WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MARY JO WINE,

Grievant,

v. **Docket No. 07-39-358**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Mary Jo Wine ("Grievant") initiated this proceeding on March 16, 2007, challenging the calculation of her compensable work time as a classroom and bus aide for the Preston County Board of Education ("the BOE"). The grievance was denied at levels one and two, level three was bypassed, and Grievant appealed to level four on July 12, 2007. Due to statutory changes affecting the grievance procedure and the Grievance Board, a level four hearing was not held until March 7, 2008. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and the BOE was represented by Kimberly Croyle, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 8, 2008.

Synopsis

In February of 2007, BOE discontinued payment to transportation aides for time spent on school buses without assigned students present. Grievant contends that this violates the Fair Labor Standards Act ("FLSA"), because she was told by a school principal to board the bus at a specific school, and she believes she should have continued to receive payment for all time spent riding the

bus. Pursuant to the FLSA and past legaldecisions, riding a bus is a preliminary and postliminary activity for an aide, and it is not compensable work time. The grievance is denied.

Findings of Fact

After a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

1. Grievant is employed by the BOE as a special education aide, requiring her to provide services to a particular student both in the classroom and during his bus rides to and from school.

2. During the 2006-2007 school year, Grievant boarded the bus at 6:00 a.m. at Kingwood Elementary School, approximately one hour prior to her assigned student boarding the bus. In the afternoon, Grievant continued to ride the bus after her student had exited the bus, back to Kingwood Elementary School where her car was parked.

3. Grievant received overtime pay from the beginning of the school year until February of 2007 for the entirety of her time spent riding the bus.

4. The BOE's finance office had a practice of paying bus aides beginning at the time both the aide and student are on the bus together. An audit of payroll records began in the fall of 2006 in order to ensure compliance.

5. In early 2007, Grievant and other aides were advised by the BOE's payroll office that they were not entitled to compensation for any time when their assigned student was not actually present on the bus. From February through the end of the school year, Grievant was no longer paid for the time before and after her student was on the bus. (See footnote 1) 6. The principal of Kingwood Elementary School had advised Grievant she could board the bus at the school. However, Grievant was aware that some aides boarded school buses at or near the homes of students they serve, in order to avoid overtime. Grievant did not wish to do this, because there was no acceptable parking location for her at her student's home.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6. (See footnote 2) "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 and Human Res.*,

Docket No. 92-HHR-486 (May 17, 1993).

Grievant contends that she was required to board the bus at Kingwood Elementary School and, despite the fact that her student was not present on the bus at that time, all of her time on the bus is compensable work time. While Grievant acknowledges that thisGrievance Board has recently decided a nearly identical case in favor of the board of education, she argues that the decision in *George v. McDowell County Board of Education*, Docket No. 07-33-200 (Feb. 28, 2008) is incorrect and should be overruled.

Issues regarding what types of activities constitute compensable employee work time are largely governed by the provisions of the federal Fair Labor Standards Act ("FLSA"). "Under W. Va. Code § 29-6A-2(I), the West Virginia Education and State Employees Grievance Board has jurisdiction over grievances concerning wage and hour claims arising under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., and applicable state wage and hour laws, e.g., W. Va. Code §§ 21-5C-1, et seq." *Belcher v. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995).

As demonstrated by the West Virginia legislature's recent codification of the requirement that transportation employees be compensated for all time spent on a bus boarded at a designated work location, this has been a troubling issue for many years. However, as determined in *George*, *supra*, and its predecessor decision in *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006), pursuant to the FLSA, 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. 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). 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). In the case of transportation aides, they are notperforming their "principal work activity," which is caring for the needs of assigned students, unless the student(s) are physically present.

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). However, Grievant has failed to establish by a preponderance of the evidence that this

exception, providing for compensation for travel to and from work in some instances, applies to her situation.

While Grievant contends that her situation is different from *Dillon*, *supra*, in that she did not park at the school merely “for her own convenience,” but did so at the direction of the principal, this does not alter the state of the law on this issue. It has long been held by the Grievance Board that unauthorized actions of employees are not binding upon an employer. "*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95- HHR-297 (Jan. 31, 1996); *Ebert Allen v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007); *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.*, Docket No. 99- HHR-228 (Nov. 30, 1998). 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); *Pughv. Hancock County Bd. of Educ*., 95-15-128 (June 5, 1995). Additionally, the 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).

It is obvious from a review of the evidence, and as explained by the BOE's superintendent in his testimony, that there was no board-approved policy of compensating transportation employees for time spent on a bus, but not providing services to students. As stated by Superintendent Lofink, early in the 2006-2007 school year, the BOE made a conscious effort to ascertain the exact situation of every bus aide in the county by requiring all of these employees to complete detailed information forms regarding their individual assignments and daily work schedules. Because it took several months after the beginning of the school year to obtain accurate information regarding whether or not each aide was actually performing compensable job duties during the hours listed on their time sheets, Grievant and others were not notified of the error until February of 2007. The evidence does not establish that Grievant was required by the BOE to be on the bus prior to or after her student, so

this cannot be characterized as compensable, approved work time. There is also no credible evidence that the principal was directed by any BOE official to allow Grievant to park at the school with any understanding that she would be paid for all time on the bus. Accordingly, Grievant has failed to prove entitlement to the relief requested. The BOE had no legal obligation to continue to pay Grievant for non-compensable time during which she was not performing her duties as an aide. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. "Under W. Va. Code § 29-6A-2(I), the West Virginia Education and State Employees Grievance Board has jurisdiction over grievances concerning wage and hour claims arising under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., and applicable state wage and hour laws, e.g., W. Va. Code §§ 21-5C-1, et seq." *Belcher v. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995).

3. 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). 4. Travel to work is "a normal incident of employment," and riding on an employer's bus is a preliminary or postliminary activity to an aide's principal work activity of providing services to assigned students. *See Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006).

5. 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. BooneCounty 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).

6. Grievant has failed to prove any violation of the FLSA or an entitlement to compensation for riding a bus when her assigned student is not present.

Accordingly, this grivance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court

of Preston County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 2, supra)*. Neither the West Virginia Public 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: May 5, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

Effective June 8, 2007, the legislature amended W. Va. Code § 18A-4-8 by adding a provision that, unless agreed to in writing by the employee, a board of education mustestablish a beginning and ending work station for bus operators and transportation aides at a board-owned facility with parking. The provision further states that the employee's workday begins and ends at this designated work station where the employee boards and leaves the bus. The amendment was passed after the time period for which Grievant is seeking compensation, and, pursuant to the amended statute, all BOE employees will receive payment for their time on buses after June of 2007.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.