JUDY TELLER,

Grievant,

v. DOCKET NO. 97-15-457

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Judy Teller, filed this level four grievance, alleging as follows:

> **I am an employee of Hancock County Schools. I am contracted for 5¾ hrs. per day. If I am required to work over that amount of time, it is agreed that the board will compensate me for the extra work. Violation of 18A-4-8a and 18A-4-8b and 18A-4-16. Compensated for time worked now and in the future.**

This grievance was filed at level one on June 13, 1997, and it was denied by Grievant's immediate supervisor. She appealed to level two, where a hearing was conducted on August 14, 1997. Dr. Charles Chandler, Superintendent, denied the grievance at level two in an undated written decision. Consideration at level three was waived, and Grievant appealed to level four on October 14, 1997. A hearing was held in the Grievance Board's office in Wheeling, West Virginia, on January 7, 1998. Grievant's representative, Owens Brown of the West Virginia Education Association, filed proposed findings of fact and conclusions of law on February 2, 1998. (See footnote 1)

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is employed by the Hancock County Board of Education (HCBOE) as a bus operator.

2. Grievant's daily schedule consists of a morning bus run and an afternoon run. She completes her morning run at approximately 9:00 a.m. and does not begin the afternoon run

until some time between 1:30 and 2:00 p.m.

3. Grievant is required by HCBOE and the State of West Virginia to possess and maintain a commercial driver's license (CDL).

4. Federal law requires random drug testing of all individuals who hold CDLs.

5. A random drug test was scheduled by federal authorities for June 2, 1997, between the hours of 9:00 a.m. and 11:00 a.m. The testing was conducted by a laboratory selected by the federal government, whose personnel came to HCBOE's central office to test employees.

6. Grievant's name was drawn for random drug testing on June 2, 1997.

7. Grievant went to the central office after she completed her morning run at 9:00 a.m., and she returned from the testing at approximately 11:00 a.m.

8. Grievant received no additional compensation for the approximately two-hour time period she was traveling to the central office and taking the drug test.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving her allegations by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). Grievant contends that she was required by HCBOE to submit to drug testing and, because she had to do so on her personal time, she should be compensated by HCBOE. However, Grievant hasprovided little support for her claims.

At level three, Grievant called another bus operator, Christine Zirkle, to testify, in an effort to provide support for Grievant's contention that other employees who have been required to submit to the drug testing have received compensation. However, Ms. Zirkle's testimony revealed that, when she was required to submit to the test, she had already scheduled an extra-duty run. In that case, Ms. Zirkle received the compensation she would have received for making the extra run, even though she could not perform it due to the testing. This is not analogous to Grievant's situation, (See footnote 2) because Grievant was not forced to miss any of her regularly scheduled duties in order to attend the drug testing. In addition, Ms. Zirkle did not actually receive compensation for undergoing the testing, but only received pay she would have normally been entitled to for services rendered.

Although not clearly articulated, Grievant has also attempted to make an argument that she is entitled to compensation for this time, because it required her to exceed her normal, contracted 5¾ hour work day. Testimony in this area was inconsistent. Grievant testified that her actual driving time each day is well over five hours, requiring her to actually work approximately seven hours in order to perform her pre- and post-trip inspections and wash her bus. However, Mr. Allison, Transportation Supervisor, testified that Grievant's actual driving time is much less, approximately four hours, leaving her nearly two hours to perform her other duties.

The interesting aspect of Grievant's contentions in this regard is that she has not contended that she has been entitled to extra pay for allegedly working seven hours perday under a 5¾ hour contract throughout the duration of her employment. (See footnote 3) In his post- hearing submission, Grievant's representative made reference to a violation of W. Va. Code § 21-5C-1(g), which states that a "workweek" consists of a "regularly recurring period of one hundred sixty-eight hours in the form of seven consecutive twenty-four hour periods. . . ." There is no explanation, however, of how this provision has been violated by HCBOE. The statute referenced is part of West Virginia's wage and hour laws, and the only reference to maximum working hours is contained in Code § 21-5C-3, which states that a workweek can only consist of forty hours, and any required work over forty hours entitles the employee to overtime pay. Grievant has provided no evidence that the time spent undergoing drug testing prevented her from performing any of her normal duties, nor has she alleged that she had to work any extra hours on the day in question in order to complete her responsibilities. There is absolutely no basis for a finding that these provisions have been violated in this case.

A prior Grievance Board decision involved a somewhat similar situation. In Zirkle v. Hancock County Bd. of Educ., Docket No. 94-15-441 (Feb. 24, 1995), the grievants, all bus operators, contended they were entitled to extra compensation for attendance at a training session conducted after working hours, which was necessary to maintain their bus operator's certifications. The training was provided by the board of education at no cost to the employees. In rejecting the grievants' claims of entitlement to extra-duty compensation, Administrative Law Judge Koval found that school boards are not required to "incur the costs, in the form of unproductive work hours, reimbursement or the like, ofthe qualifying

minimal training or continuing education of any employee." She also noted that "workers are commonly required not only to finance any qualifying or continuing education relative to their jobs, but also to obtain said training on their own time." (Emphasis added.)

Similar logic certainly applies to the instant case. If a board of education is not required by any law or policy to compensate employees for training provided by the employer, then it should hardly be required to provide compensation to employees who are responding to a requirement of the federal government. Submitting to federal requirements in order to maintain her CDL is Grievant's responsibility, not her employer's. See Zirkle, supra. Moreover, Grievant was not rendering any services to HCBOE while she was undergoing the required testing, so it would be senseless to require HCBOE to compensate her for this activity. As stated earlier, there is no evidence that it interfered with her ability to accomplish her required duties.

Grievant has failed to identify any policy, law or regulation which requires HCBOE to compensate her for undergoing mandatory federal testing, which is required in order to maintain her CDL. Although mentioned in her level four grievance statement, Grievant has not explained nor presented any argument as to how Code §§ 18A-4-8a, 18A-4-8b and 18A-4-16 have been violated in this case.

In accordance with the foregoing findings and discussion, the following conclusions of law are appropriately made.

Conclusions of Law

1. In a non-disciplinary matter, a grievant bears the burden of proving her allegations by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v.Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. School boards are not required to "incur the costs, in the form of unproductive work hours, reimbursement or the like, of the qualifying minimal training or continuing education of any employee." Zirkle v. Hancock County Bd. of Educ., Docket No. 94-15-441 (Feb. 24, 1995).

3. Grievant has not established any requirement on the part of HCBOE to provide her with compensation for her compliance with federally-mandated drug testing, in order to maintain her Commercial Driver's License.

4. Grievant has failed to prove a violation of any law, regulation or policy related to HCBOE's failure to compensate her for submission to federal drug testing, which did not interfere with her ability to perform her required duties as a bus operator.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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 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.

Date: May 27, 1998

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Respondent's attorney, William Fahey, did not file a post-hearing submission.

Footnote: 2

At level four, Grievant made no arguments based on claims of discrimination or favoritism.

Footnote: 3

Neither party provided this contract as documentary evidence to prove exactly what Grievant's required working hours are.