ANGELA J. WINGFIELD,

Grievant,

v. **Docket No. 02-HHR-031**

DEPARTMENT OF HEALTH & HUMAN RESOURCES and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Angela J. Wingfield, employed by the Department of Health and Human Resources (DHHR or Respondent) as a Protective Service Worker, filed a level one grievance on January 2, 2002, in which she asserted that because she is not free to come and go as she pleases, she should be compensated for on-call time. For relief, Grievant requested that she be compensated at her regular rate of pay for time spent on-call. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. After the grievance was denied at levels two and three, appeal was made to level four on February 5, 2002. A level four hearing was conducted in the Grievance Board's Elkins office on April 19, 2002, at which time Grievant was represented by Thomas M. Regan, Esq., DHHR was represented by Assistant Attorney General B. Allen Campbell, and the Division of Personnel (DOP) was represented by Steve Forsythe, Senior Personnel Specialist for Employee Relations. The grievance became mature for decision on June 10, 2002, the due date for filing proposed findings of fact and conclusions of law. (See footnote 1)

The essential facts of this matter are undisputed and may be set forth as follows.

Findings of Fact

1. Grievant has been employed by DHHR as a Protective Service Worker assigned to the Elkins office at all times pertinent to this grievance.

2. Protective Service Workers are required to be “on-call” evenings and weekends to respond to emergencies. These employees rotate the on-call duty on a weekly basis. The frequency of on-call duty is determined by the number of Protective Service Workers employed in the office at any given time, and has varied for Grievant from every three weeks to the current every seven weeks.

3. When on-call, Grievant must be able to respond to an emergency anywhere in Randolph or

Tucker counties within a two-hour time period. She is provided a pager, and is not required to remain at home.

4. It is approximately a two-hour drive from Grievant's residence to the furthest point in her assigned area.

5. Protective Service Workers are compensated for actual hours worked while on-call, but do not receive compensation for on-call time they do not work.

Discussion

It is incumbent upon the Grievant, in a non-disciplinary matter, to prove the allegations in her complaint by a preponderance of the evidence. Thus, Grievant must prove by a preponderance of the evidence that time she is on-call is compensable. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

Grievant relies upon DHHR Policy Memorandum 2102 “Hours of Worker/Overtime” which defines “on-call” as,an employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while on-call. An employee who is not required to remain on the employer's premises, but is merely required to leave word at his home or with Department officials where he may be reached is not working while on-call.

Additionally, Section IX, Paragraph S, provides that employees who are required to be on duty for less than 24 hours may be considered working even though some of their time is spent sleeping or in certain other activities. Specifically,

social workers who are required to be on-call (engaged to wait) in their home for a specified number of hours, without the freedom to come and go as they please, are working even though they are permitted to sleep when not busy answering calls. The time on-call is for the benefit of the Agency. Because employees are required to be on duty, the time is considered worktime and compensation must be granted. On the other hand, for social workers who are required to be on- call for a specified number of hours, but are allowed to come and go as they please, all hours spent on-call do not have to be counted as worktime. If employees are allowed to come and go as they please, as long as they leave a number where they can be reached, or wear beepers and are accessible to a telephone, only the time spent on the phone or on an emergency call is counted as hours worked.

Grievant argues that she lacks the “freedom to come and go” as she pleases. For example, she cannot travel to Clarksburg to shop, or go swimming at her favorite river location, because she could not be on site for an emergency call throughout her assigned area within the two-hour limit. DHHR and DOP assert that Grievant is not required to remain at home, and may go anywhere she likes so long as she is available for emergencies. Because the use of her time is her own, they argue that Grievant is not entitled to compensation for hours she does not actually work while on-call. The subject of on-call compensation has been the subject of a great deal of litigation under the Fair Labor Standards Act (FLSA), which provides in pertinent part:

(a) An employee will be considered on duty and time spent on standby duty shall be considered hours of work if:

(1) The employee is restricted to an agency's premises, or so close thereto that the employee cannot use the time effectively for his or her own purposes; or

(2) The employee, although not restricted to the agency's premises;

(i) Is restricted to his or her living quarters or designated post of duty;

(ii) Has his or her activities substantially limited; and

(iii) Is required to remain in a state of readiness to perform work.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

29 C.F.R. §551.431

In general, the courts have determined that if an employee is free to engage in personal activities while on-call, and not required to stay on the employer's premises, the on-call time is not compensable. Berry v. County of Sonoma, 30 F.3d 1174 (9th Cir. 1994). This does not mean that the

employee must be free of restrictions. Rulings have held that employees who were unable to leave town, or consume alcohol, and were required to remain near a telephone or carry a beeper while on-call, were not entitled to compensation. Birdwell v. City of Gadsden. Ala., 970 F.2d 802 (11th Cir. 1992); Armitage v. City of Emporia, KA, 982 F.2d 430 (10th Cir. 1992); Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671 (5th Cir. 1991). Employees who were required to report to the employer's place of business within twenty to thirty minutes, were also determined not to be entitled to compensation for on-call time. Gilligan v. City of Emporia, KA, 976 F.2d 410 (10th Cir. 1993).

Maintenance mechanics and instrument electricians were not entitled to overtime compensation for on-call time during which the employees were free to do anything and go anywhere they wanted as long as they remained within pager range, because the on-call time was spent "waiting to be engaged" rather than "engaged to wait." LaPorte v. General Elec., 838 F. Supp. 549 (M.D. Ala. 1993).

In McCarty v. Harless, 181 W. Va. 719, 384 S.E.2d 164 (W. Va. 1989), the West Virginia Supreme Court of Appeals found that county deputy sheriffs who were required to stay on site or at a particular location during their meal period were to be compensated for that time, but deputies who were on-call, but not required to remain on the employer's premises during their meal period, were not entitled to compensation. Id. at 172.

Grievant's perception that her activities are unduly restricted while on-call is likely due in part to the large, rural region to which she is assigned. However, while she may not be able to engage in every activity she might wish, Grievant is free to go anywhere and engage in personal activities while on-call, so long as she wears her pager and can respond to a call within two hours. Grievant is “waiting to be engaged” rather than “engaged to wait” and her time is her own, unless and until she is called to work. In this factual situation, Grievant is not entitled to compensation for time she is on-call. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. It is incumbent upon the Grievant, in a non-disciplinary matter, to prove the allegations in her complaint by a preponderance of the evidence. Thus, Grievant must prove by a preponderance of the evidence that time she is on-call is compensable. Procedural Rule of the W. Va. Educ. & State

Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

2. In general, the factor determining when on-call time is compensable is whether the employee can effectively use the time for personal purposes. The fact that the employee is subject to certain restrictions while on-call does not entitle her to compensation under the FLSA or Respondent's policy. See McCarty v. Harless, 181 W. Va. 719, 384 S.E.2d 164 (W. Va. 1989).

3. Grievant has failed to prove that she is entitled to compensation while on-call.

Accordingly, the grievance is **DENIED**.

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. 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, andshould 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: June 27, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant elected not to file any post-hearing submissions.