THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

EDWARD J. PEDDICORD,
Grievant,

v. **DOCKET NO. 2010-0354-DOC**

MINERS' HEALTH, SAFETY AND TRAINING,
Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Edward J. Peddicord, on September 21, 2009, against his employer, Respondent, West Virginia Office of Miners' Health, Safety and Training. The statement of grievance is quite lengthy, but basically asserted that a Memorandum from Alan Lander, Inspector-at-Large, dated September 4, 2009, regarding work hours and pay for commuting time should not apply to him. As relief Grievant sought:

> Work time should begin from the time that I enter the State's vehicle in the morning and should end when I exit the State's vehicle for the last time in the evening, as it does with all Inspectors. This should be the case no matter where I travel to, as it is with all Inspectors.

A conference was held at level one on October 1, 2009, and the grievance was denied at level one on October 7, 2009. Grievant appealed to level two on October 14, 2009. A mediation was held on November 10, 2009. Grievant appealed to level three on January 4, 2010, alleging a default had occurred at level two when the Grievance Board did not issue an Order within 30 days of the mediation session. The request for default was denied on February 4, 2010. A level three hearing was held before the undersigned

Administrative Law Judge on March 4, 2010, in the Grievance Board's Westover office. Grievant appeared *pro se,* and Respondent was represented by Elaine L. Skorich, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on April 5, 2010.

Synopsis

Grievant works in the field four days a week, and is compensated for the time he spends traveling from his home to the mine sites where he conducts testing, and back. Grievant contends that he should also be compensated for the time he spends traveling to and from the office one day a week. Respondent's Policy and Procedures Manual states that a central office is the primary work location for employees other than certain inspectors, and that employees whose primary work location is the central office are not compensated for travel to and from the office. The undersigned has no authority to change this policy.

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

Findings of Fact

1. Grievant has been employed by the West Virginia Office of Miners' Health, Safety and Training ("MHST"), in Region One, as a Safety Inspector for 16 years.

2. Grievant is also an apparatus wearing member of the Mine Rescue Team, and is on call 24 hours a day, seven days a week to respond to mine accidents. He receives extra compensation for this work, and he is not required as part of his job as a Safety Inspector to be an apparatus wearing member of the Mine Rescue Team.

3. Grievant has been assigned a state owned vehicle to use, and he is allowed to drive it home at night. Grievant lives in Kingwood, West Virginia, and the MHST Region One office is in Westover, West Virginia.

4. Grievant's primary job duty is to conduct testing of mine employees after they have gone through training. Four days a week Grievant travels to mine sites throughout North Central West Virginia, covering 17 counties, to conduct testing. On occasion, Grievant will stop by the office on his way home to drop off materials. One day a week he conducts testing in the Westover MHST office. Grievant also approves comprehensive mine safety programs for every new mine, and updates these safety programs annually, he monitors the training of certified instructors, and he certifies people to be on Mine Rescue Teams.

5. For many years Grievant has been allowed to begin his work day at his home, and end his work day at his home, regardless of where he worked that day. That is, his 40 hour work week began when he got in the state owned vehicle at his home, and his work day ended when he returned home.

6. In May 2007, MHST adopted a Policy and Procedures Manual,[1] which covered a variety of personnel issues, including work hours and travel time. The Manual was reviewed and approved by the Division of Personnel, and found to be in compliance with the Fair Labor Standards Act.

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[1] The document introduced into the record is dated March 17, 2008, but Director Ron Wooten testified that this Policy was adopted in 2007, and that is also the year on the statement signed by Grievant acknowledging his receipt of the Policy. The record does not reflect why the date on the document in the record is 2008.

7. The new Policy and Procedures Manual addresses many employment topics, including when employees would be compensated for travel to and from their home, and states that "[p]ositions other than surface mine inspector, underground mine inspector and electrical inspectors have a central office location that is established as their primary work locations. . . . Routine commute from home to the central office and from the central office to home shall not be compensated work time, regardless of whether they drive State vehicles from their home. . .." Grievant did not change the way he reported his travel time after adoption of this Manual.

8. Sometime in 2009, MHST supervisory personnel discovered that Region One was not complying with the provisions of the Policy and Procedures Manual. A Memorandum was issued by Alan Lander, Inspector-at-Large, on September 4, 2009, noting this fact, and requiring full compliance with the Policy and Procedures Manual immediately. The Memorandum noted that Safety Instructors are to report to the office each day, and "cannot charge travel time to and from their homes."

9. Grievant is still allowed to count as work time the time he spends driving from his home to mine sites to conduct testing, and the time he spends driving from the mine site to his home, or from the mine site to the office and then home. Grievant is no longer allowed to count as work time the time he spends driving from his home to the Westover office, and from the Westover office home on the one day a week he works in the 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 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).

Grievant has been assigned a state owned vehicle, which he is allowed to take home everyday. When Grievant leaves his home in Kingwood in the morning he reports to a site to conduct testing on most days, and his work day begins when he gets in the car at his home. However, one day per week he must report to the MHST office in Westover, as most other state employees do on a daily basis.[2] On this one day a week, his work day starts when he reaches the office, rather than when he gets in the state owned vehicle. Grievant believes he should get to count the time he spends in the car driving to the office as time spent working. He asserts that the Policy and Procedures Manual does not address his position, the Westover office is not his primary work location, and that because he is on call 24 hours a day, he should be allowed to count all travel time as work time. He also argued that there are inspectors who go into the office more than he does and who get to include their travel time to and from the office toward their work hours, and that not all inspectors are addressed in the Policy and Procedures Manual. Respondent pointed

[2] The undersigned will take administrative notice that it is approximately 29 miles from Kingwood to Westover, and that the trip would consist almost entirely of travel on a winding, two-lane road. It would likely take Grievant well over 30 minutes to travel this distance.

out that the undersigned has no authority to change MHST's Policies, and that Federal law does not require that Grievant be compensated for traveling to and from the office.

MHST's Policy and Procedures Manual states as follows:

II. Establishment of primary work location

A. All inspectors, mine rescue team members and certain administrative staff in Charleston shall be on unrestricted call twenty-four hour/day. These individuals drive State vehicles which are kept at their home premises. Unrestricted call shall not be considered hours worked. The primary work location for surface mine inspectors, underground mine inspectors and electrical inspectors shall be their individual home since they leave from their home to travel to various mine sites and they return to their home, rather than a central office location. Therefore, travel from their home to mine sites and travel from mine sites to their home shall be work time. These individuals shall be paid for such travel time, less any additional meal period taken above the two and one-half hours per week which shall be a paid interruptible meal period (see section I above.)

B. Positions other than surface mine inspector, underground mine inspector and electrical inspectors have a central office location that is established as their primary work location. It is to this office that they report each day of the workweek. Routine commute from home to the central office and from the central office to home shall not be compensated work time, regardless of whether they drive State vehicles from their home for the purpose listed in the preceding paragraph. These individuals shall be paid for hours worked in the office, less any additional meal period taken above the two and one-half hours per week, which shall be a paid interruptible meal period (see section I above). However, when an individual, who has a central office location, travels from their home to a mine site or location other than the central office on official business of the State, or leaves from a mine site or location other than the central office where they are conducting official business of the State to travel home, in such instance travel time between home and the location shall be considered work time. Employees who work in a central office and drive State vehicles to their home residence must complete a commuting values worksheet quarterly and submit it to the payroll office.

"'An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).' *Finver v. W. Va. Bd. of Trustees*, Docket No. 97-BOT-271 (Oct. 15, 1997). An agency's 'interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable.' *Dyer, et al., v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996) (citations omitted)." *Frame, et al., v. Dep't of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

The quoted provision of the cited Policy and Procedures Manual requires little to no interpretation, and MHST's interpretation of its own Manual is entitled to deference. The Manual clearly states that for all employees other than certain inspectors, the primary work location is the central office, so that when they are traveling to and from the office, they cannot count this as work time. Grievant is not an inspector. While Grievant has not been required to report to the office everyday as the Manual seems to envision, there is nothing in the Manual which would change his primary work location, and MHST has not done so. Grievant's primary work location, as designated in the Manual, is the Westover office, and when he reports to the Westover office, the Manual does not allow him to count his travel time as work hours.[3]

Grievant does not believe he is being treated fairly by this procedure, and presented evidence in support of his belief that his home should be his primary work location. The undersigned, however, cannot change Respondent's policies. "The undersigned has no

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[3] As Grievant did not allege a violation of the Fair Labor Standards Act, it is unnecessary to address the applicability of this Act.

authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.

Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

Frame, supra.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. 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. "'An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).' *Finver v. W. Va. Bd. of Trustees*, Docket No. 97-BOT-271 (Oct. 15, 1997).

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3. "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

4. Grievant has not established that he is entitled to compensation for time spent driving to and from his office at the beginning and end of his workday.

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).

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BRENDA L. GOULD
Administrative Law Judge

Date: August 3, 2010