THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SIDNEY GEORGE,

Grievant,

v.

Docket No. 07-33-200

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Sidney George, filed this grievance against the McDowell County Board of Education ("MCBOE" or "Board") on February 7, 2007. His Statement of Grievance reads:

> Grievant is employed by Respondent as a classroom and transportation aide. Grievant contends that his hours worked is [sic] not being properly calculated, in that he is not credited with starting work when he boards the bus at the home of the bus operator and in that his actual work time is rounded down to the nearest fifteen minute segment. Grievant also is receiving two rates of pay for work performed beyond his regular work day and contends that this is not correct. Grievant contends that the action of the board of education violates the federal Fair Labor Standards Act.
>
> Relief sought: Grievants [sic] seeks compensation for wages lost as a result of improper calculation by Respondent with interest to the fullest extent permissible by law.

This grievance was denied at Levels One and Two, and Level Three participation was waived on behalf of Respondent by State Superintendent Steven L. Paine. Grievant appealed to Level Four on May 23, 2007. A Level Four hearing was scheduled for December 14, 2007, before the undersigned; however, the parties agreed to submit the matter on the record. Grievant was represented by John

Roush, Esq., WVSSPA, and Respondent was represented by Kathryn Reed Bayless, Esq. This grievance became mature for decision on January 11, 2008, after receipt of the parties' proposed findings offact and conclusions of law.

Synopsis

Grievant is a transportation aide, and must ride the school bus with his students to and from the school. Grievant chooses to board the bus some thirty minutes prior to the time the first student boards the bus in the morning, and remain on the bus some thirty minutes after the last student departs the bus in the afternoon. Grievant asserts he should receive compensation for all the time he is on the Board's school bus, whether his students are present or not. Grievant contends his hours of work are not being properly calculated because he is not credited with starting work when he boards the bus, and that his actual work time is rounded down to the nearest fifteen minute segment. Grievant also asserts he is receiving two rates of pay for work performed beyond his regular work day. Grievant contends that the Board's action violates the federal Fair Labor Standards Act ("FLSA").

Respondent counters that Grievant is allowed to ride the bus as a courtesy, and riding the bus while his students are not on the bus is not time spent in the performance of his duties and should not result in compensation. In addition, the practice of rounding work time up and down to the nearest fifteen minute segment was approved and directed by the State Department of Education, and is set forth in the *Guide to Fair Labor Standards Act for West Virginia Schools*. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judges makes the following findings of fact.

Findings of Fact

1. Grievant is employed by MCBOE as a transportation and classroom aide.Grievant is expected to be on the bus by the time his first student arrives, attend school with the students, work with the students during the school day, and return with the students to their final destination.

2.

Grievant parks his car and boards the school bus each morning at the home

of bus operator Randy Brewster. Grievant does this because this is a shorter distance than if he were to travel to the location where the first student boards the bus. In addition, Grievant could park his car near the first student pick-up but does not do so because he considers that location to be an unsafe area to leave his car for the day.

3. Grievant then rides on that bus for approximately 35 minutes before the first student boards the bus, and he begins his aide duties. On the return trip, Grievant drops off his last student and then rides the bus for another 35 minutes before reaching the bus operator's home where Grievant returns to his personal vehicle.

4. Grievant is not paid for the time he spends riding the bus when there are no students on the bus. Grievant is paid mileage expense from the site of the school to the bus operator's home because the bus operator's home is farther away from the Grievant's home than is the school.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. *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 footnote 2) *Seealso 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).

Grievant asserts a violation of the federal Fair Labor Standards Act. This Grievance Board has jurisdiction over grievances under the FLSA, *Belcher v. W. Va. Div. of Highways*, Docket No. 94-DOH-341B (June 30, 1995), and must necessarily look to the federal courts for guidance in interpreting and applying the FLSA.

Grievant begins his work day by meeting the school bus driver at the driver's residence. Grievant does this because this is a shorter distance than if he were to travel to the location where the first student boards the bus. In doing so, Grievant must drive from his home past the school and continue to the home of the bus operator. Grievant then rides on that bus for approximately 35 minutes before the first student boards the bus, and he begins his aide duties. On the return trip, Grievant drops off his last student and then rides the bus for another 35 minutes before reaching the bus operator's home where Grievant returns to his personal vehicle. Grievant argues the Board must compensate Grievant for the entire time he is on the school bus as time worked. (See footnote 3) The undersignedfinds this argument to be without merit.

A review of the applicable FLSA sections, and case law makes it clear Grievant should not be paid for his travel time in this case. 29 U.S.C. § 254(a) states the following activities are not compensable:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform,
>
> and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities . . . .

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Supreme Court held that "activities performed either before or after the regular work shift are compensable . . . if those activities are an integral and indispensable part of the principal activities for which workmen are employed . . . ." These activities are ones that are "made necessary by the nature of the work performed." *Id*. In *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994), the court noted home to work travel is not compensable, travel to work is "a normal incident of employment," and riding on an employer's bus is a preliminary or postliminary activity. (Citations omitted.) Further, principal activities included activities "performed as part of the regular work of the employee in the ordinary course of business[,] . . . [the] work is necessary to the business and is performed by the employees primarily for the benefit of the employer. . . ." *Id*. (*citing Dunlop v. City Electric, Inc.*, 517 F.2d 394 (5th Cir. 1976)). In *Smith v. Aztec Well Servicing Co.*, 321 F.Supp. 1234 (D.N.M. 2004), the question before the court was whether employees who were required to travel with their foreman to their work site and who, while in the vehicle, occasionally discussed safety issues and engaged in *de minimus* work activities, such as putting on tire chains, digging the vehicle out of the mud, and opening gates, should be paid for their travel time. The court noted that compensation required "some indication that the Plaintiffs were performing compensable work activities that were an integral and indispensable part of the principal activities for which they

were employed while traveling in order for the Defendant to be liable to compensate them for that time." *Id.* at 1237 (*citing Steiner*, *supra*). The court concluded, the time the employees "spent traveling to and from their work location was an ordinary incident of their employment for which the Defendant employer was not obligated to compensate Plaintiffs," even though the employees were required to travel with the foreman. The court also noted the "activities performed while traveling were preliminary or postliminary to the principal activities" and occurred either before or after the work day. *Smith* at 1239.

In this grievance, it is clear the activities performed while traveling were preliminary or postliminary to Grievant's work activities, and he was not engaged in integral and indispensable principal activities for which he was employed. Grievant contends it was necessary for him to board the bus in order to provide services to the children on the bus. In doing so, Grievant must drive from his home past the school and continue to the home of the bus operator. This is contrary to the underlying facts in this matter in light of the fact that Grievant could park his car near the first student pick-up location in the morning. Grievant chose not to park his vehicle in this area because it is a greater distance from hisresidence, and he considered it an unsafe location to leave it. Grievant acknowledged that he is paid for his work time the moment the first student boards the bus in the morning, and is paid until the last student leaves the bus in the afternoon.

Grievant has not met his burden of proof on this issue, and he has not established that his assertions are supported by the FLSA or case law. Further, Grievant has a choice. Grievant may start his day by meeting the bus at the location that the first student boards the bus. Grievant is under no requirement to travel on the school bus to the first student's point of boarding. It is unclear to the undersigned Administrative Law Judge why Grievant thought this bus ride was compensable since he was not working, and no one ever told Grievant he could count this ride as work time.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. 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).

2. Home to work travel is not compensable, as travel to work is “a normalincident of employment,” and riding on an employer's bus is a preliminary or postliminary activity. *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006).

3. “[A]ctivities performed either before or after the regular work shift are compensable . . . if those activities are an integral and indispensable part of the principal activities for which workmen are employed[,] . . . ” and if they are ones “made necessary by the nature of the work performed.” *Steiner v. Mitchell*, 350 U.S. 247 (1956).

4. Principal activities include tasks “performed as part of the regular work of the employee in ordinary course of business . . . [the] work is necessary to the business and is performed by the employees primarily for the benefit of the employer . . .” *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994).

5. “Under W. Va. Code § 29-6A-2(I), the West Virginia Education and State Employees Grievance Board has jurisdiction over grievances concerning wage and hour claims arising under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., and applicable state wage and hour laws, e.g., W. Va. Code §§ 21-5C-1, et seq.” *Belcher v. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995).

6. Grievant has not met his burden of proof on this issue, and failed to establish a violation of the FLSA.

Accordingly, this grievance is **DENIED**.

Any party 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. *See* W. Va. Code § 18-29-7 (repealed, *See Footnote 2, supra)*. Neither the West Public Employees Grievance Board nor any ofits 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: February 28, 2008

_____

Ronald L. Reece

Administrative Law Judge

Footnote: 1

This Guide is prepared by the West Virginia Department of Education to assist boards of education in understanding and applying the Fair Labor Standards Act.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees,and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

No evidence was offered to prove any elements of the other two grounds raised by Grievant. In fact, the issues of the hours of work for which Grievant is paid, and the rate of pay which Grievant receives were, in effect, withdrawn by Grievant's counsel at the beginning of the Level Two hearing. Level Two Hearing Transcript pp. 11 - 16. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. Church v. McDowellCounty Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987).