THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHAD HEATH ARBOGAST,
Grievant,

v. **Docket No. 2009-0287-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Chad Arbogast filed this grievance against his employer, Respondent Division of Highways ("DOH"), on August 29, 2008. His Statement of Grievance indicates that DOH "failed to properly compensate the grievant for time spent by the grievant in the employ of WVDOH. This is a violation of CFR 29 (The Fair Labor Standards Act)." His request for relief is for "1) Funds due the grievant be paid immediately (9764.75) 2) An amount, equal to that illegally withheld, be paid to the grievant as liquidated damages, 3)The WVDOH shall come into compliance with the FLSA immediately 4) The WVDOH pay and all legal fees associated with this grievance."[1]

This grievance was denied at level one following a conference conducted on September 19, 2008. Level two mediation was conducted on February 24, 2009. The level three hearing was conducted before the undersigned Administrative Law Judge on

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[1] The Grievance Board does not award punitive or tort-like damages. *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006). In addition, it is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). W. VA. CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense."

June 25, 2009, at the Grievance Board's Westover office. Grievant represented himself and Respondent DOH appeared by its counsel, Barbara L. Baxter, Esquire. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on August 10, 2009.

Synopsis

Grievant seeks payment for the time he was required to travel from his job site to the DOH District office in order to enter data through a computer program and have his work checked by his supervisor. Grievant indicated that had he been able to access an internet connection and enter the contractor documentation at the job site that would have been done at the job site because this was an integral part of his supervisory activities on that project. DOH counters that this activity was not required of his job, was incidental to his work, occurred after his work activity had ceased and he was traveling from work to his home. The record established that the travel time of Grievant in this case was an integral and indispensable part of his assignment as supervisor on that project and should have been compensated.

The following Findings of Fact are based on the record developed at level three:

Findings of Facts

1. Grievant is a level four Transportation Engineering Technician employed by DOH since March of 2002. Grievant was assigned to supervise for DOH the work of contractors on the Parsons' bridge construction project.

2. DOH mandates that, on state and federally funded projects, detailed daily records be maintained to document work type and work quantity, performed by the contractors, in order to facilitate proper payment for the percentage of work performed.

3. DOH requires that this contractor work documentation be entered into a PRS system in a timely manner, in most instances within a twenty-four-hour period. Preparing and entering these documents into the PRS system was an integral aspect of Grievant's employment while on the Parsons' bridge project.[2]

4. No internet connection was available to the PRS system at the work site, therefore Grievant had no means of entering the required work site documentation into the system.[3]

5. Prior to entering the contractor documentation on the PRS system, Grievant was required to submit for review to his supervisor the percentage of work performed for a secondary check. Daily contractor documentation from Grievant's site project was delivered to the DOH District 8 office for review by Grievant's supervisor, prior to the information being entered into the PRS system at the district office location.

6. Grievant transported daily contractor documentation between the DOH District 8 office and the project field office from January 2007 to August 2008. Grievant

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[2]The record of the matter did not indicate for what "PRS" stood, but entry into this computer system is necessary for authorization for final payment to contractors.

[3]Parsons is the county seat of Tucker County, West Virginia. The Cheat River is formed at Parsons by the confluence of the Shavers Fork and the Black Fork. A beautiful spot, especially for the outdoors type, not so much for the wireless internet dependent type.

was not compensated for the time spent transporting the contractor work verification between the DOH District 8 office and the project field office.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

The facts are not in dispute in this grievance. Grievant claims he is entitled to compensation for 41.5 hours of compensatory time he accrued for the time he worked between January 2007 and August 2008, along with payment for the additional 324 hours of overtime he worked between the same time period. Grievant's primary argument centers around the Fair Labor Standards Act in making the assertion that the documentation for the Parsons' bridge project had to be transported to DOH's Elkins office to be entered through the internet into the PRS system thereby making it compensable

work time. DOH counters that Grievant has failed to provide sufficient proof to support his claim that he should be paid for travel time from his work site to the District office. This activity was not required of his job, was incidental to his work and occurred after his work activity had ceased and he was traveling from work to his home.

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 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).

The unique circumstances of this case demonstrate that it was necessary for Grievant to transport contractor verification documents to a location that provided internet access in order to enter the information into the PRS system. In addition, Grievant also took the opportunity to have his supervisor make the necessary secondary check of this information gathered by Grievant.

DOH does not dispute that it was necessary for Grievant to enter this contractor documentation into the PRS system; however, they attempt to characterize this activity as traveling from his work site to his pooling location and voluntarily stopping to drop off and pick up mail on his way home. DOH asserts this was done by Grievant in the hope that this would change his home commute from non-compensable time to compensable time. DOH generally claimed in its post-hearing submissions 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. Judge Spatafore recognized that an employee who 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. However, she also pointed out that there are exceptions to the general rule that an employee is not to be compensated for travel to and from work.

It was necessary for Grievant to obtain an internet connection in order to enter the documentation on the PRS system as part of the ordinary course of that assignment. Again, DOH does not dispute this in the record of this grievance. Instead, DOH argues that a mail person who drives to various work locations in the District could have picked up the material and transported it. The record reflects that this was not done, and DOH continued to allow Grievant to transport the documentation, enter into the PRS system, and have the work scrutinized by Grievant's supervisor at the District 8 office. It is undisputed that all of these activities were part of Grievant's assignment as supervisor at the project site.

Jeff Black, Human Resources Director for DOH, acknowledged that in the event Grievant had to go to the District office at the end of the day with the contractor documents and "enter that information and work with it, that would definitely be work time and that would then encompass the travel [time]." Level three testimony. This unique circumstance is analogous to a situation where an employee is required to report to a location where he or she receives instructions before traveling to the work site. In fact, Grievant indicated that had he been able to access an internet connection and enter the contractor documentation at the job site, that would have been done at the job site. Accordingly, the travel time of Grievant in this case was an integral and indispensable part of his supervisory activities on that project and should have been compensated.

The following Conclusions of Law support the Decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. 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).

4. The FLSA provides that when an 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.

5. Grievant has proven by a preponderance of the evidence that his travel time in this case was an integral and indispensable part of his supervisory activities on that project and should be compensated.

Accordingly, this grievance is **Granted**.

Respondent is **ORDERED** to compensate Grievant for his work time spent transporting the contractor documentation and entering it in the PRS system since that activity was an integral part of Grievant's assignment as supervisor at the project site. The undersigned is reluctant to order a specific number of hours for compensation since insufficient evidence was offered relating to payroll records and compensable time Grievant has claimed; however, the record does reflect that Grievant maintained a record of his time

on the project. Accordingly, Respondent is **ORDERED** to apply Grievant's reported hours to this Decision.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: September 30, 2009

Ronald L. Reece
Administrative Law Judge