HAROLD J. MICHAEL,

Grievant,

v. **Docket No. 04-49-424**

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Harold J. Michael ("Grievant") initiated this proceeding on October 13, 2004, challenging the loss of two personal days when he was subpoenaed to testify in a court proceeding. The grievance was denied at level one on October 18, 2004. A level two hearing was held on November 1, 2004, and the grievance was denied in a decision dated November 12, 2004. At a meeting conducted on December 2, 2004, the Upshur County Board of Education ("BOE") voted to deny the grievance at level three. Grievant appealed to level four on December 10, 2004. After the matter was scheduled for a level four hearing, the parties elected to submit this grievance for a decision based upon the record developed below. Grievant represented himself at level two and was represented by counsel, Robert L. Stultz, at level four. BOE was represented at level four by counsel, Howard E. Seufer, Jr. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on February 22, 2005.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by the BOE as a classroom teacher at Buckhannon- Upshur High School. 2. Grievant serves as a foster parent for the West Virginia Department of Health and Human Services. He is the foster parent for a child whose custody has been the subject of proceedings in Lewis County Circuit Court.

3. Grievant was subpoenaed by the prosecuting attorney of Lewis County to testify regarding

the custody of this foster child on September 9, 2004 and on September 29, 2004.

4. Grievant was required to use personal leave on each day that he was required to testify regarding this child.

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 (2004); 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). See W. Va. Code § 18-29-6.

___The outcome of this grievances hinges largely upon W. Va. Code § 18A-5-3a, which provides, in pertinent part:

> Any teacher, principal, supervisor, service personnel or other person employed by a board of education who is subpoenaed to appear as a witness but not as a defendant in any criminal proceeding in any court of law may make such appearance without loss of pay.

Similarly, the BOE has adopted County Policy II.4.6, which provides for the same when an employee is subpoenaed to testify in a criminal proceeding.

Grievant contends that the proceeding in which he was subpoenaed to testify was at least “quasi-criminal” in nature, in that the subpoena was requested by the prosecutingattorney, and underlying matters related to the child's custody involved criminal issues. Unfortunately, the record does not explain the exact nature of the proceedings. Conversely, Respondent argues that Grievant was *not* subpoenaed to testify in a criminal action, as set forth in the statute, and is, therefore, required to use personal leave time for his absence from work. Respondent points to a letter from the State Superintendent of Schools dated May 10, 1995, in which this issue was discussed, which stated, in part:

> The apparent rationale for [Code § 18A-5-3a] is that one who appears as a witness 'but not as a defendant' in a criminal case is performing a public duty and service; therefore, the employee should not suffer any monetary loss for performing that service. This applies whether or not the witness appearance is school related. Therefore, . . . the employee appears without loss of pay or loss of his personal or legal days.

The Superintendent went on to say that, if the matter is civil in nature, then the employee's absence will be without pay, or personal leave must be used. Interpretations by the State Superintendent of Schools of statutes affecting education personnel are to be accorded great weight unless clearly erroneous. Smith v. Greenbrier County Bd. of Educ., 192 W. Va. 321, 452 S.E.2d 412 (1994).

The burden of proof in this case is upon Grievant, and he simply has not met that burden. The statute is clear that a school employee only testifies without loss of pay (or personal leave) when he is subpoenaed in a criminal proceeding. Grievant has failed to prove that the proceeding was criminal. He only described it as a custody issue, and the prosecutor's involvement does not necessarily make it a criminal case. Certainly, Grievant is to be commended for his service as a foster parent. However, he could easily have introduced more evidence, or requested a hearing at level four, in order to establish thathis testimony was required in a criminal proceeding. As it stands, the record is devoid of any evidence regarding the nature of that proceeding. Therefore, Grievant has failed to prove entitlement to the requested relief.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-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 (2004); 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). See W. Va. Code § 18-29-6.

2. A board of education who is subpoenaed to testify in a criminal proceeding shall do so without loss of pay or personal leave time. See W. Va. Code § 18A-5-3a.

3. Grievant has failed to prove by a preponderance of the evidence that he was required to testify in a criminal proceeding, so he was required to use his personal leave time for his absences.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Upshur County. Any such appeal must be filed within thirty (30) days of receipt of this decision.

W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a partyto 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: March 9, 2005

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DENISE M. SPATAFORE

Administrative Law Judge