caruthers. There is no evidence that this policy is even the only applicable state insurance policy. Further, no relief is available to Grievants through the grievance procedure with regard to this issue. The undersigned certainly cannot order the state to increase its liability cap, or to change its coverage. As to Grievants' request that they be provided with a certificate of insurance, Grievants again have not demonstrated that they have requested such a certificate, and it has been denied to them, or that HHRcould issue such a certificate to them.

Grievants' questions and concerns are certainly valid, and they are in a much different situation than Grievant Gwinn; however, HHR's Travel Policy does not make a distinction between an employee who travels on back roads to visit client homes on a regular basis, transports clients, and is required to have a vehicle, and an employee such as Grievant Gwinn. The Travel Policy states that it applies to all HHR employees. The Policy must be applied to Grievants in the same manner as it was applied to Grievant Gwinn. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977)." Finver v. W. Va. Bd. of Trustees, Docket No. 97-BOT-271 (Oct. 15, 1997). An agency's "interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable." Dyer, et al., v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996) (citations omitted). Grievants enjoyed the benefit of their local offices not properly applying HHR's Travel Policy for many years. This does not entitle them to continue to receive this benefit when it violates HHR's Policy.

HHR's Travel Policy is nearly identical to the State Travel regulations developed by the Department of Administration. The testimony presented was that these regulations apply to HHR employees. Although the rule requiring the deduction of the normal daily commute may seem harsh, Catherine DeMarco, the State Travel Manager, explained that the reason behind the rule is quite

logical. According to Ms. DeMarco, the State Travel regulations follow the Internal Revenue Service rules. That is, the Internal Revenue Service does not require an employee to report mileage reimbursement as taxable income to the extent the normal daily commute mileage is deducted from the total miles traveled. According to Ms. DeMarco, if the normal daily commute mileage is not deducted, that portion of the mileage reimbursement which represents the normal daily commute mileagemust be reported by the employee as taxable income. She believed this would also impose reporting and tax requirements on the state itself. She testified the state did not want to get into this, so the State Travel regulations simply followed the Internal Revenue Service rules.

While the undersigned sympathizes with Grievants' plight, it is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997); Olson v. Bd. of Trustees, Docket No. 99-BOT-513 (Apr. 5, 2000); Gary and Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999).

> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to- day supervision of its workforce. See Skaff, supra.

Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants bear the burden of proving their allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2.

> [HHR's] Travel Policy requires that when an employee travels from his home to another designated place of work he cannot be compensated for this mileage unless the distance is greater than his normal daily commute. If the distance is greater than his normal daily commute, the employee is to compensated for the difference between the two.

Gwinn v. Dep't of Health and Human Resources, Docket No. 00-HHR-064 (May 22, 2000). HHR's Travel Policy applies to all employees. When submitting mileage forreimbursement, Grievants must deduct the mileage equivalent to their normal daily commute to and from the office from their total business miles traveled.

3. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977)." Finver v. W. Va. Bd. of Trustees, Docket No. 97-BOT-271 (Oct. 15, 1997). An agency's "interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable." Dyer, et al., v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996) (citations omitted).

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5.

> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. See Skaff, supra.

Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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.

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BRENDA L. GOULD

Administrative Law Judge

Date: April 20, 2001

Footnote: 1

The Nicholas County grievance was filed on June 12, 2000. The Nicholas County Grievants are Stephen Frame, Kathryn Hambrick, Lola Phillips, Christina Sorrent, Tammy Spearen, Monica Lay, Wanda Sparks, Beulah Branhan, and Cheryl Pittsenbarger. Their grievance was denied at Level I on June 21, 2000. The record does not reflect what occurred at Level II. Grievants appealed to Level III, where a hearing on the Nicholas County grievance was begun on July 20, 2000. Grievants attempted during the hearing to contact Catherine DeMarco in order to call her as a witness, but were unable to do so. The grievance evaluator gave the Grievants the option of waiting until a new evaluator was appointed at Level III, as she was resigning, in order to take Ms. DeMarco's testimony, or proceeding to Level IV. The Nicholas County Grievants appealed to Level IV on July 24, 2000. On October 17, 2000, they requested that their grievance be joined with the Greenbrier County grievance.

The Greenbrier County grievance was filed on June 30, 2000. The Greenbrier County Grievants are Vicky Caruthers, Dorothy Wright, Carol Groves, Debra Corbin, Margaret Sheppard, Genevieve Bennett, Dixie Smith, Jonathan Gwinn, Monica Bowyer, Ollie Curry, Cathy Hendricks, Marcie Waselchalk, Gisela Wykle, Karen Circle, Gail Stone, Madonna Morgan, Melinda Wilson, Leslie Bonds, Judith Jensen, Sarah Ann Massie, Sarah Morgan, Tonya Bragg, Rebecca Taylor, Janet Turner, Allen Hunter, David Nichols, Mary Treece, Kelli Holbrook-Nichols, Sondra Persinger, Connie Pyne, Mary Christian, and Debbie Totten. Grievants' supervisor responded on June 30, 2000, that the grievance was not timely, and that he lacked authority to grant the relief requested. The parties agreed to waive Level II. The parties met for a Level III hearing on August 29, 2000, at which time an off the record discussion was held, and HHR was given additional time to respond to Grievants. After receiving no response, the Greenbrier County Grievants appealed to Level IV on October 20, 2000.

A Level IV hearing was held on the consolidated grievance on January 12, 2001. Grievants were represented by Steve Rutledge and Vicky Caruthers, and HHR was represented by Anthony D. Eates, II, Esquire. The parties asked to submit written argument, and this matter became mature for decision on February 26, 2001, upon receipt of the last of the parties' written arguments.