PAUL DOUGLAS, et al.

v. Docket No. 96-BOT-389

BOARD OF TRUSTEES, WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievants, eleven Trades Workers, filed a level one grievance on or about August 6, 1996, in which they alleged that West Virginia University (Respondent), had eliminated their paid lunch period, effective June 16, 1996, when it required them to keep their radio and pager on, and to answer and evaluate calls. They assert that this monitoring restricted their mobility, requiring them to stay within range of the pager and radio. Following denials at levels one and two, appeal was made to level four on September 11, 1996. (See footnote 1) An evidentiary hearing was conducted to supplement the lower level record on November 25, 1996. Both parties waived the opportunity to file proposed findings of fact and conclusions of law.

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

Findings of Fact

1. Grievants are eleven individuals employed as Trades Workers at West Virginia University, Department of Housing and Residence Life.

2. Grievants are responsible for the maintenance and operation of approximately twenty-five housing facilities (dormitories, apartment buildings) at West Virginia University.

3. By memorandum dated June 5, 1996, Jeff Miller, Assistant Director for Housing Facilities in the Department of Housing and Residence Life, notified John Lawson, MaintenanceManager, that effective June 16, 1996, all shift workers would be directed to take a thirty minute meal break during their eight hour assignment.

4. The June 5, 1996, memorandum stated that employees were allowed to leave their work station during their meal break but would be required to “remain on site with their radio on. That is, they are required to remain in radio contact with the dispatcher.” 5. Employees are expected to

answer any calls directed to them and to immediately respond to an emergency.

6. Workers called to an emergency during their meal break are compensated for that thirty minute period, subject to proper documentation recorded in the night log.

Grievants argue that because they must monitor the radio they are not provided a duty free lunch break, and request a totally free period of thirty minutes, or to be paid for the time, effective June 16, 1996. Grievants' undisputed testimony was that six departments use the same radio frequency, so they must listen constantly and closely to identify a code *93 for their messages. Because of this situation, they claim they cannot engage in many activities, such as watch television or ride on a motorcycle, during their break. Grievants also claim that their movement is restricted in that they are required to respond to emergencies within ten minutes. Although not included in the written complaint, at both level two and four Grievants additionally stated that their possession of the building keys restrained them from leaving the job site during their meal break. Testimony establishes that they are responsible for several pounds of keys which they are given when they report for work and for which they are responsible during their shifts. Grievant Carrie Dodson noted that other employees had been disciplined for losing keys, and that there was no practical place for them to be stored if she wanted to leave campus, and that she would not feel safe leaving them in any location accessible to others. They stated that for all intents and purposes, possession of the keys prohibits Grievants from enjoying a duty free lunch.

In support of their claim, Grievants cite a prior decision of the Grievance Board, Mayle v. Bd. of Trustees, West Virginia University, Docket No. 95-BOT-581 (July 11, 1996). This case involved a similar situation and issue in that three individuals, employed as Trades Workers assigned to the Physical Plant, alleged that Respondent had violated its own policy, and applicable Federal and state laws when it enacted Policy and Procedure AD-47, “Meal Breaks”, effective October 5, 1995. That Policy required all employees receive a non-compensable, thirty minute meal break during any shift of six hours or more. Grievants in Mayle were permitted to leave their work site during their meal break but were required to carry a two-way radio to respond to emergency calls.

The one exception was Grievant Walden who was allowed to leave his work site, but was required to remain on the premises when working an overtime function. Based upon a finding that Mr. Walden was not free to engage in personal activities nor permitted to leave the employer's premises during meal periods while working overtime, that portion of the grievance was granted and

Respondent was ordered to compensate him for that time. Grievants herein argue that, like Mr.Walden, they may not leave the premises during their meal break. Respondent also cites Mayle in support of its position, that Grievants are identically situated, and the grievance was denied for those employees whose complaint was based on the meal break during the regular work day. Because Grievants' claim mirrors that of grievant Mayle, Respondent must prevail in this matter.

In Mayle it was determined that Respondent's meal break policy meets the three-pronged FLSA "employee freedom meal test". It consists of a period at least thirty minutes in duration, the employee is completely relieved of all duties, and the employee is free to leave his or her duty post. It is important to note in this matter that being allowed to leave the duty post does not mean that the employee be allowed to leave the premises or work site. Grievants herein are permitted to leave the premises as well, so long as their radio or beeper is on.

The issue of whether an employee is completely relieved of his duties if they are required to keep their radio on during the break, was also addressed in Mayle. It was determined that when 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, even when the employee is required to wear a radio and respond to emergencies. Thus, while Grievants may not exercise unfettered freedom during their meal break, they are provided the opportunity to leave their work site for thirty minutes while completely relieved of all duties. Additionally, they are permitted to leave Respondent's premises to conduct private business if they wish, constrained only by the requirement that they remain in radio range. While the use of a single radio frequency by multiple departments is less than desirable, it does not change Grievants' "off duty" status. Thus, Grievants have failed to prove that Respondent has improperly denied them a meal break as required by policy and law. In addition to the foregoing findings of fact and discussion it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In non-disciplinary matters it is incumbent upon the Grievants to prove the allegations in their complaint by a preponderance of the evidence. Byers v. Marion County Bd. of Educ., Docket No. 94-24-388 (Dec. 29, 1995).

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); Mayle v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-581 (July 11, 1996).

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

4. Grievants have failed to prove that they are deprived of a duty free meal break as required by Respondent's policy and law.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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 notbe 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.

Date: March 28, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

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Footnote: 1

For administrative reasons, this case was reassigned to the undersigned Administrative Law Judge in November 1996.