WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RICHARD COULTER, et al.,

Grievants,

v. **Docket No. 06-DOH-356**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievants are employed throughout West Virginia by the Division of Highways ("DOH") in various capacities. Numerous grievances were filed after DOH adopted a revised "Assignment and Use of Transportation Vehicles Policy" on August 29, 2006. These grievances were heard at level three in various groupings, and many Grievants appealed to level four, individually and in groups. After conference calls and correspondence with the Grievants, their representatives, and DOH counsel, it was agreed that these grievances could be decided based upon the records developed at level three. All grievances resulting from the vehicles policy change were consolidated by Order dated March 15, 2007. This matter became mature for consideration upon receipt of the final fact/law submissions of Respondent, received by this office on April 25, 2007.

Synopsis

Several groups of DOH employees filed grievances as a result of changes in DOH's vehicle policy on August 29, 2006. Employees who had previously been compensated for all time spent traveling to and from their specific project sites, whether in state or personalvehicles, are no longer paid for this time, which is considered normal commuting time. In addition, employees may no longer pool their state vehicle at a facility outside their district, even if it is closer to their domicile, and only district-based managers are allowed to take state vehicles and park them at their homes. All of these changes complied with the FLSA, and some were management decisions within DOH's discretion to make. Grievants have failed to prove their claims of discrimination nor any entitlement to receive benefits extended under the previous policy.

Findings of Fact

1. For many years, DOH has followed the same policy regarding use of state vehicles and payment of travel time to employees when using such vehicles.

2. DOH employees are assigned to a district, which may comprise several counties and a large geographical area. Due to the nature of highway work, employees may be assigned to a project that lasts a day, a week, or many months, so their work location may vary on a regular basis. Some project sites may located more than an hour away from an employee's home.

3. It was DOH's past practice to allow many employees to use a state vehicle to travel to the job sites to which they were assigned, and they were paid for being on “work” time as soon as they entered the vehicle.

4. Some employees parked their state vehicle at a district or county office. These employees would drive their personal vehicle to the office, pick up the state vehicle, and drive to their work site, then return the vehicle at the end of the day. They were paid for working when they were driving to and from the job site in the state vehicle. 5. Some managerial employees, such as district and county administrators, had been allowed in the past to take a state vehicle home and park it at their domicile. Employees who did this were required to report the use of the vehicle to the IRS as a “taxable fringe benefit.”

6. Because some employees work in one DOH district, but live in another, DOH's previous policy allowed an employee to park their assigned vehicle at the DOH office closest to his or her domicile, even if it was not in the district in which the employee was normally assigned to work.

7. Due to perceived possible misuse of state vehicles, along with reviews of the requirements of the Fair Labor Standards Act ("FLSA"), an "Assignment and Use of Transportation Vehicles Policy" was adopted by DOH on August 29, 2006. This policy made the following significant changes in past practice:

> -- Employees may be provided a state vehicle to travel to and from their domicile to an approved pooling location (district or county headquarters, county substations, DMV or state police facilities), the vehicle is provided solely for the employee's convenience, and the employee must sign a "Vehicle Use Agreement." Employees who do not sign the Agreement must use their personal vehicle to travel from home to their job sites.
>
> -- The Vehicle Use Agreement provides that the vehicle is an optional benefit, provided at the employee's convenience, and that the employee will not be paid for travel/commuting time unless required by the FLSA. Whether using a state vehicle or personal vehicle, no employee will be paid for travel to and from their assigned job site, unless specifically required by the FLSA.
>
> -- Only the following district-based employees are furnished a state vehicle to travel between their domicile and work: District Engineer/Manager, Assistant District Engineer--Construction, and Assistant District Engineer-- Maintenance.
>
> -- Employees who reside outside their assigned district are to park their state vehicle at a secure pooling location closest to their domicile, but only if within the boundaries of their assigned district.

8. On September 20, 2006, Jeff Black, Human Resources Director for DOH, issued a memorandum to all management employees, clarifying certain provisions of the new policy. With regard to whether or not employees traveling from home or a pooling location to a project site are paid travel time, he stated:

> As a general rule, employees are not paid for time spent commuting, including in employer-provided vehicles. However, employees must be paid if they are required to work at home before commuting or if they must report to a specified location to receive job assignments or work locations, to pick up and carry tools, or to perform other work. The agency's administration is attempting to allow employees the convenience of employer-provided vehicles while, at the same time, reducing the amount of travel time paid. For this reason, supervisors at all levels are expected to eliminate, to the greatest extent possible, conditions that may require payment of travel time.

9. Grievant Gwen Conley is employed in District 2 as a Construction Inspector. Because of the

new policy, he has to pool his state vehicle at a different location. He also is no longer paid for travel time after he picks up his state vehicle, and he is only compensated for actual time at his assigned project site.

10. Grievants John Todd and Dwayne Stout are employed in District 8 as TCC- Mains (Transportation Crew Chief for Maintenance). Because of the new policy, they are no longer allowed to park their state vehicles at home, and they are now required to pick up their state vehicles at a pooling location.

11. Grievants Charles Beverage, Alan McCarty, James McCoy and Samuel McPaters are employed in District 8 as county administrators and foremen. Pursuant to previous practice, they were allowed to park state vehicles at their domiciles and were paid travel time for commuting between home and work. They are no longer eligible to take vehicles home, and they are not paid for travel time under the new policy. These Grievants are certified as emergency responders. 12. Grievants Chad Arbogast, James Rossi, Mary Smith, Stanford Mills and Jeremy Metheny are employed in District 8 in the construction division. They were formerly paid for their time once they picked up their state vehicles and drove to and from their project site. Under the new policy, since they are assigned to a project site that has a temporary field office, they are no longer paid for travel time in their state vehicles until they reach the project site. Employees who travel to various locations each day and are not assigned to a specific project site are paid for travel time.

13. Grievants Barbara Craghead, Joseph Ray and Eric White are employed in District 10 as engineers/project supervisors. Because of the new policy, they no longer receive pay for traveling to remote job sites.

14. Numerous employees of the District 9 construction division are also included in this grievance, challenging the denial of travel time pay.

15. Grievant Keith Hollinghead is the Highway Administrator for Greenbrier County in District 9. Beginning in 1997, he was allowed to park his assigned state vehicle at his residence, which he now is required to park at a pooling location in Lewisburg. Because he did not know that he was entitled to travel time pay from the time he left his home until he returned home at the end of the day, pursuant to previous practice, he seeks back pay for that work time from 1997 until the new policy was adopted in 2006. He filed his grievance on September 22, 2006.

16. Grievant Donnie Meadows is employed in District Nine, Construction, as a Transportation Engineering Technician Associate. Because of the new policy, Mr. Meadows' pooling location has been moved from a location ten miles from his home to a location which is ten miles farther from his home than his current job site (which isapproximately 40 miles from his home). Therefore, he has not signed the Vehicle User Agreement, and seeks restoration of his travel time pay and a change in his pooling location.

17. Bridge Inspectors and survey crews are paid for all time spent in their state vehicles, because they travel to different locations each day, are not assigned to a project site, and carry their equipment and tools in their vehicles. Employees who are assigned to project sites are expected to store their tools at the project field office.

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.*

Although the undersigned does recognize that there are various groups of Grievants, along with separate individual Grievants, involved in this case, and each have made various arguments and allegations, the new vehicle policy adopted in August of 2006 gave rise to all of the claims presented here. Grievants' claims fall into the general categories of challenging the loss of travel pay--alleging it is discriminatory for other employees to still receive that pay, change of pooling locations that are less convenient totheir domiciles, and the fact that many management employees are no longer allowed to park their state vehicles at home.

As explained extensively by Jeff Black, Human Resources Director, the changes in the policy were brought on by two concerns: first, there were concerns regarding possible misuse of state vehicles, and second, DOH wanted to make the policy comply with the FLSA, in order to reduce the expense paid for travel time. As to compensation for travel time, the relevant portion of the FLSA provides that compensable time does not include time spent “walking, riding, or traveling to or from

the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. 254(a). In addition, 29 C.F.R. § 785.35 specifically states that:

> [a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work
>
> travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites.

Generally, an employee is not at work until he or she reaches the work site. *Dillon v. Northern States Power Co.*, 22 Wage & Hour Cas. (BNA) 1187 (Fifth Cir. 1976).

However, there are exceptions to the general rule that an employee is not to be compensated for travel to and from work. The FLSA also provides that when the employee travels "as part of his principal activity, such as travel from job site to job site during the workday," this is considered compensable work time. 29 C.F.R. 785.38. Also, if an employee must report to a particular location to obtain the necessary tools before he can begin his principal activities at another location, the travel time is an integral and indispensable part of those activities. *See*, *Barrentine v. Arkansaw-Best Freight System, Inc.*, 750 F.2d 47 (8th Cir. 1984, *cert. denied*, 471 U.S. 1054 (1985)). Similarly, if theemployee is required to report to a location where he or she picks up other employees or receives instructions before traveling to the work site, the compensable time starts at that location. *Herman v. Rich Kramer Construction*, 1998 U.S. App. LEWIS 23329 (8th Cir. 1998); *Baker v. GTE North Inc.*, 927 F. Supp. 1104, 3 Wage & Hour Cas. 2d (BNA) 527 (N.D. Ind. 1996). The key to the analysis regarding whether the travel is considered actual "work" is whether it benefits the employer, either partially or completely, in the ordinary course of the particular business. *Dunlop v. City Elec. Inc.*, 527 F.2d 394 (5th Cir. 1976).

___Also of relevance to the instant case is the so-called "Employee Commuting Flexibility Act of 1996, 29 U.S.C. 254(a), which provides, in pertinent part:

> [T]he 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 if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee[.]

___It is indisputable that, over the years, DOH employees have received a very desirable benefit by being paid for time spent traveling to and from job sites in state vehicles. However, DOH was not

required by law to compensate for this time, at least with regard to the employees who filed this grievance and provided evidence as to their situations. As discussed above, only employees who travel to different job sites daily, carry equipment necessary to perform their job duties, or who must report to an office to receive assignments each day are considered to be "working" while driving to and from their assignments. Conversely, as to the various Grievants who brought this grievance, (See footnote 1) itappears that all are assigned to project sites where necessary tools are expected to be stored, and the use of a state vehicle is only provided as a benefit to the employee who does not wish to place extensive mileage and wear and tear on his or her personal vehicle. The testimony of record indicates that many Grievants feel that they are being discriminated against, because they do not believe that some employees should receive travel compensation while others do not. "Discrimination means 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." *W. Va. Code* § 29-6A-2(d). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants have failed to meet the threshold requirement of proving that they are "similarly situated" to other employees who have received travel pay. Moreover, Respondent has contended that the employees who receive the pay are compensated for travel in accordance with the FLSA, due to their job duties, such as bridge inspectors andsurvey crews, who travel from location to location each day. Unfortunately, Grievants have not provided sufficient evidence to establish that

any FLSA violations have occurred, or that the difference in treatment is a result of anything other than assigned duties.

Grievants from District 9 have relied heavily upon an unpublished opinion from United States Court of Appeals for the Eleventh Circuit entitled *Burton, et al., v. Hillsborough County, Florida*, No. 05-10247 (May 18, 2006). That case involved an action brought by a group of engineers employed by a county Public Works Department, whose job duties consisted of driving to job sites throughout the county and inspecting the work of subcontractors. These engineers were required by county policy to use county vehicles, in which the tools used in their jobs were stored, which they were required to park at secure county facilities at the end of each workday. They were successful in persuading the Court that they were entitled to compensation for all time spent in the county vehicle, including at the beginning and end of the day. In reaching its conclusion the Court noted:

> Ultimately, the employees who used the county vehicles had no choice but to begin and end their work day not at a work site, but at a county parking facility. And **without the county vehicles the employees could not perform the principal activities for which they were employed** _ driving throughout Hillsborough County and inspecting public works construction sites. Needless to say, getting a county vehicle from the parking site and driving it to the first work site and returning it to the parking site was integral and indispensable to the plaintiffs' principal activities.

Id. at 15-16 (Emphasis added).

Unfortunately, the instant case is distinguishable from the one described above, in that the state vehicle is provided only as a convenience to DOH employees. Employees who are assigned to project sites are not *required* to use a state vehicle to get there, but,of course, many employees use the state vehicle as an option. However, the vehicles are used by choice, not as a job requirement.

As to DOH's decisions to require employees to use pooling locations in their districts and to only allow district management to park vehicles at home, Grievants have not identified any statute, rule, regulation or policy that has been violated. These decisions are management choices, which are judged by the arbitrary and capricious standard. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the*

Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Additionally, the West Virginia Supreme Court of Appeals has noted this Grievance Board's jurisdiction to resolve grievances does not provide authority for an Administrative Law Judge to substitute her management philosophy for that of the employer. *Skaff v.Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *See Settle v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 00-PEDTA-031 (May 23, 2000); *Bennett v. Dep't of Health and Human Res.*, Docket No. 99-HHR-517 (Apr. 26, 2000); *Terry v. Dep't of Transp./Div. of Personnel*, Docket No. 99-DOH-207 (Mar. 17, 2000). "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *See Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000)(*citing Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997))." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002).

This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997). *See W. Va. Code* § 29-6A-2(i); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

While the undersigned certainly agrees with Grievants that DOH's decisions regarding many of the issues presented here have definitely not improved morale or working conditions for employees, I cannot find that they were arbitrary and capricious. Indeed, many Grievants testified that the use of the state vehicle, the ability to park it at the most convenient location, and payment for all time spent in it, were all inducements to accept employment with DOH, which everyone would certainly agree does not necessarily pay competitive salaries. Nevertheless, it is within DOH's discretion to make

thesedecisions, and concerns for misuse of vehicles and their safety and security are legitimate, and they provided rational reasons for the changes in policy.

Some Grievants, particularly those complaining that they are no longer allowed to park state vehicles at home, have contended that they must be allowed to continue the previous practice, because they are certified as emergency “first responders.” They argue that, when emergencies occur, such as floods and storms, they may be called at home to respond. These Grievants believe they will be hindered in their ability to perform these duties, if they must first go to a DOH facility to pick up a state vehicle. Grievants cite West Virginia Code § 17-2A-8c, which provides:

> [T]he commissioner of highways shall have authority to use, and permit and allow or disallow his designated employees to use, publicly provided carriage to travel from their workplace and return: Provided, That such usage is subject to the supervision of such official and is directly connected with and required by the nature and in the performance of such official's or designated employee's duties and responsibilities.

However, as pointed out by DOH, this provision specifically grants the commissioner the authority to “allow or disallow” employees to park state vehicles at home. DOH has made the decision to allow only district-based managers to take the vehicles home, a decision within its discretion to make. Although it would likely be preferable to allow county administrators to also park vehicles at home, especially in emergency situations, Grievants have not established that they would actually be unable to perform their required job duties without this added benefit.

One remaining issue to be addressed is Grievant Keith Hollinghead's claim for back pay. He contends that he had no knowledge that he was entitled to compensation for travel time until the new policy was adopted on August 29, 2006. He initiated thisgrievance on September 22, 2006, seeking back pay for all travel time he incurred from 1997 until the new policy was adopted. Respondent contends that this claim is untimely. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997); *Higginbotham v. W. Va. Dep't of Pub*. Safety, Docket No. 97- DPS- 018 (Mar. 31, 1997); *Buck v. Wood County Bd. of Educ*., Docket No. 96-54-325 (Feb. 28, 1997).

W. Va. Code § 29-6A-4(a) (See footnote 2) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

The grievable event in this case was the adoption of the new policy on August 29, 2006, which Mr. Hollinghead claims gave rise to his claim of entitlement to travel pay previous to that time. Ten working days after August 29 would be September 13, 2006. Even assuming it took a day or two for the policy to be distributed to employees, Grievant still waited approximately a week past the ten-day time limit when he filed this grievance on September 22, 2006. Therefore, his claim for previous travel pay is barred due to untimeliness. (See footnote 3)

In summary, while Grievants have been fortunate to receive the benefits of payment for travel time and the convenience of use of state vehicles for many years, the changes made in 2006 comply with the FLSA and do not constitute an abuse of the employer's discretion in such matters. While the changes are unfortunate, and indeed may cause future recruitment and/or retention problems for DOH, they were not contrary to applicable law. The following conclusions of law support this decision.

Conclusions of Law

1. 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). 2. The Fair Labor Standards Act does not consider normal home-to-work travel part of the employee's principal work activities, for which compensation must be provided. 29 U.S.C. 254(a).

3. If an employee is required to report to a specific location to pick up materials, equipment or other employees, or to receive instructions before traveling to the work site, compensable time starts at that location. *See Herman v. Rich Kramer Construction*, 1998 U.S. App. LEWIS 23329 (8th Cir. 1998); *Baker v. GTE North Inc.*, 927 F. Supp. 1104, 3 Wage & Hour Cas. 2d (BNA) 527 (N.D. Ind. 1996).

4. Grievants have not established that they are entitled to compensation for time spent driving to and from DOH project sites at the beginning and end of their workday.

5. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

6. “Discrimination means 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.” *W. Va. Code* § 29-6A-2(d). In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

7. Grievants have failed to prove discrimination in this case, as they are not similarly situated to employees who have received different treatment under the travel policy, and the differences in treatment are based upon the employees' respective job duties.

8. "A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997). *See W. Va. Code* § 29-6A-2(i); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

9. Revisions of DOH's policy on use and parking of state vehicles were management decisions, and Grievants have failed to prove that they were arbitrary and capricious, violated any rule, regulation or statute, or constituted a substantial detriment to or interference with their job performance, health or safety. 10. A grievance must be filed “within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant[.]” *See* W. Va. Code § 29-6A-4(a)(repealed 2007).

11. Grievant Hollinghead's claim of back pay for travel time from 1997 until August 29, 2006, is barred due to untimely filing.

Accordingly, this 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. *See* W. Va. Code § 29-6A-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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 8, 2007

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It should be noted that many of the grievants picked a single "spokesperson" for their group who gave testimony, so the exact nature of each individual's job situations weremostly unaddressed by the evidence given.

Footnote: 2

Although this provision was repealed by passage of Senate Bill 442 in March of 2007, pursuant to the provisions of Executive Order No. 2-07 (May 8, 2007), the grievance statute in place at the time this grievance was filed governs its outcome.

Footnote: 3

It is also very difficult to understand how, of the hundreds of DOH employees who drove state vehicles and were paid for travel time, Mr. Hollinghead was unaware of this practice for nearly ten years.