THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BRADFORD ROBINSON, et al.,

Grievants,

v. **Docket No. 06-01-085**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants--Bradford Robinson, Matt Price, Jerry Robinson, and Lisa Knight (See footnote 1) --are employed by Respondent Barbour County Board of Education ("Board") as substitute bus operators. They seek compensation for times they were in a "waiting" status and required to be available to receive call-outs for substitute work. After denials at all lower levels, Grievants appealed to level four on March 8, 2006. A hearing was conducted in Elkins, West Virginia, on July 10, 2006, at which Grievants were represented by counsel, John Roush of the School Service Personnel Association, and Respondent was represented by counsel, Ashley Hardesty. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 11, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievants are employed by the Board as substitute bus operators.

2. Respondent contacts substitute employees when the need arises to fill temporary vacancies pursuant to its Policy G-59, Employment of Substitute Service Personnel.

3. Policy G-59 provides that calls for substitute employment will be made between the hours of 9:00 p.m. and 10:30 p.m. on the day prior to the vacancy and between 5:00 a.m. and 8:30 a.m., if the call is made on the day the vacancy occurs.

4. Calls are made on a seniority basis. If the phone is not answered or a message machine or service picks up, this is counted as a refusal, and the next substitute on the list is called. The Policy provides that refusals of work on six occasions in any one school year will be cause for termination. After four refusals, a warning is issued.

5. At the beginning of the 2005-2006 school year, all substitutes were given a copy of Policy G-59, along with a memo from Sharon Cross, the secretary who would be making the calls. Ms. Cross explained the call-out procedure, stating that one telephone number would be used, calls would be made after 9:10 p.m. and 5:00 a.m., and the phone would be allowed to ring six times before the next person is called.

6. Substitute bus operators have been allowed in the past to use a cell phone as their primary contact number for call-outs.

7. A training session for bus operators was conducted just prior to the beginning of the school year, on August 23 and 24, 2005. During that time, Board policies were discussed, including the Fair Labor Standards Act ("FLSA") and overtime issues. At thattime, substitute drivers asked if they would be compensated for the hours during which they may be waiting to be called out, and they were informed that they would not.

8. Grievants filed this grievance on November 10, 2005.

9. Respondent asserted a timeliness defense at level two.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims 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.

As a preliminary issue, Respondent contends that this grievance is untimely. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense

by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

As to when a grievance must be filed, W. Va. Code § 18-29-4(a) provides, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of thedate on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
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> * * * * * *
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> Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4, stating "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Grievants have provided no explanation for the delay in filing this grievance. Accordingly, the filing of the grievance nearly two months after they were unequivocally informed that they would not be paid for call-out times is untimely.

Nevertheless, the undersigned believes it would be edifying to both parties to briefly address the merits of this grievance, being that the law on the issue is clear. Grievants contend that they are entitled to compensation for all time periods during which substitute calls are made, because their activities are restricted, and they cannot use this time as they please. They argue that, pursuant to

the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, these hours are considered compensable work time, as they are either considered “on call”or “engaged to wait.” As will be discussed below, Grievants are not performing either of these activities, so they are not entitled to compensation.

The FLSA provides:

> 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.

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). Clearly, if an employee who is actually “on call” but free to engage inpersonal activities off of work premises is not entitled to compensation, then a substitute who may or may not even receive a call to work on any given day is not engaged in work activities either.

In addition, it has been held that it is not compensable work time if the employee is 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 Grievants' situation, they are obviously “waiting to be engaged,” and are even free to refuse the call to work completely, within the limitations promulgated by the Board. Whether or not they choose to remain at home to wait for a call or carry a cell phone (See footnote 2) to receive substitute call- outs, Grievants are free to use their time as they choose. (See footnote 3)

Also important to this case is the following portion of the FLSA:

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves 'scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged.'

29 U.S.C. § 785.14 (citation omitted). As discussed above, it is intrinsic to the nature of substitute employment that the employee is “waiting to be engaged” and not vice-versa. To compensate employees for time during which they may or may not be called to work as a substitute would border on the absurd.

The following conclusions of law support this Decision.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

2. A grievance must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant. W. Va. Code § 18-29-4(a).

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180

W. Va. 634, 378 S.E.2d 843 (1989).

4. Grievants did not initiate their grievance within fifteen days of discovering the grievable event.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Barbour County. Any such appeal must be filed within thirty (30) daysof 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.

Date: August 29, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The original list of grievants included David Shelton, Robert Golden, Terrie Tusing Hedrick and Jack Valentine. However, those individuals are not represented by Mr. Roush, and have not appeared to represent their interests at any stage of this proceeding. Accordingly, they are deemed to have abandoned their grievance.

Footnote: 2

Although there was some variations in the testimony regarding whether or not cell phones were actually allowed to be used as primary numbers, indications are that Grievants or some Board employees may have simply misunderstood the rule. Nevertheless, due to the nature of substitute work, the undersigned does not find this issue to be dispositive as to whether or not Grievants should receive compensation.

Footnote: 3

It should also be noted that the hours during which call-outs occur are hours during which most people with day jobs are likely to be home, anyway.