THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ERIC POWERS, et al.,
Grievants,

v. **Docket No. 2012-0935-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievants, Eric Powers, Paul Heater, John Whiting, William Heath, Rex Rohrbaugh, Leslie Blake, Randy Stalnaker and Kendall Heckert filed this grievance on March 6, 2012, against their employer, Division of Highways. They assert an improper denial of breaks and seek to be made whole, including payment for denied breaks. This grievance was denied at level one by letter dated September 24, 2012, and signed by Sandra Castillo, level one grievance evaluator. A level two mediation session was conducted on February 11, 2013. Grievants perfected their appeal to level three on February 15, 2013. A level three hearing was conducted before the undersigned Administrative Law Judge on August 8, 2013. Grievants appeared in person and by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its attorney, Krista D. Black, Division of Highways Legal Division, and by law student, Joshua Snyder, appearing under the requirements of Rule 10 of the Rules for Admission to the Practice of Law. This matter became mature for consideration upon receipt of the last of the parties proposed findings of fact and conclusions of law on September 13, 2013.

Synopsis

Grievants claim that Respondent has failed to provide structured breaks available for them throughout the course of their workday. The record of the case did not establish that Grievants were deprived of the ability to take breaks throughout the day for personal needs or refreshments. Grievants failed to meet their burden by a preponderance of the evidence that Respondent violated any applicable statute, rule, or regulation.

The following findings of fact are based upon the record established at level one and level three.

Findings of Fact

1. Grievants, Eric Powers, Kendall Heckert, John Whiting, Leslie Blake, Randy Stalnaker, Paul Heater, William Heath and Rex Rohrbaugh, are transportation workers employed in Lewis County, District 7 of the West Virginia Division of Highways.

2. Grievants complain that they are not provided with a structured break period in the morning and in the afternoon.

3. Grievants allege that on March 6, 2012, at a safety meeting, they were informed by Jason Hunt, District 7 Assistant Maintenance Engineer, that maintenance was exempt from any break requirement.

4. Mr. Hunt indicated that while structured breaks at a certain time of the day were not part of the Grievants' daily schedule, they were provided with adequate and equivalent time throughout the day to obtain refreshments and attend to personal needs.

5. Grievants acknowledged that they were allowed to take breaks during the course of the workday, only that scheduled breaks were not permitted.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

Grievants allege that they are not getting two fifteen-minute breaks to which they believe that they are entitled. They are specifically requesting two structured fifteen-minute breaks per day, one in the morning and one in the afternoon. Respondent argues that it properly followed rules and regulations regarding breaks. As Respondent has noted, W. VA. CODE § 21-3-10a requires that employees who work shifts of over six hours receive a minimum of twenty minutes for a meal break, at times reasonably designated by the employer.[1] In fact, the Grievance Board has previously cautioned Respondent to be aware of the requirement that, during any work shift of over six hours, an employee must receive

[1] *Hill v. W. Va. Div. of Corr.*, Docket No. 99-CORR-110, (May 14, 1999).

at least a 20-minute meal break. The administrative law judge going on to rule that, pursuant to the above provision, employees could be provided a compensable meal break while on duty.[2] This is also apparent from Respondent's Exhibit No. 2 at level one, in setting out the different work schedules for Department of Transportation employees, the exhibit notes that some agency employees receive a paid lunch while others do not.

Respondent also provided their internal procedure which notes that employees may take short breaks for refreshment or other personal matters, but break periods cannot be accumulated, used to shorten a workday, or used to extend a lunch period.[3] The record also established Respondent's position that they recognize the need for employees to break for a cup of coffee, or to attend to other personal matters. Some work situations require a formally structured break schedule and some do not. This depends on the type of work performed.[4] It should be noted that, in the instant case, the issue of whether or not these unscheduled breaks were counted as hours worked was not developed in the record. The lower level record did reflect that, on average, Grievants worked an eight hour day with a thirty-minute lunch break.

Grievants' position is that they should have a structured break period twice per day. Nothing in the record of this case established that Respondent is obligated to have a structured break time in place; however, the record did establish that supervisors will allow a break when the employee feels it is necessary. It appears from the record that

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[2]*Myers v. W. Va. Div. of Highways*, Docket No. 04-DOH-408 (May 12, 2005).

[3]Department of Transportation Administrative Procedures, Exhibit 2, level one.

[4]Department of Transportation Employee Handbook: Holidays, Attendance, and Leave, Exhibit 4, level one.

Respondent is under no obligation to give additional break periods as long as the employees are getting the proper meal break. The record did establish that Grievants are given a thirty minute meal break and sufficient time to attend to personal needs or to obtain refreshments throughout the workday. Grievants have failed to meet their burden of proving by a preponderance of the evidence that scheduled breaks are required to be included in the workday.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. Grievants have failed to establish by a preponderance of the evidence that the failure to provide two scheduled work breaks violates the provisions of any statute, policy, rule, regulation, or written agreement applicable to their employment situation. Accordingly, this grievance is **DENIED**.

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: October 21, 2013

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Ronald L. Reece
Administrative Law Judge