THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

RAYMOND JARRELL, et al.

Grievant,

v. **Docket No. 06-41-101**

RALEIGH COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) initiated their grievances at various times. The grievances were consolidated by the Level II Grievance Evaluator. The consolidated grievance was denied at all lower levels. Respondent waived Level III, and this consolidated grievance was filed at Level IV on March 2, 2006. The statement of grievance reads:

Grievants are employed by Respondent as bus operators. They contend that they have been directed not to report as work time the time spent driving between their designated parking location and the location at which they either pick up their first student or drop of [sic] their last student. They allege violation of the FLSA (Fair Labor Standards Act), state department of education regulations related to the FLSA, West Virginia Code §18A-4-8, 18-29-2, and other statues cited in the attachment to the level one grievance forms. (See footnote 2)

For relief Grievants seek 1) compensation for lost wages with interest and (2) expungement of references in the Level II decision noting Grievants were guilty of willfulneglect of duty and insubordination. (See footnote 3) A Level IV hearing was held at the Grievance Board's office in

Beckley on June 9, 2006. Grievants were represented by John Roush, Esq., and Respondent was represented by Greg Bailey, Esq., of Bowles Rice McDavid Graff and Love, LLP. This case became mature on July 11, 2006, upon the parties' submissions of proposed findings of fact and conclusions of law.

Issues and Arguments

Grievants assert they are the victims of discrimination and favoritism because they were told they could not count the time spent driving from their designated parking spot to the location where the first student boards the bus as work time. However, special education bus drivers were exempted from this direction. Grievants also allege this practice violates the Fair Labor Standards Act ("FLSA").

Respondent argues that, because Grievants have not offered proof they were denied any compensation due, this is not a grievable event. Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants are employed by Raleigh County Board of Education as bus operators. Each Grievant drives a bus with regular education students as passengers. Grievants park their buses at their homes with Respondent's permission. Allowing Grievants to park their buses at their homes is financially advantageous to Respondent.

2. On November 7, 2005, Jerry Redden, Director of Transportation, issued a memo to bus operators concerning time sheets. The memo read: In an effort to simplify time sheets, beginning **NOVEMBER 13, 2005**, please make the following reflected on your time sheet:

The time you **pick up** your first student **plus** your 15-minute pre-trip is your beginning time.

Your ending time is when you have **dropped off** your students at the school **plus** your 15-minute post trip. **THIS IS YOUR MORNING RUN.**

Example: Pick up Becky Sue at 6:05. Your time should reflect 5:50.

In the event it is necessary to bring the bus in for inspection, repairs, etc., you MUST notate [sic] why your time has varied. Please make notations at the bottom or side of the regular time sheet.

Proceed to the appropriate location to pick up your students to begin the trip home from school. For all regular education buses your time will begin at 2:00 p.m. to ensure you are in line at the appropriate location. You will calculate your time as the time you arrive at school **plus** the 15-minute

pre-trip.

Example: Arrive at school at 2:00. Your time should reflect 1:45. Your time stops when you drop off the last student plus your 15-minute post trip.

THIS IS YOUR EVENING RUN.

Example: Drop off Becky Sue at 3:50 your time should reflect 4:05.

Level II, Joint Exhibit 1.

3. The memo also went on to explain that bus operators are paid a regular salary at 40 hours a week, regardless of how many hours are actually worked. It also clarified that overtime only occurs when the workweek extends beyond 40 hours. Special education bus operators were exempted from this direction. Level II, Joint Exhibit 1.

4. Grievants admittedly disregarded the instructions contained in the November 7, 2005, memo and continued to complete their time sheets as if the memo did not exist.

5. At all times Grievants have been paid in accordance with the time reported on their time sheets. Grievants did not earn overtime or work over 40 hours a week according to their time sheets.

6. The West Virginia School Bus Operator Instructional Program specifies bus operators are to do a pre-trip inspection. As is contemplated by the plain meaning of the word pre-trip, the inspection is to be done prior to moving the bus from its parking spot.

Discussion

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

Grievants assert Respondent has discriminated against them by refusing to allow them to count as work time the time they are en route to pick up their first child. "*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). "[T]o prevail in a claim for

discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242 , 605 S.E.2d 814 (2004).

Grievants also claim Respondent has engaged in favoritism. Favoritism is defined by *W. Va. Code* § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000). By memo dated November 7, 2005, Respondent instructed bus operators who drove regular education students to begin counting their work time from the moment they picked up the first child. Special education bus drivers were exempt. This is clearly a difference in treatment between employees who do the same job. Obviously this difference was never agreed to in writing by the regular education bus drivers.

Grievants assert this difference is in violation of the Fair Labor Standards Act (FLSA). A review of the applicable FLSA sections, and case law makes it clear Grievants should be paid for their 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
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> (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)).

Grievants assert they are required by the West Virginia School Bus Operator Instruction program to complete a pre-trip inspection prior to moving the bus from its designated parking spot. Therefore, they begin performing work duties when they begin the pre-trip inspection and should be compensated from that moment. Respondent asserts that a pre-trip inspection can be performed prior to transporting passengers. Respondent also provided testimony at the Level IV hearing that Mr. Redden was informed by a representative from the West Virginia Department of Education that the pre-trip inspection could be delayed until a point in time prior to picking up the first students. The West Virginia School Bus Operator Instructional Program clearly states, "You must inspect your bus." It goes on to specify three types of inspections that must be performed: (1) pre-trip inspection; (2) during trip inspection; and (3) post-trip inspection. With respect to the pre- trip inspection, the program clearly states, "You do a pre-trip inspection before each trip to find problems that could cause an accident or breakdown." Level IV Grievants' Exhibit 1. Clearly, this inspection was intended to be completed prior to moving the bus from its parking spot.

Grievants have a duty to conduct a pre-trip inspection, and clearly the intent is that the inspection will be completed before the bus is moved from its parking spot. The inspection is an integral to Grievants' primary function, which is driving the bus. Therefore, under the FLSA, Grievants should be able to claim their time from the beginning of the pre- trip inspection. However, while the undersigned finds Respondent's memo is in violation of the law, no damages can be awarded. Grievants took it upon themselves to completely disregard the memo from their supervisor. This behavior will not be endorsed by the Grievance Board. “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” *Reynolds v. Kanawha-Charleston Health Dept*., Docket No. 90-H-128 (Aug. 8, 1990). It should be noted, however, Respondent took no disciplinary action in this case. Also, this memo did not affect

Grievants' pay because they did not exceed 40 hours even counting the additional time prohibited by the memo. While no disciplinary action was taken, Respondent did argue that because Grievants suffered no damage within the meaning of the definition of "grievance," as set forth in *W. Va. Code* § 18-29-2, the events that occurred are not grievable. Respondent also rightfully asserts the Grievance Board does not issue advisory opinions.

However, this is not an advisory opinion. Respondent misinterpreted the FSLA. *W. Va. Code* § 18-29-2(a) states that a grievance means any claim that the employer has misinterpreted compensation, hours or conditions of employment. Clearly, in this case Respondent's misinterpretation affects both Grievants' compensation and work hours. Also, Respondent's instructions from the memo are still in place and were not invalidated by Grievants refusal to follow them. Therefore, this is a grievable event. An opinion on the merits of the case is not advisory, but operates to correct the misinterpretation upon which the grievance is based.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enoughevidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

2. "*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

3. "[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242 , 605 S.E.2d 814 (2004).

4. Favoritism is defined by *W. Va. Code* § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000).

5. 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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> (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 . . . .

6. 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.

7. 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)).

8. Grievants have met their burden and proved they were the victims of discrimination and favoritism. Grievants have also proven Respondent violated the FSLA.

Accordingly, this grievance is **GRANTED**. However, no damages are awarded, as Grievants suffered no damage.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County. Any such appeal must be filed within thirty days of receipt of this decision. *W. Va. Code* § 18-29-7. Neither the West Virginia Education and StateEmployees 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.

DATE: August 31, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Raymond Jarrell, Jr., Billy Waddel, Paul Landy, Greg Daniel, and James Dickens are Grievants in this matter. Michael Holshouser participated at the lower levels, but then withdrew from the proceedings by letter dated March 29, 2006.

Footnote: 2

While not specifically alleged in the statement of grievance, Grievants also indicated they believed they were victims of discrimination and favoritism. Because this was indicated and argued, these issues will be addressed below.

Footnote: 3

The request for expungement from the Level II decision relating to insubordination is a modification of the relief sought by Grievants. Because this modification was not agreed to by the parties pursuant to W. Va. Code § 18-29-3(k), this portion of the relief sought will not be addressed.