JANE E. STOVER,

Grievant,

v. DOCKET NO. 04-CORR-259

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL

COMPLEX,

Respondent.

DECISION

On May 12, 2004, Grievant, Corporal Jane E. Stover filed a grievance against her employer, the Division of Corrections (Respondent), claiming she should be reimbursed for travel between her home and her workplace on days she is forced to work outside her normal schedule, such as mandatory overtime or training days. As relief, Grievant seeks,

> To be reimbursed for incurred expenses as related to mandatory overtime on atypical workday. These expenses are from legitimate, accurate per mileage amounts resulting from travel from point of residence to the mandatory workplace as initiated by Shift Commander, Lt. Delena Sanford totaling as follows at 53 average miles each way for a total of 106 average miles at a pre- established rate of mileage expense at 37.5 cents per mile figuring a total of [$]39.76, to which should be paid by regular post or designated form in a timely manner.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on August 16, 2004. Grievant was represented by Zach Hill. Respondent was represented by counsel, Charles Houdyschell, Assistant Attorney General. The matter became mature for decision on September 17, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed as a Correctional Officer 3 by Respondent at the Mount Olive Correctional Complex (MOCC).

2. April 24, 2004, was a scheduled day off for Grievant, but she was required to work at MOCC due to a mandatory "freeze over (See footnote 1) ."

3. Grievant submitted a travel reimbursement form for the travel between her home and MOCC for that date. The distance between Grievant's home and MOCC is 53 miles. Grievant requested reimbursement for the round trip, a total of $39.76

4. The form was returned to her with a notation stating, "Cannot pay travel mileage to and from home to workplace even if working on day off."

5. Grievant has had previous requests for travel reimbursement paid for days she had to work on a scheduled day off, but not when the travel expense report reflected that she worked at MOCC. Grievant has been reimbursed for travel from her home to Charleston when guarding an inmate who was a hospital patient. (See footnote 2)

DISCUSSION

Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policyunder which she works. Her claim must be proven by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant claims that her mileage is not "normal" commuting mileage when done on a day off for overtime work. Respondent maintains all travel to work at Grievant's normal workplace is normal commuting, and if it has paid for that in the past, it was a mistake.

Grievant cited no authority for her theory that her commute from home to her workplace was not "normal" on days she is scheduled to be off. However, Respondent cites several previous Grievance Board decisions that determined an agency is not required to compensate employees for commuting to and from their place of employment. *See Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001); *Gwinn v. Dep't of Health and Human Res.*, Docket No. 00-HHR-64

(May 22, 2000); *Parker v. Div. of Corrections*, Docket No. 96-CORR-28 (Dec. 2, 1996). *Frame*, especially, comports with Respondent's assertion that travel reimbursement is based on the State Auditor's rule that compensable mileage meet the United States Internal Revenue Service rules, and Grievant's travel does not. Section 4.2.6.1 of the State Travel Rules provides for reimbursement "at the prevailing rate per mile established by the Travel Management Office, *excluding normal daily commuting mileage*, for actual miles traveled using the shortest practicable route to the point of arrival at the traveler's destination." [Emphasis supplied.] The phrase "normal daily commuting" modifies "mileage," indicating an intent to put the emphasis on the loci of the destinations rather than the temporal alignment of the travel with the employee's work schedule.

Further, contrary to Grievant's assertions, a shifting schedule and overtime work are both "normal" for her job. The following "Conditions of employment with the Division of Corrections"appear in the Correctional Officer 3 class specification: "Applicants appointed to the classified service will be required to work various shifts and it is understood schedules as subject to change at any time. Applicants are subject to mandatory overtime requirements and must be available for assignment to any location in the State of West Virginia."

Grievant argues that her evidence that she has been compensated for travel to MOCC on "off" days for overtime work or training proves the existence of a policy that allows the reimbursement she requested. Respondent has mistakenly reimbursed Grievant and other employees for travel it should not have, but those mistakes do not create an entitlement to future incorrect reimbursement. *See Ritchie v Dep't of Health and Human Res.*, Docket No. 96- HHR-181 (May 30, 1997).

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which she works. Her claim must be proven by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Boylan v. W. Va. Dep't of Transp.*, Docket No. 94- DOH-211 (Oct. 25, 1994); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). If the

evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. Compensable travel using a personal vehicle under the state travel rules does not include normal daily commuting mileage, which is travel between the employee's normal workplace and her home. *See* § 4.2.6.1 of the State Travel Rules. *See also Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001); *Gwinn v. Dep't of Healthand Human Res.*, Docket No. 00-HHR-64 (May 22, 2000); *Parker v. Div. of Corrections*, Docket No. 96-CORR-28 (Dec. 2, 1996*).*

3. Respondent is not required to continue a mistaken practice. *See Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997*).*

4. Respondent is not required to reimburse Grievant for travel between her home and MOCC on days she is scheduled to work mandatory overtime or for training.

For the foregoing reasons, this grievance is **DENIED**.

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, and 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.

Date: September 24, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

A freeze-over occurs when an employee is given a mandatory overtime assignment on a day off following a regularly-scheduled work day.

Footnote: 2

It appears even these reimbursements were in error, as Grievant was paid for the entire mileage from her home to

Charleston, instead of the difference between that and her regular commute.