THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RICHARD SCOTT,
Grievant,

v. **Docket No. 2009-0833-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Richard Scott, filed this grievance against his employer, Division of Highways (DOH), alleging that he was not paid for time spent as a representative in a grievance, and seeks back pay with interest. This grievance was denied at level one by letter authored by Respondent's designee dated February 2, 2009. A level two mediation session was convened on September 21, 2009. Appeal to level three was perfected on September 23, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on May 18, 2010 at the Grievance Board's Elkins office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. DOH appeared by its attorney, Barbara Baxter, Legal Division. This matter became mature for consideration upon the cut off date of August 30, 2010, for the submission of proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as a telecommunications operator at the DOH's District 8 headquarters in Elkins, West Virginia. Grievant asserts that he should have been paid for four hours of time spent preparing and participating as a grievant representative. Grievant failed to demonstrate that the decision to not pay him for participating as a grievant

representative at a level one hearing outside of his work schedule was unlawful or clearly wrong. Accordingly, this grievance is denied.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed as a telecommunications operator with DOH for nearly 24 years at District 8 headquarters in Elkins, West Virginia.

2. Grievant's duties include answering the telephone, operating the radio and handling communication with county maintenance personnel and the central office during the snow removal and ice control season.

3. For the week of November 17, 2008, through November 21, 2008, Grievant's work schedule was modified in preparation for predicted snow in District 8 counties. Grievant worked his normal 40 hours for that time period, and a certain amount of overall time for which he is paid time and a half.

4. Grievant represented John Robert Vance in Mr. Vance's level one hearing on Thursday, November 20, 2008, at 10:00 a.m.

5. The notice for Mr. Vance's level one hearing was dated and mailed on October 20, 2008. Grievant did not request that the hearing be rescheduled to a date and time which fell within his work schedule.

6. For November 20, 2008, Grievant submitted 16 hours time, which included eight regular hours, four overtime hours, and four hours for preparation and participation at the level one grievance hearing.

7. Grievant's supervisor, L. Shelton Barger, Jr., District 8 Maintenance Engineer, did not approve payment for Grievant's four hours claimed for participation as a representative in the level one hearing.

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 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). "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).

Respondent argues that Grievant is not entitled to be compensated for participation as a representative in a prior grievance because the level one hearing was conducted outside of Grievant's scheduled work hours, and Grievant had worked his forty-hour week. Grievant argues that it is unfair for the Respondent to compensate all employee witnesses that it calls for a proceeding that it schedules and refuse the same accommodation to employees participating on behalf of grievants. A similar argument was put forth to the undersigned by Mr. Simmons in the grievance styled *Thornquest v. Dep't of Health and Human Res./Pinecrest Hospital*, Docket No. 2009-1070-DHHR (Aug. 24, 2010). While the undersigned has now seen two variations of Mr. Simmons' argument and recognizes this

treatment is basically unfair, his argument has no statutory support. This is the current posture of the law and the undersigned is bound to follow the clear language of the governing statute.

WEST VIRGINIA CODE § 6C-2-3(o) states, in pertinent part, that "all proceedings shall be scheduled during regular work hours in a convenient location accessible to all parties." Additionally, WEST VIRGINIA CODE § 6C-2-3(p)(1) provides that "the grievant, witnesses, and an employee representative shall be granted reasonable and necessary time off during the working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits."

The record establishes that the level one conference was originally scheduled for a time within Grievant's normal work schedule but Grievant's work schedule was changed to a night shift to provide for extended radio coverage in preparation for predicted snow events for the week. Grievant did not request that the level one conference be rescheduled for a time during his work schedule. The proceeding was scheduled by Respondent's level one designee during regular business hours. In addition, Grievant suffered no loss of pay to attend this hearing, and that is the clear intent of the applicable statute. Within the context of this case, that means that Grievant's participation in the level one hearing as a representative occurred, and appropriately so, on his personal time.

In his proposals, Grievant argues for the first time that he has established a *prima facie* case of discrimination. Regarding this argument, the record was not developed regarding any similarity of Grievant's responsibility as a representative with those of employees requested to testify as a witness for Respondent employers. Indeed, each scenario presents a distinct set of circumstances which would need to be developed in the

record. In any event, Respondent was not given notice of this allegation and had no opportunity to respond. The proposals raise an entirely new claim that has scant evidentiary support; the argument need not be further addressed.

The Grievance Board has long recognized that in the event "grievance hearings are held during the employee's work time it shall not result in any reduction of salary, wages, rate of pay or other benefits and shall be counted as time worked." *Burdette v. WVU*, Docket No. BOR-88-196 (May 10, 1989). Grievant failed to demonstrate that the decision to not pay him for participating as a grievant representative at a level one hearing outside of his work schedule was unlawful or clearly wrong.

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 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. The Grievance Board has long recognized that in the event "grievance hearings are held during the employee's work time it shall not result in any reduction of salary, wages, rate of pay or other benefits and shall be counted as time worked." *Burdette v. WVU*, Docket No. BOR-88-196 (May 10, 1989).

3. Grievant failed to demonstrate that the decision to not pay him for participating as a grievant representative at a level one hearing outside of his work schedule was unlawful or clearly wrong.

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 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: October 27, 2010

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Ronald L. Reece
Administrative Law Judge