THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOE LEE TALLMAN,
Grievant,

v. **DOCKET NO. 2010-0591-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Two grievances were filed at level one of the grievance procedure by Grievant, Joe Lee Tallman, on October 8, 2009, against his employer, Respondent, Division of Highways. Both grievances contested Grievant's temporary reassignment to the Kanawha Head Sub-station in Upshur County, West Virginia. One of the grievances asserted a claim of discrimination, and the other a claim of retaliation for Grievant's comments during a meeting. The relief sought by Grievant in both grievances was to be "[r]eturned to job TCSI at Upshur Co headquarters, with reimbursement for cost of traveling to sub-station to work - to be made whole." As Grievant has already been returned to his assignment at the Buckhannon maintenance garage, he is now seeking to be paid for his mileage and the time he spent traveling to and from his temporary reassignment.

The grievances were consolidated at level one, and a conference was held at that level on November 10, 2009. A level one decision denying the grievance was issued on December 2, 2009. Grievant appealed to level two on December 12, 2009. A mediation was held on March 30, 2010. Grievant appealed to level three on April 6, 2010. A level three hearing was held before the undersigned Administrative Law Judge on November

18, 2010, in Elkins, West Virginia. Grievant appeared *pro se,* and Respondent was represented by Robert Miller, Esquire, Legal Division. This matter became mature for decision on January 10, 2011, the deadline for submission of written proposals. Grievant declined the opportunity to file written argument.

Synopsis

Grievant was temporarily reassigned from the Buckhannon maintenance garage to the Kanawha Head Sub-station in Upshur County for a period of approximately 11 months. As this was his assigned work site, Respondent was not required to pay him for his travel time or mileage.

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

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Transportation Crew Supervisor I, at the Buckhannon maintenance garage in Upshur County, West Virginia. He has been employed by DOH for 24 years.

2. Grievant was temporarily reassigned by DOH to the Kanawha Head Sub-station, also in Upshur County, from October 5, 2009, through September 10, 2010. The Kanawha Head Sub-station is 17.4 miles southeast of the Buckhannon maintenance garage. The round trip travel time between these two points is about one hour.

3. When Grievant reported to the Kanawha-Head Sub-station from his house, he traveled 26.76 miles one way. When Grievant reports to work at the Buckhannon maintenance garage, he travels 13.04 miles one way. The mileage added to Grievant's

daily commute when he was reporting to the Kanawha Head Sub-station was 13.04 miles one way, or 26.08 miles round trip.

4. During the period of reassignment, Grievant was not reimbursed for his travel from Buckhannon to the Kanawha Head Sub-station, nor was he paid for the one hour a day travel time. However, from November 15, 2009, through March 31, 2010, Grievant was assigned a state-owned vehicle which he was allowed to use to commute from home to work and back.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

Although Grievant is no longer assigned to the Kanawha Head Sub-station, he continued at the level three hearing to pursue his claim that he was treated unfairly by being reassigned to the Kanawha Head Sub-station. The grievance procedure is not in place to afford to employees declarations that an action was wrong when no relief can be granted.

> When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket

> No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008). In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't. of Trans./Div. of Highways,* Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). "[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what

"constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). "The Grievance Board has also held, 'a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.' *Emrick, supra*." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008). Grievant has failed to state a claim for which relief can be granted with regard to his complaint that he was treated unfairly when he was reassigned to the Kanawha Head Sub-station, and that part of this grievance will not be addressed.

Grievant's contention that he should be paid for the one hour he spent traveling to his temporary work location, and mileage during the period of time he was required to use his own vehicle to travel to this location, however, does state a claim for which relief could be granted, were he entitled to such payment. The undersigned concludes, however, that DOH is not obligated to pay Grievant for the time it took him to travel to work, or mileage.

> 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."

> 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). During the period of his temporary reassignment, Grievant's work site was the Kanawha Head Sub-station. His travel from his home to the Kanawha Head Sub-station and back is simply travel to and from work, for which employees are not required to be compensated.

Likewise, it has been determined by the Grievance Board on many occasions that an agency is not required to reimburse an employee for his mileage to and from his work site. "As explained in *Frame v. Department of Health and Human Resources,* Docket Nos. 00-HHR-240/330 (April 20, 2001), the State Travel Rules follow the Internal Revenue Service requirements, in that an employee who receives compensation for his normal daily commute is deemed to be receiving taxable income. Therefore, by excluding daily commuting mileage from travel reimbursement for employees, reporting and tax

requirements imposed upon both the state and the employee can be avoided." *Starr v. Div. of Corrections*, Docket No. 05-CORR-201 (Nov. 4, 2005). "Mileage to and from work is a normal incident of employment, and is not subject to reimbursement as travel expenses. *See Frame v. Dep't of Health & Human Resources*, Docket No. 00-HHR-240/330 (Apr. 20, 2001); *Gwinn v. Dep't of Health & Human Resources,* Docket No. 00-HHR-064 (May 22, 2000)." *Swinler/Taylor v. Dep't of Tax and Revenue*, Docket No. 04-T&R-052 (June 24, 2004). "Compensable travel using a personal vehicle under the state travel rules does not include normal daily commuting mileage, which is travel between the employee's normal workplace and her home. *See* § 4.2.6.1 of the State Travel Rules. *See also Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001); *Gwinn v. Dep't of Health and Human Res.*, Docket No. 00-HHR-64 (May 22, 2000); *Parker v. Div. of Corrections*, Docket No. 96-CORR-28 (Dec. 2, 1996*)." Stover v. Div. of Corrections*, Docket No. 04-CORR-259 (Sept. 24, 2004). "Simply put, 'an agency is not required to compensate employees for commuting to and from their place of employment.' *Stover, supra. See also Frame, supra; Gwinn v. Dep't of Health and Human Res.*, Docket No. 00-HHR-64 (May 22, 2000); *Parker v. Div. of Corrections*, Docket No. 96-CORR-28 (Dec. 2, 1996)." *Starr, supra.*

In this case neither party referenced the state travel rules discussed in the cases cited above. However, the burden of proof was on the Grievant to demonstrate that he was entitled to be reimbursed for his mileage to and from his temporary work site. Grievant produced no law, rule, regulation, or policy stating that he was entitled to such reimbursement. Rather, Grievant simply argued he had effectively taken a pay cut because of the additional travel costs he incurred with the reassignment, and he should

therefore be paid mileage. The undersigned is unaware of any such requirement. Grievant has not met his burden of proof.

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. "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).

3. Grievant has not established that he is entitled to compensation for time spent driving to and from his assigned work site at the beginning and end of his workday. *Coulter, supra*.

4. "Mileage to and from work is a normal incident of employment, and is not subject to reimbursement as travel expenses. *See Frame v. Dep't of Health & Human Resources*, Docket No. 00-HHR-240/330 (Apr. 20, 2001); *Gwinn v. Dep't of Health & Human Resources,* Docket No. 00-HHR-064 (May 22, 2000)." *Swinler/Taylor v. Dep't of Tax and Revenue*, Docket No. 04-T&R-052 (June 24, 2004). "Simply put, 'an agency is not required to compensate employees for commuting to and from their place of employment.' *Stover [v. Div. of Corrections*, Docket No. 04-CORR-259 (Sept. 24, 2004)].

See also Frame, supra; Gwinn v. Dep't of Health and Human Res., Docket No. 00-HHR-64 (May 22, 2000); *Parker v. Div. of Corrections*, Docket No. 96-CORR-28 (Dec. 2, 1996)." *Starr v. Div. of Corrections*, Docket No. 05-CORR-201 (Nov. 4, 2005).

5. Grievant did not demonstrate that he is entitled to compensation for his mileage for travel to and from his temporary work site.

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).

Date: May 27, 2011

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BRENDA L. GOULD
Administrative Law Judge