DARRYL E . ATKINS,

Grievant,

v. Docket No. 99-PEDTA-335

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

DECISION

Darryl E. Atkins (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on March 8, 1999, alleging that Respondent West Virginia Parkways Economic Development and Tourism Authority (Parkways) failed to pay him a witness fee to testify at a lower level grievance hearing.

This grievance was denied at Level I, on March 10, 1999, by Immediate Supervisor Roger Trzicak, and at Level II, on March 18, 1999, by W. K. Forrest. A Level III hearing was held on July 23, 1999. Grievant was represented at this hearing by Mr. Boyd Lilly of the West Virginia State Employees Union, and Parkways was represented by A. David Abrams, Jr., Esq. This grievance was denied at Level III by Grievance Evaluator D. L. Lake on August 4, 1999.

After two continuances at Grievant's request, a Level IV hearing was held before the undersigned administrative law judge at the Grievance Board's Beckley office on March 30, 2001. At that hearing, Parkways was again represented by Mr. Abrams, and Grievant was again represented by Mr. Lilly. The parties agreed that this matter would become mature for decision at the conclusion of the Level IV hearing.

The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant works at Parkways' Beckley Maintenance facility.
2. On February 25, 1999, Grievant testified, pursuant to subpoena, at a lower level

grievance hearing for Bruce Prince.

3. Mr. Prince's subpoena for Grievant contained a statement offering Grievant a witness fee, to be paid by Mr. Prince.

4. Grievant declined to accept this fee.

5. Parkways did not pay a witness fee to Grievant.

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 W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidencewhich as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant claims that Parkways failed to pay him a witness fee to testify at a lower level grievance hearing. As relief, he seeks to be made whole and complete.

W. Va. Code § 29A-5-1(b), the Administrative Procedures Act, provides:

> Any person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state; and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this state. All such fees shall be paid by the agency if the subpoena or subpoena duces tecum were issued, without the request of an interested party, at the instance of the agency. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued. (emphasis added)

W. Va. Code § 29-6A-5(b) provides that “[h]earing examiners may. . . subpoena witnesses. . . in accordance with [W. Va. Code § 29A-5-1(b)],” set forth above.

The Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.6 (2000) provide that a request for a subpoena shall include “a statement accepting

responsibility for service, and for witness and mileage fees, if any."

Accordingly, it is clear that any witness fee owed Grievant was owed by the person issuing his subpoena, Mr. Prince, and not Parkways. Grievant has cited no authority to the contrary, and the undersigned is aware of none. Therefore, this grievance must be denied. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In this non-disciplinary grievance, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Under W. Va. Code § 29A-5-1(b), W. Va. Code § 29-6A-5(b), and the Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.6 (2000), any witness fee owed Grievant was owed by the person issuing his subpoena, and not Parkways.

Accordingly, the 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.

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ANDREW MAIER

Administrative Law Judge

Dated: May 1, 2001