THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JACK COLLINS, ET AL.,

Grievants,

v. **DOCKET NO. 08-DOH-010**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievants[1] challenge the decision of Respondent Department of Transportation/Division of Highways ("DOH"), denying payment for travel time. The September 21, 2006,[2] "Statement of Grievance" provides that:

> [t]he West Virginia Division of Highways is in violation of the statute, [r]ules and policy which may apply by utilizing and showing discriminatory treatment when District 3, supervision removed travel time compensation on 9-11-06.

As relief, the Grievants seek to "[m]ake all employees affected (statewide) whole."

This grievance was denied at all lower levels. A Level Four hearing was held before the undersigned in Charleston, West Virginia, on February 5, 2009. Grievants appeared

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[1] Grievants in this matter are Jack Collins, Brian Westfall, Joyce Petry, Jeremiah L. Gaston, Ron Pettit, Ned Brown, Mike Davis, Charles Pickens, Michael Foley, Christopher Cooper, Leon Ash, Joseph Sheets, Howard W. King, Jr., Donald Joseph, Michelle Weekley, Tiffany Bourgeois, Randall F. King, Brian Kucish and Stacko L. Hudkins.

[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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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.

by and through their representative Gordon Simmons, Steward, UE Local 170. Respondent appeared by and through its counsel, Barbara L. Baxter, Esquire. This matter became mature for decision on March 4, 2009, the deadline for submitting proposed findings of fact and conclusions of law. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievants allege that the DOH policy concerning state vehicle usage and payment for travel time is discriminatory, arbitrary, capricious and contrary to law. Respondent DOH argues that this grievance is barred by the doctrines of issue preclusion and claim preclusion and was untimely filed. Further, DOH maintains that the policy is not discriminatory, arbitrary, capricious or contrary to law.

This grievance is not barred by any preclusionary doctrine and was timely filed. The Grievants have not established, by a preponderance of the evidence, that the DOH policy is arbitrary, capricious, discriminatory or contrary to law, in any respect.

This grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievants are all employees of the Department of Transportation/Division of Highways, and work within District Three. District Three encompasses the Parkersburg, West Virginia, area.

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 work sites may be located more than an hour away from an employee's home.

3. Prior to August 29, 2006, it was DOH practice to allow many employees to use a state vehicle to travel to the work sites to which they were assigned and employees were paid for being on "work" time as soon as they entered the vehicle.

4. 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 the employee was normally assigned to work.

5. DOH was interested in spending allocated taxpayer money as efficiently as possible and chose to change its travel time policy to accord more closely with federal law. Level Four, Testimony of Jeff Black; Level Three, Testimony of Jeff Black, 69-70. DOH implemented the policy change because it was "paying more money than it needed to in salaries, particularly overtime salaries" and was trying to "save money and redirect the money toward road projects." *Id*. at 69

6. On August 29, 2006, DOH adopted a "Vehicle Use Policy." This policy made the following significant changes to 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 work 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 work 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; and
- 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.

Level Three, Respondent's Exhibit One.

7. On September 11, 2006, the "Vehicle Use Policy" was implemented in District Three.

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 work 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.

Level Three, Respondent's Exhibit Two.

9. Upon review of the DOH policy, the United States Department of Labor determined that the DOH was required by the Fair Labor Standards Act to pay employees for travel time greater than one hour in a state vehicle, round trip.

10. Grievant Jack Collins is a project supervisor for construction in District Three.[3] Grievant Collins is not paid travel time when picking up a state-owned vehicle from a pooling location unless his travel time is over one hour. It is very rare for him to report to district headquarters at the start of a work day. He works on many construction projects throughout District Three. Level Four, Testimony of Jack Collins.

11. Grievant Michael Moore is a utility inspector in District Three. He reports to a pooling station each morning and, from the pooling station, rides in a state vehicle to the work site. Like Grievant Collins, he does not receive payment until he arrives at the work site. He picks up a vehicle at a pooling station and is required to drive the state vehicle during the day to travel to different work sites. Level Four, Testimony of Michael Moore.

12. In District Three, when employees use district headquarters as a pooling location, and have no field office (i.e. utilities, resurfacing and construction employees) the employees receive paid travel time. Level Three, Testimony of George A. Shinsky, 34.

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[3] The only Grievants to provide testimony at Level Three or Level Four were Jack Collins and Michael Moore.

An employee using a pooling location other than the district headquarters does not receive travel time unless they are traveling over one hour. *Id*.

13. In District Four, utilities and resurfacing inspectors meet at the pooling location nearest to their home. If utility inspectors pool at the district office, they receive travel time from that location. Construction employees do not receive travel time unless they are traveling over one hour. Survey crews report to the district office. They receive no travel time to get to the office. Level Three, Testimony of Don "Danny" Williams.

14. In District Six, resurfacing employees report to an "area office" that serves as their office location. This is where resurfacing employees' travel time begins. Utilities workers report to the district office or an area office and that is where their start time begins. Generally, if an individual is pooling outside of the headquarters (or district office) the employee does not receive travel time. However, if they are pooling out of an "area office" employees start their time when they pick up a vehicle. Level Three, Testimony of Danny Sikora.

15. Most districts found it difficult to implement the policy. Level Three, Testimony of George A. Shinsky and Danny Sikora.

Discussion

Claim Preclusion and Issue Preclusion

As an initial matter, the Respondent has raised arguments related to claim preclusion, issue preclusion and timeliness. An assertion that a grievance is precluded by claim preclusion or issue preclusion is an affirmative defense that must be proven by a preponderance of the evidence. *See generally Vance v. Jefferson County Bd. of Educ.*, Docket No. 03-19-018 (May 27, 2003).

The doctrine of claim preclusion (or *res judicata*) may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." *Vance, supra; Liller v. W. Va. Human Rights Comm'n,* 180 W.Va. 433, 440, 376 S.E.2d 639, 646 (1988). "Before the prosecution of a lawsuit [grievance] may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication

on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

Relatedly, "[c]ollateral estoppel [or issue preclusion] will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Though not directly addressed or explained in its findings of fact or conclusions of law, DOH generally claimed at the Level Three hearing that this Board's decision in *Coulter v. W.Va. Div. of Highways/Dep't of Transp.*, Docket No. 06-DOH-356 (Aug. 8, 2007), prohibits or bars the instant grievance. In *Coulter*, the Board considered the DOH policy concerning driving time and determined that it was not arbitrary and capricious and did not violate the Fair Labor Standards Act. While *Coulter* found the policy non-discriminatory, it did not consider a claim of discriminatory application in the *particular* factual scenario presented by the Grievants. None of the Grievants involved in this matter were a party in *Coulter* and there is no indication that Grievants in this matter were in privity with the *Coulter* grievants or virtually represented by the *Coulter* grievants. *See Gonzalez v. Banco Central Corp.*, 27 F.3d 751 (1st Cir. 1994)(discussing the concepts of privity and virtual representation). Accordingly, DOH's arguments of claim and issue preclusion are unpersuasive.

Timeliness

Next, DOH raises the issue of timeliness. 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. *See Hale and Brown v. Mingo County Bd. of Educ.*,

Docket No. 95-29-315 (Jan. 25,1996). If the Respondent meets this burden, the Grievants may then attempt to demonstrate that they 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). As to when a grievance must be filed, WEST VIRGINIA CODE § 29-6A-4 provides, in pertinent part:

> Before a grievance is filed and 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 shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

(Emphasis added). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged*. Kessler, supra.* In *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the West Virginia Supreme Court discussed the discovery rule of WEST VIRGINIA CODE § 18-29-4 (a similar provision under the old education grievance statute), and stated that "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."

The DOH claims that this matter is untimely because the Grievants knew about the policy before it was implemented. The new policy was effective on August 29, 2006. However, it was not implemented in District Three until September 11, 2006. Level Three, Grievants' Exhibit One. On September 20, 2006, an explanatory memorandum was sent out by Jeff Black, DOH Director of Human Resources, explaining how to implement the policy. This grievance was filed on or about September 21, 2006, alleging discriminatory application. This grievance was filed within ten days of the implementation of the policy in District Three and is therefore timely. *See generally* Syl. Pt. 1, *State ex rel. Monk v. Knight*, 201 W.Va. 535, 499 S.E.2d 35 (1997)(recognizing an employee has "no duty to file a grievance until the misinterpretation or misapplication occurs").

Moreover, there is no indication that the application of the policy has changed since the filing of this grievance and the allegation of discriminatory implementation constitutes a continuing practice. Insofar as implementation is concerned, there is not one "specific,

discrete event" but a continuing event that allegedly occurs daily when alleged similarly situated employees are treated differently for reasons not based upon actual job responsibilities. *Patrick v. Dep't of Transp./Div. of Highways*, Docket No. 06-DOH-261 (Dec. 15, 2005). In light of the record presented, it cannot be said that the DOH established by preponderant evidence that this grievance was untimely filed. Next, the merits of this grievance are considered.

Merits

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. W. VA. CODE § 29-6A-6. "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

The Grievant must establish, by a preponderance of the evidence, that the DOH policy is arbitrary and capricious or contrary to law. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

As a general rule, this Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. *Chafin v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-132 (July 24, 1992), *citing Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974). In *Coulter v. W.Va. Div. of Highways/Dep't of Transp.*, Docket No. 06-DOH-356 (Aug. 8, 2007), this Board passed upon the DOH policy and found

that the policy was not arbitrary, capricious or discriminatory. The Grievants have not cited, and this ALJ cannot find, any recent case law that would support overturning *Coulter*.[4] Nevertheless, the DOH policy is now considered within the context of the Fair Labor Standards Act and the Employee Commuting Flexibility Act of 1996.

The relevant portion of the Fair Labor Standards Act 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 the employee 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. *Baker v. GTE North Inc.*, 927 F. Supp. 1104 (N.D. Ind. 1996). The key to the analysis regarding whether the

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[4] Insofar as the Grievants argue that the *Coulter* decision is not valid as precedence because the ALJ who issued the decision "did not possess the qualifications required by law to conduct hearings and issue decisions," such a consideration has no effect upon the underlying factual and legal analysis presented in this grievance or the *Coulter* analysis and is not germane to the consideration of this issue. *Grievants' Proposed Findings of Fact and Conclusions of Law*, 7.

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 "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 work 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. Now, the DOH desires to utilize taxpayer dollars in a different manner. The language of the DOH policy parallels the requirements under the Fair Labor Standards Act and the Employee Commuting Flexibility Act of 1996. *See supra* Finding of Fact Six. As this Board previously held in *Coulter*, *supra*, the DOH policy is not arbitrary, capricious or contrary to law.

While the four corners of a policy may not be arbitrary, capricious or contrary to law, a policy may be applied or implemented in a particular scenario so as to constitute arbitrary, capricious and discriminatory conduct on the part of an agency. The Grievants in this matter allege that the application of the policy is discriminatory because it is not being implemented in the same manner across all districts. WEST VIRGINIA CODE § 29- 6A-2(d) 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."[5] In order to establish either a discrimination or favoritism claim under the grievance statute, Grievants must prove, by a preponderance of the evidence:

> (a) that the employees have 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(s).

See Frymier v. Higher Education Policy Comm'n, 221 W.Va. 306, 655 S.E.2d 52 (2007). *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). Hence, the burden is upon the Grievants to establish that employees in other districts are similarly situated and differences in employee treatment between districts is not based upon actual job responsibilities.

As indicated by the above-discussion of the Fair Labor Standards Act, there are many job-specific variables that must be taken into account when determining if an employee is entitled to compensation for travel time. This same fact-based analysis must be undertaken when determining if the DOH policy is discriminately implemented in the various districts.

Only two Grievants testified in this matter. The record contains testimony of representatives from Districts Three, Four and Six, who implemented the policy. Generally, it was stated that the policy was difficult to implement. This is so because the policy must be considered on a case by case basis and, for some employees, there is a continual changing of work sites.

While the implementation may be made on a case by case basis, the policy must be applied uniformity to *similarly situated* employees. In this instance, no Grievant has

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[5] In their proposed findings of fact and conclusions of law, Grievants argue that once a prima facie case is established a "presumption shifts in favor of the Grievant." In discrimination claims under the grievance statutes, the burden or presumption does not shift and remains upon the Grievant. *See generally Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). Insofar as cases prior to 2004 suggest otherwise, they are incorrect and not persuasive.

provided the particular quantum of evidence to establish, by a preponderance of the evidence, that they are similarly situated to employees in other districts. *See generally Nelson v. W.Va. Dep't Health & Human Res.*, Docket No. 00-HHR-285 (May 14, 2001)(recognizing the fact-oriented analysis of discrimination and favoritism claims). Nor is there evidence establishing differences in policy application that are not based upon actual job responsibilities. Grievants have provided no specific examples, just general statements that they are similarly situated to other like-classified employees in other districts.

In order to prevail on their claim of discrimination, Grievants must prove they are similarly situated to an employee receiving differential treatment and the differential treatment is not based upon actual job responsibilities. In light of the particular evidence presented, and the fact-specific analysis that forms the underpinning of this discrimination claim,[6] the Grievants have not met their burden of proving discrimination by a preponderance of the evidence.

In summation, the DOH has not established by a preponderance of the evidence that this grievance is barred by the doctrines of claim preclusion or issue preclusion. Nor has it established that this grievance is untimely. The Grievants have not established, by a preponderance of the evidence, that the DOH policy was arbitrary, capricious, discriminatory or contrary to law. This grievance must be denied.

Conclusions of Law

1. "Before the prosecution of a lawsuit [grievance] may be barred on the basis of *res judicata* [claim preclusion], three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons

[6] In order to meet such a burden, Grievants would likely need to identify a particular, specific employee with the same classification who has very similar job duties and job instructions. Ideally, specific examples, with specific dates would be introduced. In this grievance, the evidence is generally vague and not factually specific enough to establish discrimination by a preponderance of the evidence.

in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

2. "Collateral estoppel [or issue preclusion] will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

3. Respondent DOH has not established that this grievance is barred or prohibited by the doctrines of claim preclusion or issue preclusion.

4. WEST VIRGINIA CODE § 29-6A-4 provides that 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 or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ."

5. Respondent DOH has not established, by a preponderance of the evidence, that this grievance was untimely filed.

6. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE § 29-6A-6.

7. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted).

8. 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). 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 (N.D. Ind. 1996).

9. Grievants have not proven, by a preponderance of the evidence, that the DOH policy concerning payment for travel time is arbitrary, capricious, unreasonable or contrary to law.

10. In order to establish either a discrimination or favoritism claim under the grievance statute, Grievant must prove, by a preponderance of the evidence:

> (a) that the employees have 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(s).

See Frymier v. Higher Education Policy Comm'n, 221 W.Va. 306, 655 S.E.2d 52 (2007); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

11. Grievants have not established, by a preponderance of the evidence, that they were discriminated against or the policy is discriminatory on its face.

Accordingly, This grievance is **DENIED**.

Any party 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. W.VA. CODE § 29-6A-7 (*See* Footnote 1). 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 WEST VIRGINIA 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: April 28, 2009

Mark Barney
Administrative Law Judge