

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MICHAEL MONEYPENNY, et al.,
Grievants,**

v.

Docket No. 2016-1029-CONS

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievants, Michael Money Penny, Marty Lipscomb, Ronald Bishop, Ralph Decker and Lori Keslar, are employed by West Virginia University in the Facilities Management Department. Grievants filed this action on December 14, 2015, in which they assert they should be compensated for attending a Level One Conference on October 23, 2015, in another grievance. Grievants seek back pay, with interest, and all other benefits to which they are entitled.

This case was denied at Level One following a conference conducted on March 9, 2016, by Chief Grievance Administrator Sue Keller. A Level Two mediation session was conducted on July 15, 2016. Grievants appealed to Level Three on July 26, 2017. A Level Three evidentiary hearing was noticed to occur before the undersigned on January 19, 2017, at the Grievance Board's Westover office. No Grievant was in attendance; however, they were represented by Ben Barkey and Thomas Bane of the West Virginia Education Association. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. The parties informed the undersigned at the hearing that the matter could be submitted on stipulations and fact/law proposals. This case became mature for

consideration upon receipt of the last of the parties' stipulations and fact/law proposals on February 22, 2017.

Synopsis

Grievants, along with fifteen additional co-workers, attended a Level One conference in another case, with the knowledge and consent of their representative. This conference was not conducted during their scheduled work day. Grievants were not compensated by West Virginia University for the time they were in attendance at the conference. Grievants allege the failure to compensate them is a statutory violation and results in discrimination. The Grievance Board has consistently held that time spent by an employee participating in a grievance proceeding scheduled outside the employee's normal work schedule is not compensable time. Because Grievants were not scheduled to work at the time the conference was held they are not similarly situated to the remaining Grievants and have not established that West Virginia University engaged in discrimination.

The following Findings of Fact are based on the parties' stipulations.

Findings of Fact

1. Grievants are employed by West Virginia University in the Facilities Management Department. Grievants allege that they were the victims of discrimination when they did not receive compensation for attending a Level One Conference during a time when they were not scheduled to work.

2. Grievants are part of another grievance docketed as *Glen Blon, et al. v. West Virginia University*, Docket No. 2015-0471-CONS, in which they allege a number of claims relating to evaluations and compensation.

3. Grievants work the night shift, the other Grievants in *Blon, et al.*, work the day shift. Grievants in the instant case agreed to conduct the *Blon, et al.*, Level One conference at 9:00 a.m. on October 23, 2015. Prior to the scheduled conference on October 23, 2015, Grievants did not request any type of flex scheduling.

4. Grievants work the night shift and request to be paid, in addition to being paid for their regular work hours, for their attendance at the October 23rd conference. Grievants did not lose any work time and did not use any leave.

5. Grievants whose work shift coincided with the 9:00 a.m. conference were compensated for attending the conference.

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 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).

Grievants, along with fifteen additional co-workers, filed a Level One grievance in which they allege a number of claims relating to evaluations and compensation. A Level One Conference was scheduled, with the agreement of Grievants' representative in *Blon, et al.* for 9:00 a.m. on October 23, 2015. Grievants attended the conference which was not conducted during their scheduled work day. Grievants were not compensated by Respondent for the time they were in attendance at the conference.

Grievants allege the failure to compensate them is a violation of WEST VIRGINIA CODE § 6C-2-3(o) and results in discrimination.¹ The Grievance Board has consistently held that both Grievants and Respondents bear some responsibility for involvement in scheduling which may appropriately require employee participation on their personal time. In such instance, the time spent by an employee participating in a grievance proceeding scheduled outside the employee's normal work schedule is not compensable time. *Thornquest v. Dep't of Health and Human Res./Pinecrest Hospital*, Docket No. 2009-1070-DHHR (Aug. 24, 2010); *Frame v. Dep't of Health and Human Res.*, Docket No. 2011-0877-DHHR (Feb. 29, 2012); *Wilt v. Dep't of Health and Human Res.*, Docket No. 2012-0278-DHHR (Nov. 19, 2013).

Due to the number of employees involved in the grievance and the fact that they work various shifts, it appears it was not possible to schedule a conference when they were

¹WEST VIRGINIA CODE § 6C-2-3(o) provides:

All proceedings shall be scheduled during regular work hours in a convenient location accessible to all parties in accommodation to the parties' normal operations and work schedules. By agreement of the parties, a proceeding may be scheduled at any time or any place. Disagreements shall be decided by the administrative law judge.

all at work. In addition, it is undisputed that Grievants' representative agreed to the time of the conference supporting a finding that no violation of WEST VIRGINIA CODE § 6C-2-3(o) occurred.

Grievants' discrimination claim arises from the fact that some employees were paid for their attendance at the conference while they did not receive compensation for the same time period. For the purpose of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. CODE § 6C-2-2(d). In order to establish a discrimination or 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).

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 reflects that Grievants who attended the conference during their regularly scheduled work hours received their regular compensation pursuant to statute. Accordingly, it follows that because Grievants were not

scheduled to work at the time of the conference they were not similarly situated to the other Grievants and did not establish that West Virginia University engaged in discrimination.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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 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. If a grievance conference or hearing is scheduled outside an employee's normal scheduled work hours, time spent by the employee participating in the grievance conference or hearing is not compensable work time. *Thornquest v. Dep't of Health and Human Res./Pinecrest Hospital*, Docket No. 2009-1070-DHHR (Aug. 24, 2010); *Frame v. Dep't of Health and Human Res.*, Docket No. 2011-0877-DHHR (Feb. 29, 2012); *Wilt v. Dep't of Health and Human Res.*, Docket No. 2012-0278-DHHR (Nov. 19, 2013).

3. In order to establish a discrimination or 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).

4. Grievants have not established their claim of discrimination or that they are otherwise entitled to compensation for time spent attending the October 23, 2015, conference.

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 (eff. July 7, 2008).

Date: March 28, 2017

Ronald L. Reece
Administrative Law Judge