BRENDA DILLON,

Grievant,

v. **Docket No. 05-29-413**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Brenda Dillon, filed this grievance against the Mingo County Board of Education ("MCBOE" or "Board") on November 18, 2004. Her Statement of Grievance reads:

> Grievant is a regularly employed aide. She contends that Respondent has erred as a matter of law and fact in failing to compensate [sic] to properly compensate her for all time worked. Grievant alleges a violation of West Virginia Code §§ 18A-4-8(m), 21-5C-3 and Guide to Fair Labor Standards Act for West Virginia Schools. (See footnote 1)
>
> Relief sought: Grievants [sic] seeks compensation for hours worked at a rate where appropriate of time and one-half her normal rate of pay. She also seeks interest on all sums.

This grievance was denied at Levels I and II, and Level III was by-passed. Before appealing to Level IV, the parties attempted to settle this grievance. Grievant appealed to Level IV on November 8, 2005, and a Level IV hearing was held on January 12, 2006, at the Grievance Board's office in Charleston. This case became mature for decision onFebruary 7, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant asserts she should receive compensation for all time she is on the bus, whether her students were present or not. (See footnote 3) Respondent maintains Grievant is allowed to ride the bus as a courtesy, but riding on the bus before her first student arrives is not time spent in the performance of her duties and should not result in compensation.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as an aide for many years. She is expected to be on the bus by the time her first students arrive, attend school with the students, work with the students during the school day, and return with the students to their final destination.

2. For the past four years, Grievant has ridden with bus operator Judy Defoe. Because Ms. Defoe parks her bus at her house and lives only a few miles from Grievant, Ms. Defoe picks up Grievant at her front door on her way to the first bus stop. Although the times have varied, Grievant rides on the bus for about forty-five minutes before her firststudent gets on the bus, and she begins her aide duties. (See footnote 4) On the return trip, Grievant drops off her last student and then rides the bus for about an hour before Ms. Defoe drops Grievant off at her front door. Grievant has never been directed by her supervisor to get on the bus at her house, nor has she ever been told that her travel time before she picks up her first student is considered compensable time.

3. At times, Grievant helped the other bus aide with the wheel chair lift before she had any of her students on the bus. (See footnote 5)

4. Aides are told they must be on the bus by the time their first student gets on

the bus. Aides do not have to be on the bus if their students are not on the bus. Each bus operator is to work out with their aides where it is convenient for the bus operator to pick up the aide.

5. Aides are allowed to ride the bus without their students present as a courtesy.

6. At the start of the 2004 - 2005 school year, Grievant reported all the time she rode on the bus as work time, and she received quite a bit of overtime as a result. (See footnote 6)

7. On September 23, 2004, all special education aides received a memo from the Transportation Director Bill Kirk and Bus Supervisor Joe Howard stating overtime could only be counted for time actually spent with the students. The memo further clarified thisstatement by saying, "[t]herefore, overtime would start when the child gets on the bus and stop when the child gets off the bus." Resp. No. 1 at Level IV. Mr. Howard sent a second memo on October 28, 2004, stating the directions in the prior memo had been confirmed after discussion with Assistant Superintendent Randy Keathley and Karen Browning, the Director of Special Education. (See footnote 7) Resp. No. 2 at Level IV.

8. On October 4, 2004, Grievant changed how she reported her time, but signed her overtime sheets stating she was "[d]oing this under duress!"

9. If Grievant did not ride the bus from her home, but decided to meet the bus, she would have to arrange another convenient meeting place where she could park a car and meet the bus operator.

10. Bus operator Defoe agreed to pick up Grievant at her house to save her from paying for gas and because she did not have a car. (See footnote 8) Test. Defoe, Level IV Hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the

W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person wouldaccept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. Id.

Grievant asserts MCBOE has violated W. Va. Code § 18A-4-8(m) which states:

> No service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

Grievant asserts the failure to pay her for travel time is a violation of this Code Section as her overtime pay was decreased.

Grievant also asserts a violation of the Federal Labor Standards Act ("FLSA"). She contends Respondent established or allowed her to establish her home as the site where her daily duties began and permitted this arrangement to continue for a number of years. Grievant maintains because Respondent allowed or permitted this arrangement, Respondent is now prohibited from changing her home as her work site and decreasing her overtime compensation.

A review of the applicable FLSA sections, and case law makes it clear Grievant should not be paid for her travel time in this case. 29 U.S.C. § 254(a) states the following activities are not compensable:

(1) walking, riding, or traveling to and from the actual place of performance

> of the principal activity or activities which such employee is employed to perform,
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> and
>
> (2) 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. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities . . . .

In Steiner v. Mitchell, 350 U.S. 247 (1956), the Supreme Court held "activities performed either before or after the regular work shift are compensable . . . if those activities are an integral and indispensable part of the principal activities for which workmen are employed . . . ." These activities are ones that are "made necessary by the nature of the work performed." Id. In Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994), the court noted home to work travel is not compensable, travel to work is "a normal incident of employment," and riding on an employer's bus is a preliminary or postliminary activity. (Citations omitted.) Further, principal activities included activities "performed as part of the regular work of the employee in the ordinary course of business[,] . . . [the] work is necessary to the business and is performed by the employees primarily for the benefit of the employer. . . ." Id.(citing Dunlop v. City Electric, Inc., 517 F.2d 394 (5th Cir. 1976)).

In Smith v. Aztec Well Servicing Co., 321 F.Supp. 1234 (D.N.M. 2004), the question before the court was whether employees who were required to travel with their foreman to their work site and who, while in the vehicle, occasionally discussed safety issues and engaged in de minimus work activities, such as putting on tire chains, digging the vehicle out of the mud, and opening gates, should be paid for their travel time. The court noted that compensation required "some indication that the Plaintiffs were performing compensable work activities that were an integral and indispensable part of the

principalactivities for which they were employed while traveling in order for the Defendant to be liable to compensate them for that time." Id. at 1237 (citing Steiner, supra). The court concluded, the time the employees "spent traveling to and from their work location was an ordinary incident of their employment for which the Defendant employer was not obligated to compensate Plaintiffs," even though the employees were required to travel with the foreman. The court also noted the "activities performed while traveling were preliminary or postliminary to the principal activities" and occurred either before or after the work day. Smith at 1239.

In this case, it is clear the activities performed while traveling were preliminary or postliminary to Grievant's work activities, and she was not engaged in integral and indispensable principal activities for which she was employed.

29 U.S.C. § 254(b) discusses compensability by contract or custom and states the travel activity may be compensable by either:

> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer;
>
> or
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> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

Grievant asserts because she was paid for her travel time in the past, a custom or practice has been established, and it must be continued. This assertion is incorrect. The majority of aides did not claim compensation for travel time on the bus. Thus, Grievant did not establish it was a custom or practice. Further, while Respondent

mistakenlyreimbursed Grievant and a couple of other employees for travel when it should not have, those mistakes did not create an entitlement to future incorrect reimbursement. See Stover v. Div. of Corr., Docket No. 04-CORR-259 (Sept. 24, 2004); Ritchie v Dep't of Health and Human Res., Docket No. 96-HHR-181 (May 30, 1997); Pugh v. Hancock County Bd. of Educ., 95-15-128 (June 5, 1995). Additionally, this Grievance Board has previously held that a county board of education is not bound by an employee's mistake. Samples v. Raleigh County Bd. of Educ., Docket No. 98-41-391 (Jan. 13, 1999); Carr v. Monroe County Bd. of Educ., Docket No. 98-31-342 (Dec. 15, 1998); Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989), aff'd, Kanawha County Cir. Ct., No. 89- AA-172 (Oct. 4, 1991).

Grievant has not met her burden of proof of this issue, and she has not established a violation of W. Va. Code § 18A-4-8(m). Through error, Grievant was allowed to claim compensation for a bus ride that was free from work and free from cost. None of Grievant's assertions are supported by the FSLA or case law. Further, Grievant has a choice. She may ride the bus for free, or she can provide her own transportation to another meeting place that she works out with the bus operator. (See footnote 9) This is what other aides do, and this is the expectation for Grievant. It is unclear to the undersigned Administrative Law Judge why Grievant thought this free bus ride was compensable since she was not working, and no one ever told her she could count this ride as work time.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly

v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. Id.

2. Home to work travel is not compensable, as travel to work is "a normal incident of employment," and riding on an employer's bus is a preliminary or postliminary activity. Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994).

3. "[A]ctivities performed either before or after the regular work shift are compensable . . . if those activities are an integral and indispensable part of the principal activities for which workmen are employed[,] . . . " and if they are ones are "made necessary by the nature of the work performed." Steiner v. Mitchell, 350 U.S. 247 (1956).

4. Principal activities includes tasks "performed as part of the regular work of the employee in ordinary course of business . . . [the] work is necessary to the business and is performed by the employees primarily for the benefit of the employer. . . ." Vega, supra (citing Dunlop v. City Electric, Inc., 517 F.2d 394 (5th Cir. 1976)). 5. Mistakes in compensation do not create an entitlement to future incorrect reimbursement. See Stover v. Div. of Corr., Docket No. 04-CORR-259 (Sept. 24, 2004); Ritchie v. Dep't of Health and Human Res., Docket No. 96-HHR-181 (May 30, 1997); Pugh v. Hancock County Bd. of Educ., 95-15-128 (June 5, 1995).

6. A county board of education is not bound by an employee's mistake. Samples v. Raleigh County Bd. of Educ., Docket No. 98-41-391 (Jan. 13, 1999); Carr v. Monroe County Bd. of Educ., Docket No. 98-31-342 (Dec. 15, 1998); Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chilton v. Kanawha County Bd. of

Educ., Docket No. 89-20-114 (Aug. 7, 1989), aff'd, Kanawha County Cir. Ct., No. 89-AA-172 (Oct. 4, 1991).

7. Grievant has not met her burden of proof of this issue and established a violation of W. Va. Code § 18A-4-8(m) or the FSLA.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Mingo County. Any 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 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: April 28, 2006

Footnote: 1

This Guide is prepared by the West Virginia Department of Education to assist boards of education in understanding and applying the Fair Labor Standards Act. The document clearly states it does not constitute legal advice. Respondent objected to its use as official state policy or interpretation. It is noted this document states at page 37, that travel from home to the work site and back is noncompensable even if it provided by the employer. Grt. No. 2 at Level IV.

Footnote: 2

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and MBCOE was represented by Howard Seufer, Esq. of Bowles Rice McDavid Graff and Love.

Footnote: 3

Although Grievant argued MCBOE is, or should be, required to provide Grievant with board of education owned property to park her car if she meets the bus, Grievant did not provide any policy or practice to support this argument, and

it will not be addressed further.

Footnote: 4

The information about the bus schedule was in complete conflict, but the parties agreed Grievant was paid for the time she was on the bus with her students. The undersigned Administrative Law Judge suggests MCBOE clarify the exact schedule and times to prevent further confusion.

Footnote: 5

Because of Grievant's confusing testimony, it is unclear when Grievant would have assisted the other aide when she had not already started her own bus aide duties.

Footnote: 6

It appears Grievant had also reported this as time worked in prior years as well, but this discrepancy was not identified before the 2004 - 2005 school year.

Footnote: 7

On August 23, 2005, Mr. Howard sent another memo to Grievant reminding her transportation was provided to her as a courtesy, but her actual work time did not begin until the first child boarded the bus and ended when her last child exited the bus. Resp. No. 3 at Level IV.

Footnote: 8

It was unclear if Grievant now has a car available to her.

Footnote: 9

Given the current price of gas, it is odd Grievant would complain about someone giving her a free, door to door, ride to work.