THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SAMANTHA JANE MEEKS,
Grievant,

v. **DOCKET NO. 2013-0220-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/TYGART VALLEY REGIONAL JAIL,
Respondent.

DECISION

Grievant, Samantha Jane Meeks, filed a grievance against her employer, the Regional Jail and Correctional Facility Authority, on or about August 16, 2012. The statement of grievance is quite lengthy, but generally contends that Grievant should have been paid for her lunch breaks from the time she was first employed in 2007, until her resignation in August 2012. As relief Grievant seeks "[c]ompensation for lunch breaks since employment began on May 29, 2007 at Tygart Valley Regional Jail."

A hearing was scheduled at level one for August 28, 2012, at which time Grievant did not appear. A level one decision denying the grievance was issued on August 28, 2012. Grievant appealed to level two on September 12, 2012. A mediation session was held on January 14, 2013. Grievant appealed to level three on February 8, 2013. A level three hearing was held before the undersigned Administrative Law Judge on April 17, 2013, at the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Shane P. McCullough, Esquire, General Counsel, Regional Jail and Correctional Facility Authority. This matter became mature for decision

on May 20, 2013, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserted that she should have been paid for her 30 minute meal break every day she worked from 2007 until her resignation in August 2012, because she had to carry her radio during her meal break and was required to report to duty in case of an emergency. Respondent did not raise a timeliness defense, however, the undersigned could not, by statute, award back pay beyond one year preceding the filing of this grievance. Grievant received a duty free meal break, and Respondent was not required to pay her for her meal break.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant was employed as an Officer by the Regional Jail and Correctional Facility Authority ("RJA"), at the Tygart Valley Regional Jail ("TVRJ"), from May 29, 2007, until she resigned effective August 17, 2012.

2. RJA Policy and Procedure Statement Number 3021, dated August 1, 2003, defines the meal period as follows:

> DUTY FREE MEAL PERIOD - A thirty (30) minute, non-compensable time period, wherein the employee is properly relieved of all duties, for the primary purpose of eating a meal. It is not necessary that the employee be authorized to leave the premises if he or she is otherwise completely free from duties during the meal period. In all but exigent circumstances, employees will be encouraged to take meal periods off premises if they so desire.

RJA employees are not paid for the 30 minute meal period.

3. RJA assigns Officers at the TVRJ to work as Pod Rovers, Core Rovers, or in the Tower Office. Grievant worked in all three posts as assigned. She worked one of two twelve-hour shifts, four days a week. The shifts at the RJA during most of Grievant's tenure were day shift, 7:45 a.m. to 8:15 p.m., and night shift, 7:45 p.m. to 8:15 a.m. During the summer of 2010 there were three eight-hour shifts.

4. Grievant worked in one of three Pods, known as Pod A, Pod B, or Pod C. When an Officer takes a meal break, he or she exits the Pod, which requires that the employee wait for the security gates to be opened and closed, and then walks from the Pod to the area where he or she wishes to take the break, generally the break room located in the administration area, or the pavilion outside. It takes two to four minutes or more to pass through security and arrive at the break room, depending on how busy the facility is, and which of the three Pods the Officer is stationed in on any given day.

5. An Officer who wishes to leave the facility during the meal period must advise his or her supervisor, and obtain permission to do so. The record does not reflect that Grievant ever asked for permission to leave the facility during her meal break, and that this request was denied.

6. During the meal break, employees are allowed to use their cell phones and conduct personal business.

7. Officers at the TVRJ carry two-way radios at all times so that they can be contacted throughout the facility. An Officer taking a meal break must keep her two-way radio with her and respond to emergencies.

8. The Post Order General for TVRJ states at paragraph numbered 18:

> Lunch breaks are thirty (30) minutes per shift. Lunch breaks should be taken when there is minimal activity in the facility core. In the event an emergency situation arises and lunch breaks are not possible, contact the Shift Supervisor as soon as possible and prior to the end of your shift. At all times 2 Core Rovers are to remain on the floor.

9. During the night shift, security "bed" checks are required every 30 minutes from midnight to 5:00 a.m. If there are only two Core Rovers assigned to the floor, the Shift Supervisor can fill in so that the Core Rover can have a meal break during this time period, or the meal break can be delayed to a later time, or a Pod Rover can do the bed check.

10. The record does not reflect that during the period from August 17, 2011, to August 17, 2012, Grievant was required to respond to an emergency during her 30-minute meal period or that she was not allowed to leave the Pods to take a 30-minute meal break.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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). "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).

As a preliminary matter, Grievant seeks back pay for a period of over five years. Respondent did not raise a timeliness defense, however, WEST VIRGINIA CODE § 6C-2-3(c)(2) limits the undersigned's authority to award back pay to one year preceding the filing of a grievance, stating as follows:

> When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the Grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

There is no evidence that any facts giving rise to Grievant's claim were concealed. Any award of back pay in this grievance could only be to August 16, 2011.

Grievant made a general allegation that she never received a 30-minute, duty-free meal break during her entire tenure at TVRJ, based on her interpretation of the language "duty-free." Her conclusion was based on the fact that she lost five to ten minutes traveling to and from the break room, she always had to carry her two-way radio, and she was subject to being called back to work in an emergency. Respondent argued that Grievant could leave the facility during her meal break, could conduct personal business, and only had to respond to emergencies. Respondent pointed to the case law which would support a finding that Grievant had a duty-free meal break, and it was not required to pay her for her meal break.

The determination of whether a meal break is indeed duty-free is not so simple as Grievant believes. There are various factors which must be considered, on a case-by-case basis, and the determination involves a fact-specific inquiry.

WEST VIRGINIA CODE § 21-5C-1(h) defines "hours worked," stating:

> in determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday, time spent in 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 activities which are preliminary to or postliminary to said principal activity or activities, subject to such exceptions as the commissioner may by rules and regulations define.

However, 42 Code of State Regulations 8 § 9.8, provides that "bona fide meal periods are not work time." This regulation further provides the following definitions at §§ 9.1 and 9.2 :

> 9.1. The workweek.-The workweek includes all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed work place.
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> 9.2. Nonwork time.-Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own time are not hours worked.

Finally, § 9.10 defines "on-call time" as:

> (a) An employee who is required to remain on-call on the employer's premises, or so close thereto, or at his or her home so that he cannot use the time effectively for his own purposes is working while on-call.
>
> (b) An employee who is not required to remain on the employer's premises but is merely required to leave word at his or her home or with his employer where he may be reached is not working while on-call.

WEST VIRGINIA CODE §§ 21-5C-1, *et seq*., is closely modeled after the federal wage and hour statute.[1] The Department of Labor's regulations, found at 29 Code of Federal Regulations 785.19(a), also provide that "[b]ona fide meal periods are not worktime."

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[1] The Grievance Board has previously determined that it has jurisdiction to hear cases involving federal and state wage and hour claims. *Belcher v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995).

Similarly, bona fide meal periods are defined under 29 Code of Federal Regulations 785.19 to require that:

> (a) [t]he employee must be completely relieved from duty for the purposes of eating regular meals . . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.
>
> (b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

Grievant's argument is nearly identical to that made by the grievants in *Mayle, et al., v. Board of Trustees, West Virginia University*, Docket No. 95-BOT-581 (July 11, 1996). The grievants in *Mayle* were on-call to respond to emergencies during their meal break, and had to carry a two-way radio to respond to such calls during their meal break. They could leave the work site during the meal break, but had to leave their radios on. They argued, as Grievant does, that they were not "completely relieved" of duty. The Administrative Law Judge noted that,

> [a] review of the caselaw in this area indicates that the question whether a meal break is compensable is to be decided on a case-by-case basis. Thus, if an employee is free to engage in personal activities while on-call and not required to stay on the employer's premises, the on-call time is not compensable. *Berry v. County of Sonoma,* 30 F.3d 1174 (9th Cir. 1994). Nor is on-call time compensable when the restrictions imposed by the employer were limited to wearing a pager, and being accessible through the pager at all times while on-call. *Gilligan v. City of Emporia, KA,* 976 F.2d 410 (10th Cir. 1993). Patrol officers were not entitled to compensation for meal periods when on-call and required to wear radios and respond to emergencies, because they could go anywhere and perform personal errands during the break *Henson v. Pulaski County Sheriff Dept.*, 6 f.3d 531 (8th Cir. 1993).

The Administrative Law Judge in *Mayle* concluded that, except for one Grievant whose situation was different from that described above, the grievants "failed to prove that they

are engaged in the performance of substantial duties during their meal period, or that their time during their meal period is spent predominantly for the benefit of their employer," and denied the grievance.

The Administrative Law Judge in *Mayle* also cited the holding in *McCarty v. Harless*, 181 W. Va. 719, 384 S.E.2d 164 (1989), where the Supreme Court of Appeals of West Virginia "found that county deputy sheriffs who were required to stay on site or at a particular location during their meal period were to be compensated for that time, but deputies who were on-call, but not required to remain on the employer's premises during their meal period, were not entitled to compensation. *Id.,* 384 S.E. 2d at 172." This would indicate that, at least under West Virginia law, if the employee asked to leave the facility during the meal break, and this request was denied, this *may* not qualify as a bona fide meal period. However, there is no evidence in the record that Grievant was told on any day that she was not allowed to leave the premises during her meal break.

The undersigned concludes that Grievant was off-duty during her 30-minute meal break, and that she received a duty-free, bona fide meal break while she was employed at TVRJ.

Grievant also pointed out that two Core Rovers must be on the floor at all times, and indicated that at times the facility was short-staffed. She apparently was indicating that sometimes she did not receive a meal break. TVRJ Administrator Scott Villers pointed out that if she did not receive a meal break, Grievant was responsible for reporting this to her supervisor, who could then try to find a time when she could have a break, or approve her overtime. Grievant did not place any information into the record as to how many times, if

any, she did not receive a meal break, or that she was not paid overtime for such instances. Without any such evidence, the undersigned cannot further address this issue.

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 her 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). "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. WEST VIRGINIA CODE § 6C-2-3(c)(2) limits the undersigned's authority to award back pay to one year preceding the filing of a grievance.

3. "[T]he question whether a meal break is compensable is to be decided on a case-by-case basis." *Mayle, et al., v. Bd. of Trustees, W. Va. Univ.*, Docket No. 95-BOT-581 (July 11, 1996).

4. Grievant did not demonstrate that she did not receive a bona fide, duty-free meal break during her employment at the TVRJ. *Id.*

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 2, 2013