PAUL MYERS,

Grievant,

v. Docket No. 04-DOH-408

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Paul Myers ("Grievant") initiated this proceeding on April 2, 2004, alleging entitlement to meal reimbursement during emergency work performed on February 22 and 23, 2004. On the date the grievance was filed, Grievant's immediate supervisor denied the grievance on the basis of untimeliness. Upon appeal to level two, a conference was held on April 12, 2004, and the grievance was granted by Dennis P. King, Acting District Engineer, on May 6, 2004. However, after being advised by the State Auditor's Office that Grievant's request (which was also requested by other employees) could not be granted, the level two decision was amended on July 22, 2004, and the grievance denied. A level three hearing was conducted on August 19, 2004, and the grievance was denied at that level on November 15, 2004. Grievant appealed to level four on November 19, 2004. A hearing was convened on April 12, 2005, at which time the parties agreed that this matter could be submitted for a decision based upon the lower level record. This grievance was assigned to the undersigned administrative law judge for a final decision on April 29, 2005. (See footnote 1) The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by Respondent Division of Highways ("DOH") in District One as a Transportation Worker 2--Equipment Operator.
2. On Sunday, February 22, 2004, an accident occurred on Interstate 79, which necessitated

that the highway be completely closed to traffic for an extensive period of time.

3. Grievant was called in to work due to the accident, and he directed traffic at the Clendenin exit for over 30 hours straight.

4. During the extensive period of time while working this emergency situation, Grievant and other DOH workers at the site were not given any formal breaks or meals. Some workers asked drivers in traffic to get them something to eat or drink, and Grievant was given one restroom break by a coworker who drove by and stood in for him temporarily.

5. After this incident occurred, Grievant and other affected workers asked to be reimbursed for meal expenses during the 30-hour period they had to work. Grievant's supervisor, Crew Supervisor Rodney Neal, advised him that he would "check into" getting meal reimbursement for them.

6. On February 26, 2004, Mr. Neal was informed that employees could not receive meal reimbursement if they were not traveling. He posted a memorandum reflecting this information in his office at the District One headquarters.

7. During February of 2004, Grievant and other DOH employees were performing flood clean-up work in Clay County. They regularly arrived at work by 6:00 a.m.and worked until 6:00 or later in the evening. Consequently, Grievant rarely saw Mr. Neal or visited his office during this time.

8. After not hearing back from Mr. Neal regarding the request for meal reimbursement, and having not seen the memo posted in his office, Grievant questioned Mr. Neal about the request. Mr. Neal advised Grievant about the posted memorandum, and Grievant filed this grievance two days later, on April 2, 2004.

Discussion

As a preliminary issue, Respondent had argued at level three that this grievance was not timely filed. Where the employer seeks to have a grievance dismissed on that basis, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996);

Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995),*aff'd* Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28,1997). *See* Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). As Grievant explained in his level three testimony, there was no reason to file a grievance until he and his coworkers were informed that meal reimbursement was not going to be granted. It is undisputed that, due to his schedule during the relevant time frame, Grievant did not know that the request was being denied until approximately March 31, 2004. The filing of this grievance two days later was timely.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Obviously, Grievant's point is well taken that he, along with his coworkers, should not have been subjected to a 30-hour work shift with no meal or bathroom breaks. Accordingly, he contends that meal reimbursement is the least Respondent can do for its employees who were subjected to these harsh conditions. (See footnote 2) However, Respondent iscorrect that the travel regulations as promulgated by the State Finance Department only allows meal reimbursement when an overnight stay, during travel, is required of the employee. That provision states as follows:

> 6.5 Meal expenses for single day travel are **not reimbursable.** . . . Travel without an overnight stay will not qualify a traveler as being away from home for purposes of receiving non-taxable meal reimbursement.

(Emphasis in original.)

However, Grievant's claim focuses upon another provision, which has been included in DOH's travel policy and is also included in the travel regulations available on the Finance Department's website. Section 6.6.2 of the same regulations provides that "[e]mployees in . . . certain occasional overtime situations, at the direction of the spending officer/designee, may be reimbursed for their actual expenses." It was on the basis of this provision that the grievance was initially granted at level two, but was later denied, due to information provided to DOH officials to the effect that the actual regulations as submitted to the Secretary of State's office did not include this specific provision.

Unfortunately, whether or not this provision has actually been adopted by the State of West Virginia is irrelevant, because of its discretionary nature. Even if the provision is applicable, it only states that employees "may" be reimbursed for actual expenses during overtime situations. Therefore, while providing Grievant and other DOH employees with meal reimbursement would certainly have been a kind gesture, this particular regulation does not require it nor create an entitlement on the employees' part.

However, the undersigned does feel compelled to note that, in future situations of this nature, DOH should be cognizant of the provisions of West Virginia Code § 21-3-10a, which requires that, during any work shift of over six hours, an employee must receive atleast a 20-minute meal break. While it is permissible, pursuant to this provision, for employees to be provided a compensable meal break *while on duty*, (See footnote 3) it appears that, during the events that occurred on February 22 and 23, 2004, DOH made no provision for any type of meal break for its employees, whether on duty, off duty, or whether compensated or not. Although Grievant was, apparently, compensated for the entirety of the time he was required to work during the incident in question, he and the other workers were entitled to some type of formal meal period, even if while performing their duties, for every six hours they were working. However, in the instant case, no particular relief would be applicable, but DOH should be cautioned to be aware of this requirement in the future.

The following conclusions of law support this Decision.

Conclusions of Law

1. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily

begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26- 234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). *See* Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

2. This grievance was filed within 10 days of Grievant being informed of the grievable event, so it was timely filed. 3. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

4. State employees' meal expenses are not reimbursed unless the employee is traveling and required to stay overnight.

Accordingly, 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." 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.

Date: May 12, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant and his co-grievant below, Randy Ramsey, represented themselves throughout this grievance, but Mr. Ramsey did not appeal to level four. Respondent was represented at the level three hearing by Carrie Dysart, Esquire.

Footnote: 2

The undersigned assumes all DOH employees received applicable regular and overtime pay during this incident, as no claim has been made by Grievant in that regard.

Footnote: 3

See Mayle v. Board of Trustees, 95-BOT-581 (July 11, 1996), and Hill v. Division of Corrections, Docket No. 99-CORR-110 (May 14, 1999) for an informative discussion of meal periods and applicable state and federal law.