THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RONALD PETRUCCI, et al.,
Grievants,

v. **DOCKET NO. 2009-0003-CONS**

DEPARTMENT OF TRANSPORATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Similar grievances were filed at level one of the grievance procedure by Grievants, Joseph Mercer and Ronald Petrucci, on October 31 and November 2, 2007, respectively, against their employer, Respondent, Division of Highways. Both grievances complained of Respondent acting in violation of applicable rules and regulations, and favoritism. In addition, Grievant Mercer alleged harassment, and Grievant Petrucci complained of unfair labor practices. The relief sought by Grievants was to be made whole.

Separate conferences were held with the Grievants at level one in November 2007, and both grievances were denied at level one on December 4, 2007. Grievants appealed to level two on December 13, 2007. A mediation was held on Grievant Petrucci's grievance on June 9, 2008, and an Order of Unsuccessful Mediation was entered on June 10, 2008. Grievant Petrucci appealed to level three on June 24, 2007.[1] Grievant Mercer

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[1] Grievant Petrucci clarified in his appeal to level three that the action he was contesting was his reassignment from the Hundred substation to New Martinsville. He also narrowed the requested relief to "be reassigned back to the work unit at the Hundred sub-station or compensated for my time loss, as all other employees that are sent to other stations other than where they are assigned."

expressed a desire to waive level two after Grievant Petrucci's unsuccessful mediation, and the grievances were consolidated at level three. A level three hearing was held before the undersigned Administrative Law Judge on January 12, 2009, in the Grievance Board's Westover office. Grievant Mercer represented both Grievants, and Respondent was represented by Robert Miller, Esquire, Legal Division. This matter became mature for decision at the conclusion of the level three hearing on January 12, 2009, as the parties declined to submit any written proposals.

Synopsis

Grievants contested the change in their work location from the Hundred Sub-station to New Martinsville. Grievant Mercer is no longer employed by Respondent, and is seeking only to be paid for the time it took him to travel from his home in Hundred to his new work location and back. Grievant Petrucci seeks the same relief, or to have the reassignment reversed. State agencies may reassign employees as the need arises. Grievant Petrucci was reassigned based upon the needs of Respondent. Grievant Petrucci claimed favoritism based upon the fact that employees assigned to Hundred who are sent to New Martinsville to work for the day are paid from the time they leave Hundred until they return, while he is not paid for the time it takes him to travel to New Martinsville. Grievant Petrucci is not similarly situated to employees who are assigned to Hundred, but are sent to New Martinsville to work for the day, as his assigned work location is New Martinsville, not Hundred. Further, Respondent is not required by law to pay Grievants for the time it takes them to travel from their home to their assigned work location.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant Petrucci is employed by the Division of Highways ("DOH") as a Craftsworker 2.

2. Grievant Mercer was employed by DOH as a Crew Leader. He resigned his employment with DOH in March 2008.

3. The Commissioner of DOH set up a core plan for DOH under which crews of seven employees would be assigned core maintenance duties. The Hundred Sub-station in Wetzel County had one nine-employee crew. Two of these employees needed to be moved to the New Martinsville Headquarters, which is also in Wetzel County.

4. Randy Rush, the Highway Administrator 2 for Wetzel County, decided that the employee who was most recently placed in Hundred in the classification which needed to be reassigned to New Martinsville, would be the employee reassigned.

5. A management decision was made that a Craftsworker and someone certified to operate a grader were needed for a New Martinsville crew. Grievant Petrucci was the Craftsworker most recently assigned to Hundred, and apparently was the only Craftsworker assigned to Hundred.

6. Grievant Petrucci and Grievant Mercer were assigned to the Hundred Sub-station until October 2007. In October 2007, they were reassigned to New Martinsville. Calvin Cecil was also reassigned from Hundred to New Martinsville. Mr. Cecil was the employee most recently assigned to Hundred who was certified to operate a grader.[2]

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[2] The record is lacking in some details of what transpired, but it appears that Mark Poe was moved from New Martinsville to be the Crew Leader in Hundred, and this may have been his choice of location due to his seniority. Mr. Cecil was at some point moved back to Hundred. The record does not reflect whether another employee has replaced Mr.

7. After the reassignment of workers, there was one seven-man crew at the Hundred Sub-station, one seven-man crew at the Pine Grove Sub-station, one seven-man crew at New Martinsville, and one eight-man crew at New Martinsville.

8. After Grievant Petrucci was reassigned, there were no Craftsworkers assigned to the Hundred Sub-station. Equipment Operators assigned to the Hundred Sub-station are performing the duties normally performed by a Craftsworker. There are two Craftsworkers assigned to New Martinsville, apparently one for each crew.

9. Both Grievants reside near Hundred, and continued to reside there after they were reassigned to New Martinsville. It is approximately 38 miles from Hundred to New Martinsville, and it takes about 50 minutes to drive this distance. Grievants have traveled from Hundred to New Martinsville and back each day in a state owned vehicle since their transfer, but they have not been paid for the time it takes to travel this distance.

10. Employees assigned to the Hundred Sub-station who are required to travel to New Martinsville to work for the day are paid from the time they leave Hundred, until they return to Hundred.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County*

Cecil in New Martinsville.

Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant Petrucci asserted a claim of favoritism. For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant Petrucci's claim is that he was treated unfairly when he was assigned to New Martinsville, and that he has been treated differently from other employees who must travel from Hundred to New Martinsville to work, in that he is not paid for the time he spends traveling, while those still assigned to the Hundred Sub-station who report to New Martinsville to work for the day are paid for their travel time. State agencies may reassign employees as needed.

> The Division of Personnel's Administrative Rule states in Section 11.6(a) that "appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time." The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n,* 155 W. Va. 69, 75, 181 S.E.2d 22 (1971).

Jordan v. Dep't of Transp., Docket No. 03-DOH-057 (Sept. 15, 2003).

Grievant Petrucci did not dispute that two people needed to be moved from the Hundred crew to the New Martinsville crew. Mr. Henry testified that a management decision was made that those most recently assigned to Hundred should be the first ones to be transferred out. He also testified that New Martinsville needed a Craftsworker. New Martinsville also needed someone who was certified to operate a grader, and Calvin Cecil was the person reassigned to New Martinsville to fill this role, as he was the person most recently assigned to Hundred with this certification. While Grievant Petrucci questioned the need for a second Craftsworker in New Martinsville, leaving none in Hundred, those in charge of reassigning personnel felt that a second Craftsworker was needed in New Martinsville, apparently one Craftsworker for each crew. It is understandable that Grievant Petrucci would question the logic of leaving no Craftsworkers in Hundred, but based upon the information presented to the undersigned, it would appear that either one crew in New Martinsville or one crew in Hundred would be short a Craftsworker no matter who was reassigned. Two people had to be moved from Hundred, and one crew in New Martinsville needed a Craftsworker, which was Grievant Petrucci. Grievant Petrucci's reassignment was made based upon the needs of DOH.

As to Grievant Petrucci's claim that he should be paid from the time he leaves Hundred until he returns to Hundred, as are employees who are assigned to the Hundred Sub-station, but are sent to New Martinsville to work for the day, Grievant Petrucci is not similarly situated to these employees. Grievant Petrucci's assigned work location is New Martinsville. The employees to whom he compares himself are assigned to Hundred. If any of the employees assigned to Hundred chose to live in New Martinsville and drove to Hundred every day, those employees would not be paid for the time they spent traveling either. Grievant Petrucci has chosen to continue to reside in Hundred. DOH is not obligated to pay him for the time it takes him to travel to work. Fortunately for Grievant Petrucci, he is able to catch a ride from Hundred to New Martinsville and back each day with a co-worker in a state owned vehicle, so he does not incur the expense of gasoline, or wear and tear on his own vehicle.

> As to compensation for travel time, 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:
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> "[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."
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> 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).
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> 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. *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).

Coulter v. Dep't of Transp., Docket No. 06-DOH-356 (Aug. 8, 2007). Grievant Petrucci's travel from Hundred to New Martinsville and back is simply travel to and from work, for which employees are not compensated. As a general rule, Hundred is the job site for employees assigned to the Hundred Sub-station, not New Martinsville. When employees assigned to Hundred are sent to New Martinsville to work for the day, their travel from Hundred to New Martinsville would generally fall within the exception to the general rule discussed above.

Grievant Mercer asserted that he was reassigned solely because he had had disagreements with management. Grievant Mercer is no longer employed by DOH. The only issue which the undersigned need address with regard to his grievance is whether he is entitled to be paid for the time he spent traveling from his home in Hundred to New Martinsville and back. Grievant Mercer was also able to make this trip in a state owned vehicle each day. The undersigned must conclude that regardless of the motive for Grievant Mercer's reassignment, his work location each day was New Martinsville. DOH was not required to pay him for his travel time.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. In order to establish a favoritism claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. "The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n,* 155 W. Va. 69, 75, 181 S.E.2d 22 (1971)." *Jordan v. Dep't of Transp.*, Docket No. 03-DOH-057 (Sept. 15, 2003).

4. Grievant Petrucci did not demonstrate favoritism in his reassignment, or that his reassignment was otherwise improper.

5. "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)." *Coulter v. Dep't of Transp.*, Docket No. 06-DOH-356 (Aug. 8, 2007).

6. "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)." *Coulter, supra*.

7. Grievants have not established that they are entitled to compensation for time spent driving to and from their assigned work site at the beginning and end of their workday. *Coulter, supra*.

8. Grievant Petrucci is not similarly situated to employees who are assigned to the Hundred Sub-station, but work in New Martinsville for the day. Further, the differences in treatment are based upon the employees' respective assignments. *See Coulter, supra*.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 29, 2009