

paid, but maintains the policy was never been enforced until he submitted a year's worth of travel expenses at one time. He noted several people he believes were in a similar situation as himself, and they were paid. [\(See footnote 3\)](#) His supervisor also indicates the Travel Policy has never been enforced pursuant to the directions in the Policy.

Respondent argues the Travel Policy is clear, and Grievant cannot be compensated for travel from his home to the Hinton Office, as the mileage is less than his daily commute to his home base in the Princeton Office. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by the BCSE as a Legal Assistant. His home base is the Princeton Office.
2. Two days a week Grievant is assigned to staff the Hinton Office.
3. Grievant lives in Lockridge, West Virginia.
4. The distance between his home and the Princeton Office is 65 miles, one way. Pursuant to Policy he is not paid for his daily commute to his workplace. Resp. No. 1, at Level IV.
5. On the days Grievant works at the Hinton Office, he travels directly to that office from his home. The distance between his home and the Hinton Office is 24 miles, one way.
6. Policy Memorandum 3400 dealing with HHR's Travel Policy states in pertinent part:

Privately Owned Vehicles/Courtesy Vehicles

Privately owned and courtesy vehicles (vehicles not owned by the traveler) may be used when traveling on state business. Reimbursement will be made at the prevailing rate per mile established by the Travel Management Office (refer to Addendum 3400), excluding normal daily commuting mileage, for actual miles traveled using the shortest practical route to the traveler's destination. This rate is intended to cover all operating costs of the vehicle (including fuel, maintenance, depreciation, insurance, etc.), and no additional reimbursement will be paid. When a traveler leaves from his/her residence, the traveler is to use the shortest distance from departure (headquarters to home) to destination for calculating mileage reimbursement.

(Emphasis added.)

7. Warren Keefer, Assistant Director of Finance and the Director in charge of Travel, Payroll, and Accounting, explained that this Section of the Travel Policy covers Grievant's

situation and prevents him from being paid for his travel to the Hinton Office because travel is reimbursed only after first excluding the employee's daily commute. Since the distance Grievant is required to travel to the Hinton Office is less than his normal daily commute to the Princeton Office, by 31 miles, Grievant was not entitled to mileage. [\(See footnote 4\)](#)

8. In August, Grievant submitted approximately one year of Travel Expense Forms for his travel to the Hinton Office.

9. The supervisor who initialed Grievant's Travel Expense Forms was not aware that the Policy was to be interpreted in the manner stated in Finding of Fact Number 7. She approved Grievant's travel from his home to the Hinton Office.

10. When Nancy Bond, an employee in the BSCE Finance Office, received these forms she questioned whether Grievant was entitled to the mileage he had claimed. She called Jean Jones in HHR's Travel Office to inquire.

11. Ms. Jones consulted with her supervisor, Mr. Keefer, and then informed Ms. Bond that Grievant was not entitled to mileage, as the distance to the Hinton Office was less than the distance for Grievant's daily commute to his home office in Princeton. 12. This policy has not been routinely enforced, and some employees have been paid in circumstances similar to Grievant's.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

A review of the policy, especially coupled with Mr. Keefer's explanation, clearly indicates Grievant should not be paid for his travel from home to the Hinton Office. When he travels to the Hinton Office, he travels less miles than he would when he commutes to his home base, the Princeton Office. [\(See footnote 5\)](#) However, the inquiry cannot end there. Grievant has alleged discrimination and argues he has been treated differently than other employees.

W. Va. Code § 29-6A-2(d) defines discrimination as "any differences in the treatment of

employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action.

However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has established a prima facie case of discrimination through his un rebutted testimony, albeit hearsay, that other employees who were similarly situated received travel pay. His supervisor testified she was unaware, until this grievance, that the Travel Policy was to be interpreted in this manner, and she previously believed Grievant should receive travel reimbursement when he staffed the Hinton Office. Accordingly, Grievant has demonstrated he has been treated differently than other similarly situated employees.

Respondent did present evidence indicating Grievant could not be paid because of the Travel Policy, but did not speak directly to Grievant's discrimination claims, and the evidence that similarly situated employees had received reimbursement for travel expenses.

To pay Grievant in this situation would be in violation of the Travel Policy, but there still remains the issue of discrimination. What is needed here is a remedy fashioned to treat Grievant fairly while maintaining the integrity of the Travel Policy. It is noted in W. Va. Code §

29-6A-5(b) that:

[h]earing examiners may . . . provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.

Accordingly, in an attempt to find an equitable solution, Respondent is directed to take the following actions. First, Grievant is to be compensated for the unpaid Travel Expense Forms, representing travel from his home to the Hinton Office, that he submitted up until the time he filed this grievance, on January 6, 2000. [\(See footnote 6\)](#) This date is selected as this was the time when Grievant and his supervisor were informed he could not be paid travel to the Hinton Office pursuant to the Travel Policy. Second, after this date, Grievant cannot be compensated for any travel from his home to the Hinton Office. Third, Grievant is directed to turn in all future requests for travel reimbursement within in fifteen days of his travel. Fourth, HHR is directed to confirm all supervisors and employees understand exactly what this policy entails, and to insure the Policy is correctly followed in all its offices.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

- 1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.**
- 2. The Travel Policy requires that when an employee travels from his home to another designated place of work he cannot be compensated for this mileage unless the distance is greater than his normal daily commute. If the distance is greater than his normal daily commute, the employee is to compensated for the difference between the two.**
- 3. Discrimination is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 29-6A-2(d)**

4. To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action.

However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant has met his burden of proof and demonstrated he was treated differently than other similarly situated employees.

6. W. Va. Code § 29-6A-5(b) allows a administrative law judge to "provide relief as is determined fair and equitable . . . for the effective resolution of grievances." Additionally, an administrative law judge "has the authority to provide appropriate remedies including, but not limited to, making the employee whole."

7. In this specific set of facts, Grievant has demonstrated he entitled to some monetary relief.

Accordingly, this grievance is GRANTED. Respondent is directed to compensate Grievant for his unpaid Travel Expense Forms, representing travel from his home to the Hinton Office, that he has submitted up until January 6, 2000. Respondent is also directed to insure that all supervisors and employees understand exactly what the Travel Policy entails, and to confirm the Policy is correctly followed.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: May 22, 2000

[Footnote: 1](#)

The February 3, 2000 hearing was a telephone conference to take the testimony of Warren Keefer. The tape from this portion of the Level III hearing was inaudible.

[Footnote: 2](#)

Grievant represented himself, and Respondent was represented by Dennise Smith, Assistant Attorney General.

[Footnote: 3](#)

Grievant's supervisor testified that the question of whether Grievant's failure to turn in these Travel Expense Forms in a timely manner would effect payment was explored, and this issue was answered in the negative.

It is noted that Travel Rule 2.5 from the Department of Administration states: "[t]he responsibility to audit a traveler's expense account settlement lies with the state agency. Approval of a traveler's expense account settlement by the state agency means that the expense account settlement meets all criteria established by this rule for reimbursement. The state agency shall audit and submit an accurate expense account settlement for reimbursement to the State Auditor's Office within 15 days after completion of travel." (Emphasis in the original.) There is no stated penalty for the failure to follow this guideline.

[Footnote: 4](#)

An example may assist the numerically challenged. If an employee normally is required to commute from Charleston to Institute on a daily basis to work, he would not be compensated for this travel. If, once a week, this

employee is required to travel from Charleston to Huntington for work, he would be compensated for the mileage from Institute to Huntington.

[Footnote: 5](#)

The undersigned Administrative Law Judge suggests that adding specific examples for utilization of this portion of the Policy would be helpful and instructive.

[Footnote: 6](#)

It is noted this relief crosses the fiscal year. Since HHR's witness indicated that Grievants' failure to turn these forms in a timely manner would not effect payment, there should be no problem with this relief.