LAWRENCE MAYLE, et al.,

Grievants,

v. DOCKET NO. 95-BOT-581

BOARD OF TRUSTEES,
WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievants, Lawrence Mayle and Gilbert Moore, and David Walden, filed two separate grievances on November 29, 1995, and October 16, 1995, respectively, alleging that Respondent West Virginia University, Board of Trustees ("University"), violated University policy and applicable Federal and state laws when it enacted Policy and Procedure AD-47, "Meal Breaks", which provides that all employees receive a non- compensable 30-minute meal break during any shift of 6 hours or more.

Following adverse decisions at the lower levels, Grievants appealed to level four, where the two grievances were consolidated by Order dated January 30, 1996, by Administrative Law Judge Mary Beth Angotti-Hare. (See footnote 1) Hearing was held on March 19,1996, and this case became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or about April 22, 1996.

The material facts are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievants Mayle and Moore are employed at the West Virginia University Physical Plant as trades workers, and Grievant Walden is employed at the Physical Plant as a lead electrician.

2. Grievants are responsible for the maintenance and operation of various facilities within the University, including the Coliseum, the Natatorium, the Shell Building, and the Fire Training Center.

3. Prior to approximately October 1995, Grievants were compensated for their meal break taken during their respective shifts.

4. The University promulgated Policy and Procedure AD-47 on October 5, 1995, which provides that all Physical Plant employees be required to take a 30-minute or 60-minute meal break (in the Grievants' case, 30 minutes), and that the meal break be non-compensable, unless emergency conditions exist.

5. Grievants are now provided with a 30-minute, non-compensable meal break during their respective shifts, during which they are "on-call" to respond to any emergencies which may arise. They are required to carry a two-way radio to respond to such calls. 6. If Grievants were called out to respond to an emergency, and missed their meal break, they would be compensated for that 30 minute period.

7. Grievants are permitted to leave the work site during their meal break, but are required to leave their radios on so they can be contacted during emergencies.

8. Grievant Walden must remain on the premises when he is working overtime at a University function such as at the Coliseum, but he is permitted to leave his duty station to take his meal break.

Discussion

Grievants allege that the University, by not compensating them for their 30-minute meal break, has violated the terms of its own policy, as well as applicable Federal and state law. Respondent denies it has violated any policy, procedures, law or statute, and that, to the contrary, it enacted the Policy to be in compliance with the Federal Fair Labor Standards Act ("FLSA"), as well as applicable state law. (See footnote 2)

University Policy and Procedure AD-47 provides, in pertinent part:

> All Physical Plant non-exempt employees (eligible for overtime compensation) will be designated for routine meal breaks of 30 minutes or 60 minutes in duration. These meal breaks will be mandatory whenever employees are required to work any shift of six hours or more, including overtime assignments. Any variation of this policy must be approved in writing through the Director of Physical Plant.

. . .

Supervisor Will

Supervisor's may not authorize personnel to be compensated for working meal periods unless emergency conditions exist.

G Ex. 1.

Respondent enacted the above policy to comply with W. Va. Code § 21-3-10a, which provides:

> During the course of a workday of six or more hours, all employers shall make available for each of their employees, at least twenty minutes for meal breaks, at times reasonably designated by the employer. This provision shall be required in all situations where employees are not afforded necessary breaks and/or permitted to eat lunch while working. (1994, c.85).

Further, Respondent promulgated its Policy to ensure that its public employees were not receiving compensation for services not rendered, in conformance with W. Va. Code 12-3-13, which states:

> No money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered.

Respondent was concerned that under its previous practice of paying its Physical Plant employees for their meal breaks, it was violating the above statute by paying them for time not actually worked.

Finally, Respondent issued a clarification of the above Policy on February 5, 1996, outlining the circumstances under which time spent by an employee on a meal break is compensable or non-compensable. That memorandum defines "bona fide meal period" as follows:

> A bona fide meal period is a period set aside for a regular meal. It must be long enough to allow the employee to use it for this purpose. It mustoccur at a scheduled hour or within a specified period of time of day which, in light of the employee's working hours, is suitable for a normal meal period, and the employee must be completely relieved from duty. This time is not considered work time and it is not compensated by the University.

Jt. Ex. 1.

Grievants aver that these statutes do not support the action of the University in requiring its Physical Plant employees to take a 30-minute, non-compensable meal break. Grievants also point to the February 5, 1996, memorandum, to further support their contention that, since they are required to be on-call and carry radios during their meal break, they are not "completely relieved from duty" and, thus, should be compensated for their meal break.

There is no statutory provision in the West Virginia Code which deals with the issue of whether meal breaks should be included in the daily work hours calculation. W. Va. Code § 21-5C-1(h) (1996) defines "hours worked" as:

> the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday, time spent in walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform and activities which are preliminary to or postliminary to said principal activity or activities, subject to such exceptions as the commissioner may by rules and regulations define.

However, W. Va. CSR 42-8-9.8, provides that "bona fide meal periods are not work time." Section 42-8-9 also states that:

> 9.1. The workweek.-The workweek includes all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed work place.
>
> 9.2. Nonwork time.-Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own time are not hours worked.

Finally, § 9.10 defines "on-call time" as:

> (a) An employee who is required to remain on-call on the employer's premises, or so close thereto, or at his or her home so that he cannot use the time effectively for his own purposes is working while on-call.
>
> (b) An employee who is not required to remain on the employer's premises but is merely required to leave word at his or her home or with his employer where he may be reached is not working while on-call.

W. Va. Code §§ 21-5C-1, et seq. is closely modeled after the federal wage and hour statute. The Wage and Hour Division of the Department of Labor, at 29 C.F.R. 785.19(a)(1995), also provides that

"[b]ona fide meal periods are not worktime." Similarly, bona fide meal periods are defined under 29 C.F.R. 785.19 to require that:

> (a) [t]he employee must be completely relieved from duty for the purposes of eating regular meals . . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.
>
> (b) It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

The subject of meal periods has been the subject of a great deal of litigation under the FLSA, primarily on the very issue in the instant grievance: what constitutes a "bona fide" meal period, and when is it compensable or non-compensable.

Under the FLSA "employee freedom meal test", unless all of the following three conditions are met, meal periods must be counted as hours worked:

(1) The meal period generally must be at least 30 minutes, although a shorter period may qualify under special conditions.

(2) The employee must be completely relieved of all duties: for example, if the employee must sit at a desk and incidentally answer the telephone, the time would be compensable.

(3) The employee must be free to leave the duty post. There is no requirement, however, that the employee be allowed to leave the premises or work site.

Fair Labor Standards Handbook (Sept. 1995); G. Ex. 8.

With respect to the Grievants, numbers 1 and 3 have been met: Grievants' meal periods are 30-minutes long, and they are free to leave their duty posts, and are also free to leave the premises, as long as their radios are turned on. The only exception is when Grievant Walden is required to remain at his site during his meal period while working overtime functions at the University.

The issue remains, though, whether they are "completely relieved of their duties" during their meal periods as set forth in number 2.

Grievants aver that since they are on-call and have to keep their two-way radios on, they are not completely relieved of their duties, and in fact, have the duty to respond at any time. Respondent proposes that, under the "substantial duties" test developed in cases such as this, the Grievants' meal time is not compensable.

The "substantial duties" test establishes:

> As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA.

Hill v. United States, 751 F.2d 810 (6th Cir. 1984).

It is incumbent upon the Grievants, in a non-disciplinary matter, to prove the allegations in their complaint by a preponderance of the evidence. Thus, Grievants must prove by a preponderance of the evidence that they are performing substantial dutiespredominantly for the benefit of their employer during their meal breaks in order for those meal breaks to be found compensable.

A review of the caselaw in this area indicates that the question whether a meal break is compensable is to be decided on a case-by-case basis. Thus, if an employee is free to engage in personal activities while on-call and not required to stay on the employer's premises, the on-call time is not compensable. Berry v. County of Sonoma, 30 F.3d 1174 (9th Cir. 1994). Nor is on-call time compensable when the restrictions imposed by the employer were limited to wearing a pager, and being accessible through the pager at all times while on-call. Gilligan v. City of Emporia, KA, 976 F.2d 410 (10th Cir. 1993). Patrol officers were not entitled to compensation for meal periods when on- call and required to wear radios and respond to emergencies, because they could go anywhere and perform personal errands during the break. Henson v. Pulaski County Sheriff Dept., 6 F.3d 531 (8th Cir. 1993). The mere fact than an employer requires employees to leave word where they can be reached will not be sufficient to make on- call time compensable. Martin v. Ohio Turnpike Comm'n, 968 F.2d 606 (6th Cir. 1992), cert. denied, 113 S.Ct. 979 (1993).

Maintenance mechanics and instrument electricians were not entitled to overtime compensation for on-call time during which the employees were free to do anything and go anywhere they wanted as long as they remained within pager range, because the on- call time was spent "waiting to be engaged" rather than "engaged to wait." LaPorte v. General Elec., 838 F. Supp. 549 (M.D. Ala.

1993). Finally, in McCarty v. Harless, 384 S.E.2d 164 (W. Va. 1989), the West Virginia Supreme Court of Appeals found that county deputy sheriffs who were required to stay on site or at a particular location during their meal period were to be compensated for that time, but deputies who were on-call, but not required to remain on the employer's premises during their meal period, were not entitled to compensation. Id., at 172.

Grievants testified that they are required to be on-call and to keep their two-way radios on during their meal break. Grievants testified that they could be called out to respond to various types of emergencies, such as power outages, water leaks, fires, lockouts, and other such things. Grievants Mayle and Moore testified they usually take their meal break in the "break room" at the Coliseum, although they are permitted to leave the premises if they so choose, again, as long as they keep their radios on. Grievants acknowledged that they would probably be compensated if indeed they were required to respond to an emergency during their meal period, although it has not yet happened. Grievant Walden testified that he is required to remain on the employer's premises when he is working an overtime function, but may leave his duty post during his meal break.

It is apparent that Grievants are free to go anywhere and do anything they want during their meal break so long as they keep their two-way radios turned on, except for those instances when Grievant Walden is working an overtime function for the University and is required to remain on the premises.

Nevertheless, Grievants argue that the substantial duties test does not apply in this instance, because the University's policy and subsequent clarification state clearly thatthe employee must be "completely relieved of all duties" (emphasis added). Thus, Grievants argue, the University has adopted a standard more stringent than that currently imposed by the FLSA and supporting cases. However, it is clear that the University adopted its policy and clarification almost word for word from the FLSA rules and definitions, and clearly meant for that body of law to govern its Policy. The Federal definition of "on-call time" is identical to the West Virginia definition above, and therefore, the analysis of those provisions relies upon the same body of law. 29 C.F.R. § 785.17; see, McCarty, supra.

In light of the similarities between W. Va. Code §§ 21-5C-1, et seq. and the FLSA, and the West Virginia Supreme Court of Appeal's holding in McCarty, supra, the undersigned finds that only those employees who are required to stay on site or at a particular location during their meal period should be paid for that time. Hence, only Mr. Walden should be paid for his meal period during those times

he is working overtime at a University function and is required to remain on site. The other employees are free to leave the employer's premises during their meal period, as long as they keep their two-way radios on. This is the equivalent of merely letting their employer know where they are going to be. They are still free to pursue personal activities during their meal break if they so desire. Of course, if those employees were called for an emergency situation during their meal period, and they were not able to take a meal break that shift, they would be compensated in accordance with FLSA and University policy.

Conclusions of Law

1. It is incumbent upon Grievants to prove the allegations in their complaint by a preponderance of the evidence.

2. As long as an employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA. See Hill v. United States, 751 F.2d 810 (6th Cir. 1984); see also, McCarty v. Harless, 384 S.E.2d 164 (W. Va. 1989).

2. Grievants have failed to prove that they are engaged in the performance of substantial duties during their meal period, or that their time during their meal period is spent predominantly for the benefit of their employer.

3. Grievant Walden has proven that he is not free to engage in personal activities nor permitted to leave the employer's premises during meal periods while working overtime during a University function.

4. Grievants have failed to prove the University has adopted a policy more stringent than that currently imposed by the FLSA and applicable state law.

Accordingly, this grievance is **DENIED** insofar as it applies to the Grievants' meal break during their regular shifts. This grievance is **GRANTED** with regard to Grievant Walden's meal break while working overtime for the University. Wherefore, Respondent is hereby **ORDERED** to compensate Grievant Walden for any meal periods while he was working overtime for the University in an amount allowable by law.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 11, 1996

Footnote: 1

This case has been reassigned to the undersigned Administrative Law Judge for administrative reasons.

Footnote: 2

This Grievance Board has ruled that is has jurisdiction to hear cases involving Federal and state wage and hour claims. See Belcher v. W. Va. Dept. of Trans., Docket No. 94-DOH-341 (Apr. 27, 1995).