THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN ANDERSON & TOM ROBERTS,

Grievants,

v. **Docket No. 2012-0131-CONS**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, John Anderson and Tom Roberts, filed this consolidated grievance against their employer, Respondent, Kanawha County Board of Education, dated August 4, 2011, stating as follows: "Grievants did not receive a full day salary for the following dates upon which they worked in excess of 3 ½ hours: July 1, 5, 6, 7, & 8. Grievants allege a violation of W. Va. Code 18-5-39 & 18A-4-8a. (Grievants discovered the discrepancy when they received their pay checks on or about July 25, 2011.) As relief sought, Grievants seek "[c]ompensation for the difference between the compensation received for July 1, 5-8, 2011 and a five full day salary with interest." In the appeal to level two, Grievants amended their grievance to include the claim that they were "the victims of reprisal for filing this grievance" pursuant to W. Va. Code 6C-2-2.

A level one hearing was held on August 23, 2011, and denied by decision dated January 18, 2012. Grievants appealed to level two on January 26, 2012. A level two mediation was conducted on March 21, 2012. Grievants perfected their appeal to level three on March 27, 2012. A level three hearing was held on November 1, 2012, before the undersigned administrative law judge at the Grievance Board's Charleston, West

Virginia office. Grievants Anderson and Roberts appeared in person, and by counsel, John E. Roush, Esq., WVSSPA. Respondent appeared by counsel, James W. Withrow, Esq. This matter became mature for consideration on January 3, 2013, upon the receipt of the Grievants' proposed Findings of Fact and Conclusions of Law. By letter dated December 26, 2012, Respondent informed the Grievance Board that it had elected not to file proposed Findings of Facts and Conclusions of Law.

Counsel for Grievants advised the Grievance Board in his proposed Findings of Fact and Conclusions of Law that Grievant Roberts and Respondent had reached a settlement. Therefore, Grievant Roberts would no longer be participating as a party to this grievance. As such, Grievant Roberts shall be dismissed as a party to this action, and only Grievant Anderson's claims will be addressed in this decision.

Synopsis

Grievant, a bus operator, was hired to work in a summer position transporting students between the Elkview/Pinch area and Stonewall Jackson Middle School for the Critical Skills Program. On each work day, Grievant made a morning run and an afternoon run. The runs were scheduled to take a total of three and one-half hours to complete. However, on some days, the runs took Grievant more than three and one-half hours to complete. On others, it took less time. Starting in July 2011, Grievant began to be paid less than a full day's pay for his runs even when he worked more than three and one-half hours. Grievant asserts that he was improperly paid a half-day's pay on July 1, 5, 7, and 8, 2011, when he should have been paid for full days because he worked more than three and one-half hours on those days. Grievant also asserts that he received a written reprimand in retaliation for filing his grievance. Respondent

denies Grievant's claims and argues that Grievant was properly paid for his runs. Respondent asserts that Grievant clocked-in for work earlier than he should have, thereby "padding" his time. Further, Respondent denies Grievant's reprisal claim, asserting that the written reprimand it issued to Grievant was appropriate given Grievant's failure to properly pre-trip his bus. Grievant proved by a preponderance of the evidence that Respondent improperly paid him on July 1, 5, 7, and 8, 2011. Grievant failed to prove his reprisal claim by a preponderance of the evidence. Accordingly, this grievance is GRANTED IN PART and DENIED IN PART.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, John Anderson, is employed by Respondent as a bus operator.

2. Grievant bid upon and received a summer bus operator position for the summer of 2011.

3. In this summer position, Grievant made a morning run and an afternoon run, transporting students between the Elkview and Pinch areas and Stonewall Jackson Middle School for the Critical Skills Program. Grievant went home between his runs and did not otherwise work for Respondent during that time. In addition to making his runs, Grievant was responsible for "pre-tripping," fueling, and cleaning the bus each day.

4. Respondent had scheduled this run to take three and one-half hours.

5. Early on, Grievant told Peggy Whittacre, Elkview Terminal Supervisor, that the run would take more than three and one-half hours to complete.

6. Grievant's start time was determined by his supervisor, Nancy Fields, Elkview School Bus Supervisor. Grievant was first instructed to clock in at 6:00 a.m.

7. On some days, Grievant made his runs in three and one-half hours or less. On others, it took Grievant longer.

8. Prior to July 1, 2011, Grievant was paid for a full day for each day of his summer 2011 job,[1] and expected that he would continue to be paid in this manner. However, commencing on July 1, 2011, Respondent stopped paying him a full day's pay on days he worked more than three and one-half hours.

9. Commencing on July 1, 2011, Grievant began to be paid for only a half-day's pay even when he worked more than three and one-half hours in a day. Grievant learned of the change in his pay when he received his pay check on or about July 25, 2011. The days at issue, for which Grievant seeks payment for full days instead of the half-day pay he received are July 1, 5, 7, and 8, 2011.[2]

10. After receiving his paycheck on or about July 25, 2011, Grievant requested additional compensation from George Beckett, Administrative Assistant for Pupil Transportation for Kanawha County Schools.

11. In response to Grievant's request, Mr. Beckett reviewed the bus GPS records, timecard punches, schedules, and videos from Grievant's bus. From these records, Mr. Beckett concluded that Grievant had "padded" his time and had not worked all the time reflected by his timecard punches. Mr. Beckett did not grant Grievant the

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[1] It is unclear from the evidence presented why Grievant was paid a full day's pay for the month of June 2011.

[2] Initially, Grievant sought additional compensation for July 6, 2011, but it has been determined that he worked less than three and one-half hours on that date. As such, Grievant has stated that he does not seek a full day's pay for this date.

additional compensation that he requested.

12. Mr. Beckett also concluded from his review of the electronic records that because there was no video of Grievant pre-tripping his bus, Grievant had not performed a pre-trip.[3] As such, Mr. Beckett issued Grievant a written reprimand for failure to properly pre-trip his bus.[4]

13. Grievant had performed certain pre-trip requirements. However, such actions were conducted before the bus was running. Grievant's pre-tripping was not recorded by the video recording system because it is only operational when the bus is running.

14. Grievant did not perform complete pre-trips. Grievant did not test the air brakes on his bus, which is a pre-trip requirement. Even though he did not perform the air brake test each day, Grievant indicated on his pre-trip inspection forms that he performed the air brake test.

15. Grievant had been instructed several years ago by Gary Mullins, who, at that time, was a crew leader over the mechanics, not to pump the air brakes because it caused wear and/or damage to them.[5] Despite this, Grievant has acknowledged that he knew that state and federal law required the air brake test.

16. Grievant was required to punch a time clock before his runs and again after he had completed his runs. Grievant was off the clock between his morning and

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[3] It was undisputed by the parties that the video recording equipment for the bus Grievant was operating will function only when the bus is running.

[4] Grievant Anderson did not file a separate grievance over his receipt of the written reprimand. He clarified at level three that such is being addressed as part of his reprisal claim.

[5] Former Grievant Roberts testified as to receiving this instruction as well.

afternoon runs.

17. The punches on his time card reflect the following: Grievant worked three hours, fifty-nine minutes on July 1, 2011; three hours, forty minutes on July 5, 2011; three hours, twenty-nine minutes on July 6, 2011; four hours, seven minutes on July 7, 2011; and, three hours, forty-three minutes on July 8, 2011.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 that he is entitled to a full day's pay for July 1, 5, 7, and 8, 2011, because he worked more than three and one-half hours on each of those days. Grievant points to his time clock punches as support for his position. Respondent argues that Grievant "padded" his time by clocking in earlier than he was supposed to

and by engaging in a thirty-nine-minute personal conversation while on the clock. Respondent argues that the bus GPS and video records reveal that Grievant worked less than three and one-half hours each day.

WEST VIRGINIA CODE § 18-5-39(f) requires that summer service employees be paid in accordance with the salary schedule of persons regularly employed in the same class title. *See* W. Va. Code § 18-5-39(f). Further, WEST VIRGINIA CODE § 18A-4-8a(a)(1) provides, in part, as follows: "Beginning July 1, 2011, and continuing thereafter, the minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the 2011-2012 State Minimum Pay Scale Pay Grade and the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one-half the amount indicated in the 2011-2012 State Minimum Pay Scale Pay Grade set forth in this section subdivision." W. VA. CODE § 18A-4-8a(a)(1).

The evidence presented showed significant discrepancies between the times recorded by GPS and the videos. Grievant's time clock punches do not match the clock times recorded by the GPS and the videos. Even though the times at which the bus operated and traveled could vary because of differing software, idle times, and the like, the total time spent on the runs should be substantially the same; however, it is not. Grievant admitted that he engaged in the thirty-nine minute personal conversation on July 6, 2011, and stated that he does not expect to be paid for that. However, Grievant denies that he "padded" his time. Grievant asserts that he was instructed by his supervisor to clock in at 6:00 a.m. and that the runs, at times, took longer than three and

one-half hours to complete because of traffic and transferring the students. Given the time discrepancies in the GPS and the video, the undersigned finds that the time clock punches should be used to determine Grievant's work time. Further, Respondent presented no other evidence to support its claims that Grievant "padded" his time. Accordingly, the time clock punches for July 1, 5, 7, and 8, 2011, should be used to determine what Grievant is paid for those days. As Grievant worked more than three and one-half hours on those days, he should be compensated a full day's pay for each, pursuant to West Virginia Code § 18-5-39(f) and § 18A-4-8a(a).

Grievant asserts that he was reprimanded in retaliation for filing this grievance. Reprisal is "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. Va. CODE § 6C-2-2(o). To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
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> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
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> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
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> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Res./*

Bureau for Children and Families, Docket No. 2010-0448-DHHR (Feb. 11, 2011). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979).

Mr. Beckett reviewed the video and the other electronic records to verify Grievant's work time once Grievant made his claim for additional compensation. It was not unreasonable for Mr. Beckett to review these electronic records and to compare them to the time clock punches as there was a dispute as to how much time Grievant actually worked on those days. However, in the course of his review, Mr. Beckett found that Grievant did not properly pre-trip his bus. Grievant admits that he did not perform the air brake test as required, even though he indicated he did on the pre-trip inspection forms. Grievant's position is that he was instructed by a crew leader (not his supervisor) not to pump the air brakes during pre-trip because it caused damage to them. Grievant admitted that he knew that such would be contrary to state and federal law. Further, Grievant was aware that there had been no change in policy or procedures, and that Grievant's supervisors did not authorize the change. Upon receiving the instruction from the crew leader, Grievant did not speak to his supervisors about it. Given the evidence presented, the undersigned cannot find that the issuance of the written reprimand was retaliation for filing this grievance. There was cause for the issuance of the reprimand.

Accordingly, this grievance is granted in part and denied in part.

The following Conclusions of Law support the decision reached:

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2. West Virginia Code § 18A-4-8a(a) requires that service employees who work more than three and one-hours hours in a day be compensated the amount indicated in the state minimum pay scale pay grade.

3. WEST VIRGINIA CODE § 18-5-39(f) requires that summer service employees be paid in accordance with the salary schedule of persons regularly employed in the same class title.

4. Grievant met his burden of proving that Respondent failed to pay him correctly pursuant to West Virginia Code § 18A-4-8a(a) for the following dates: July 1, 5, 7, and 8, 2011.

5. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) That there was a causal connection (consisting of an

> inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Res./ Bureau for Children and Families,* Docket No. 2010-0448-DHHR (Feb. 11, 2011).

6. Grievant failed to meet his burden of proving his claim for reprisal by a preponderance of the evidence.

Accordingly, this Grievance is **GRANTED IN PART and DENIED IN PART.**

Respondent is **ORDERED** to pay Grievant Anderson the difference between the pay he received for July 1, 5, 7, and 8, 2011, and the full day's pay he should have received for those days.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: July 11, 2013.

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Carrie H. LeFevre
Administrative Law Judge