WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANDREA L. FERRIS,
Grievant,

v. **Docket No. 2014-1562-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILD SUPPORT ENFORCEMENT AND DIVISION OF PERSONNEL,
Respondent.

DECISION

Grievant, Andrea Ferris, is employed by Respondent, West Virginia Department of Health and Human Resources/Office of the Secretary ("DHHR"), as a Child Support Specialist 3 in the Bureau for Child Support Enforcement ("BCSE") in the Mingo County office. Ms. Ferris filed a grievance against Respondent DHHR on or about May 13, 2014, stating: "I was subpoenaed by the State of West Virginia to be a witness in a murder trial." The relief requested is: "Return my time." A Level I hearing was held on November 18, 2014, and the grievance was subsequently denied. Mr. Gordon Simmons represented Grievant at that hearing. The grievance proceeded to Level II on April 24, 2015, and Grievant filed a Level III appeal on or about April 29, 2015. On May 6, 2015, ALJ William B. McGinley entered an *Order of Joinder* joining DOP as an indispensable party to this matter. A Level III hearing was held before the undersigned on July 14, 2015. Grievant appeared in person and was represented by Mr. Gordon Simmons. Mr. Michael E. Bevers, Assistant Attorney General, represented Respondent DHHR/BCSE and Ms. Karen Thornton, Assistant Attorney General, represented Respondent DOP. At the conclusion of the hearing, the parties agreed to submit post-hearing arguments, the

last of which was received on August 17, 2015, upon which date this matter became mature for decision.

Synopsis

Grievant asserts that Respondents' decision that she was ineligible for paid Witness/Jury Service leave when she appeared, under subpoena, to testify at the trial of her mother's accused murderer, was arbitrary and capricious in that Respondents construed and applied DOP Administrative Rule, W. Va. Code St. R. §143-1-14.10.a. 'Court, Jury, and Hearing Leave,' and the W. Va. Division of Personnel *Witness/Jury Service* DOP Policy, DOP-P10 (Feb. 1, 1994) improperly in arriving at their decision. DOP Administrative Rule, W. Va. Code St. R. §143-1-14.10 generally provides for witness and/or jury service leave in compliance with a subpoena. The principal dispute is over the proper interpretation and application of the "personal interest" exception in these directives. Respondents argue that if a State employee may be "affected," in terms of his "private life, relationships, and emotions," by the proceeding in which he has been subpoenaed to testify, then the employee is not entitled to paid court leave. Under this definition, Respondents assert that they properly concluded Grievant had a "personal interest" in the trial of her mothers' alleged murderer. Respondents' interpretation and application of the "personal interest" exception is erroneous, arbitrary and capricious, leading to unjust results. Applying these "ordinary and accepted" meanings to "personal interest," in order for this exclusion to operate, the State employee must have some "private" (pertaining to his private life, as opposed to his professional life), legal right or concern in the proceeding, such that he/she stands to derive some tangible material (e.g., *interalia*, real or personal property) or financial

benefit from the outcome of the proceeding. In addition, the "personal interest" exclusion operates, by its plain language, to exclude payment of Witness/Jury Service leave if the employee stands to derive some private "right, privilege or power" based upon the outcome of the proceeding. Even if this definition does not reflect the "plain meaning" of personal interest, these terms have been properly construed so as not to contravene the Legislative intent of DOP Administrative Rule, W. Va. Code §143-1-14.10. As part of its rationale in promulgating DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10, the Legislature intended to protect the State employee from monetary loss when he is compelled to appear under subpoena in a criminal action in which he is not a defendant, because the employee is fulfilling his public duty, rather than pursuing his own private interests. Grievant has proved by a preponderance of the evidence that Respondents' decision to charge her accrued annual leave for compliance to a subpoena in a criminal case in which she was not a party was based upon a misapprehension of the law and criterion that were inappropriate for consideration. Therefore, their decision was arbitrary and capricious. Thus, the undersigned must conclude that Grievant was not precluded from eligibility for Witness/Jury service leave under the Administrative Rule and DOP Policy. The grievance is granted.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant is employed by Respondent DHHR/BCSE as a Child Support Specialist 3 in the Mingo County office.

2. On or about December 30, 2012, Grievant's mother was murdered.

3. On April 10, 2014, Grievant was subpoenaed by the State of West Virginia to appear on April 29, 2014, at the Circuit Court of Mingo County to testify at the trial of her mother's alleged killer ("the trial").[1] (Joint Ex. 2, Level III.)

4. On March 31, 2014, Grievant requested 24 hours of annual leave for April 28-30, 2014. (Joint Ex. 1, Level III.)

5. On April 16, 2014, Grievant sent an e-mail to BCSE Commissioner, Mr. Garrett Jacobs, requesting his opinion as to whether her time at the trial, serving as a witness, would be charged against her annual leave. In the e-mail, Grievant stated, "… I have to testify for the State on a witness stand … This really bothers me not only because it's a very bad/sad situation [,] I'm also going to be off work for a week and have to take the time off or go to jail …" Grievant attached a copy of the subpoena and DOP's relevant DOP Policy to the email. (Respondent's Ex. 1, Level I.)

6. Grievant requested Respondent DHHR to provide her with paid leave to appear at the criminal trial, as the subpoena commanded.

7. The DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10.a. ("Administrative Rule") provides for witness or jury service leave in compliance with a subpoena except in certain circumstances; one of those being if the employee has a personal interest in the matter.

[1] This is the only subpoena Grievant claims to have received from the Court.

> 14.10.a. Upon application in writing, an employee hired for permanent employment shall be released from work without charge to leave or loss of pay when, in obedience to a subpoena or direction by proper authority, he or she serves upon a jury or appears as a witness before any court or judge, any legislative committee, or any officer, board, or body authorized by law to conduct any hearing or inquiry. This subdivision shall not apply in cases where the employee or a member of his or her immediate family is a plaintiff, defendant or other interested party or has a personal, financial, or vested interest in the outcome of the proceeding or when the hours spent in compliance to a subpoena to serve on a jury or appear as a witness are outside the employee's scheduled workday. Employees subpoenaed by proper authority who are not eligible for court, jury or hearing leave shall be granted sufficient annual leave or leave without pay to fulfill the order. This subdivision shall not be construed to:
> 14.10.a.1. deprive, prohibit, or infringe upon the rights of any employee who is a party to, or a witness in, a grievance proceeding or a court of law proceeding resulting from the course of his or her State and/or classified employment; or,
> 14.10.a.2. deprive, prohibit, or infringe upon the rights of any employee in his or her pursuit of personal legal matters or civic responsibilities while on annual leave or a personal leave of absence.
> 14.10.b.The employee shall furnish such written confirmation of the absence as is required by the Director.
> 14.10.c. When an employee is released from service prior to the end of the workday, and there is more than one hour remaining in the employee's scheduled workday after allowing for reasonable return travel time, the employee shall return to work or request approval for annual leave.

(See Level III Joint Ex. 4.)

8. The W. Va. Division of Personnel *Witness/Jury Service* DOP Policy, DOP-P10 (Feb. 1, 1994), ("the DOP Policy") establishes the process, procedure and requirements for employees who receive subpoenas. Pertinent sections of the DOP Policy read as follows:

II. A. In obedience to a subpoena or direction by proper authority, and upon application in writing, an employee shall be granted leave with pay to serve on a jury or appear as a witness before any court or judge; any legislative committee; or any officer, board, or body authorized by law to conduct any hearing or inquiry.

1. An exception shall be if the employee is a litigant, defendant, or other principal party, or has a personal or familial interest in the case or proceeding. In these instances, the employee may be granted annual leave or a leave without pay.

2. This DOP policy shall not be construed to deprive, prohibit, or infringe upon the rights of any employee who is a party to, or a witness in, a grievance proceeding or a court of law proceeding resulting from the course of employment, or to deprive, prohibit, or infringe upon the rights of any employee in their pursuit of personal or civic responsibilities while on annual leave or a personal leave of absence.

II B.

3. Subsequent to the submission of a summons, the employee shall be entitled to a leave with pay for the period of absence required to perform such jury duty during the period the employee was scheduled to work. Upon return to work, the employee shall submit an official document from the court showing date(s) and time(s) served.

II. C. To be eligible for time off from work without loss of pay or charge to annual leave in response to a subpoena or direction from proper authority to appear as a witness in a court or hearing, an employee shall advise his immediate supervisor in advance of the requested time off and provide a copy of the written documentation immediately upon return to work.

Upon return to work, the employee shall submit an official document from the court or hearing officer showing the date(s) and time(s) served.

(*See* Level III Joint Ex. 5.)

9. Later that day, BCSE's General Counsel, Ms. Heidi Talmage, ("General Counsel Talmage") provided her legal opinion that,

> "There are only two parties in a criminal case – the State and the Defendant … even the victim is not a party and only has the limited rights that are specifically spelled out in [sic] Constitution or statute. Therefore, it is not possible for anyone else to have an interest in a criminal case that is recognizable under the law, including family members of the victim. Since our employee has no legally recognizable interest in the case, she should not be required to take annual leave for time spent in compliance with the subpoena or travel time to and from the courthouse." (*Underlined in the original*.) (Respondent's Ex. 1, Level I)

10. Mr. Jacobs forwarded Ms. Talmage's advice to Attorney Monica Robinson, then Assistant Director of the Employment Litigation Section of DHHR's Office of Human Resources Management ("OHRM") and asked whether she concurred with General Counsel Talmage's assessment. (Respondent's Ex.1, Level I hearing.)

11. Ms. Robinson consulted with Mr. Joe Thomas, the Assistant Director for the Employee Relations section of DOP ("Assistant Director" or "Mr. Thomas"), and Ms. Julie Thomas (no relation to Mr. Thomas), legal counsel in DHHR's OHRM, concerning this matter, before informing BCSE of her conclusion that Grievant had a "personal" interest in the outcome of her mother's murder trial. (*See* Level I Transcript, Level I Decision, Level III Testimony of Mr. Thomas and Respondent's Ex.1 from Level I hearing.)

12. Specifically, Ms. Robinson told Mr. Garrett, in her e-mail dated April 17, 2014, that, "the definition of 'personal interest' has not been determined in a court of law or grievance hearing so we must look at the common definition of the word. Although 'a

legal share or right' is one of the definitions of [sic] given in Black's Law Dictionary and Webster's dictionary, the other common definition is 'to be of concern to.' "

13. The prosecutor's office informed Grievant that her presence/testimony would be required beginning on April 28, 2014, through the trial's duration. (Testimony of Grievant, Level III hearing.)

14. Grievant's assigned work hours were 7:30 a.m. until 3:30 p.m. each day. (Joint Ex. 1, Level III hearing.)

15. Based upon DOP's advice as to the proper application of the Administrative Rule, DHHR required Grievant to take either annual leave or leave without pay for the days she spent at the trial/in the courthouse. (*See* Level I Decision, Level I Transcript and Respondent's Ex. 1 from Level I hearing.)

16. DOP's Administrative Rule makes reference to "personal" interest, but does not define the nature of that interest. (Joint Ex. 4, Level III hearing.)

17. DOP's Policy on witness/jury service makes reference to "personal or familial interest," but does not define those interests. (Joint Ex. 5, Level III hearing.)

18. Mr. Thomas opined that if a subpoenaed witness has a "personal or familial interest … they cannot get court, jury or hearing leave for that." (Testimony of Mr. Thomas, Level III hearing.)

19. Answering hypothetical questions, Mr. Thomas testified that if an employee's neighbor had been killed and the employee were subpoenaed to testify, the employee would qualify for Witness/Jury Leave with pay. But if the employee had a personal interest in the trial, the employee would not qualify for Witness/Jury Leave with pay, and would be required to use annual leave or take leave without pay. The Agency

would be responsible to investigate and determine whether its employee had a personal interest in the trial.

20. Mr. Thomas stated that Grievant had a personal or familial interest because the trial involved “immediate family as plaintiff.” This was incorrect and formed the basis, in part, for the Respondent’s decision that Grievant was ineligible for paid Witness/Jury Leave.

21. Mr. Thomas explained that in making determinations concerning whether state employees who have been subpoenaed to appear before a Court or other authorized tribunal have a "personal interest" in the trial or proceeding at which their appearance has been compelled, “Typically, it’s the agency that makes those determinations. They will contact us for an interpretation, or maybe even a second opinion. But the employer would get the information necessary to make that decision — whether through a subpoena or court documents — or the employee may provide information that may expose that there was some type of financial relationship.” (Testimony of Mr. Thomas, Level III hearing.)

22. Grievant did not stand to receive, or actually receive, any material benefit or financial gain, based upon the outcome of the trial of her mother’s accused killer.[2] (Testimony of Grievant, p. 6, Level I transcript.)

23. The “personal interest” language has been in the *Witness/Jury Service* DOP Policy and Administrative Rule at least since approximately 1994.

[2] Asked whether she had anything else to gain from complying with the Court’s order to be available to testify as a witness in the trial, Grievant answered: “If it would have brought her back to life. That ain’t going to happen. ...Nothing could bring her back. How could I have any ‘interest’?” (Testimony of Grievant, Level III hearing.)

24. Mr. Thomas stated that, "[t]he Rule provides that when an employee is subpoenaed to testify in a matter in which they have a personal or familial interest that they cannot get court, jury or hearing leave for that; they are eligible for annual leave and the employer is obligated to approve annual leave." (*See* Level III Testimony of Mr. Thomas.)

25. To the best of his knowledge, since the Administrative Rule and DOP Policy were authored, they have been consistently interpreted by DOP. (*See* Level III Testimony Mr. Thomas.)

26. Mr. Thomas had "no qualms" in determining Grievant had a personal interest in the outcome of the trial, since she was related to the victim, as the victim was her mother.

27. Asked for the rationale of the relevant language in the Administrative Rule and DOP Policy, Mr. Thomas explained: "We can't be *unjustly enriched* in our position as classified employees. We can't be paid for services not rendered as classified employees. And we have certain ethics standards so we have to make sure that we're not using work time to take care of personal matters." (*Emphasis added*.) (Testimony of Mr. Thomas, Level III hearing.)

28. Mr. Thomas added the rationale for the Administrative Rule and DOP Policy also takes into consideration that employees are given an annual leave benefit and that there is a mandatory requirement placed on State agencies covered by the merit system to approve annual leave in such circumstances if the employee is not eligible for the Witness/Jury Service leave. (*See* Level III Testimony Thomas.)

29. Mr. Thomas was not the author of the relevant language in either the Administrative Rule or the DOP Policy.

30. Grievant had, without success, asked the Court to provide her with excuses for the duration of her attendance at trial. (Testimony of Grievant, Level III hearing.)

31. On May 13, 2015, one week after the Level I decision in the instant grievance, Grievant produced Court documentation verifying the duration of the trial of her mother's accused killer, provided in response to Respondents' request for same. (Joint Ex. 6, Level III hearing.)

32. Court records verify that Grievant was present at the courthouse for pretrial proceedings on April 28, 2014, and testified on that day. The Court instructed Grievant to be present during the entire trial beginning at approximately 7:00 AM and, when she was not testifying, she was sequestered at the Mingo County Courthouse for the workday and sometimes beyond. Grievant testified at trial on April 30, 2014, and May 1, 5 and 7, 2014. She did not testify on May 2 or 6, 2014, but was sequestered at the courthouse on those days. (*See* Level III Joint Ex. 3, Table of Contents to the Trial Transcript and Testimony of Grievant, Level III hearing.) [3]

Discussion

As this is not a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. Va. Code ST. R. § 156-1-4.19 (1996); *Payne v. W. Va. Dept. of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Howell v.*

[3] The Respondents stipulated to these facts at the Level III hearing.

W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990); *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); *Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts that Respondents' decision that she was ineligible for paid Witness/Jury Service leave when she appeared, under subpoena, to testify at the trial of her mother's accused murderer, was arbitrary and capricious in that Respondents interpreted the pertinent language of DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10.a. 'Court, Jury, and Hearing Leave,' improperly and erroneously in arriving at their decision. DOP Administrative Rule, W. Va. Code St. R. §143-1-14.10 generally provides for witness and/or jury service leave in compliance with a subpoena, stating that an employee:

> … shall be released from work without charge to leave or loss of pay when, in obedience to a subpoena or direction by proper authority, he or she serves upon a jury or appears as a witness before any court or judge, any legislative committee, or any officer, board, or body authorized by law to conduct any hearing or inquiry.

However, DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10.a. ("Administrative Rule") sets forth certain exceptions to the foregoing; one of those exceptions being the employee who has a personal interest in the matter. The section of the Administrative Rule at issue states, in pertinent part:

> This subdivision shall not apply in cases where the employee or a member of his or her immediate family is a plaintiff, defendant or other interested party or has a personal, financial, or vested interest in the outcome of the proceeding …

The W. Va. Division of Personnel *Witness/Jury Service* DOP Policy, DOP-P10 (Feb. 1, 1994) ("DOP Policy"), establishes the process, procedure and requirements for employees who receive subpoenas. The DOP Policy states, in pertinent part:

> An exception shall be if the employee is a litigant, defendant, or other principal party, or has a *personal or familial interest* in the case or proceeding. In these instances, the employee may be granted annual leave or a leave without pay. (*Emphasis added*.)

The principal dispute is whether Respondents properly construed and applied the "personal interest," exception of the Administrative Rule, which is repeated in the DOP policy directive as "personal and familial interest."

When BCSE first attempted to resolve whether Grievant had any "interest" in the proceedings, General Counsel Talmage unequivocally opined that the only "interested" parties to the case in question were the State of West Virginia and defendant and that it was impossible for anyone else to have a legally recognizable interest in a criminal case. She, therefore, emphatically recommended that Grievant "should not be required to take annual leave for time spent in compliance with the subpoena or travel time to and from the courthouse." (*Underlined in the original*.) Grievant asserts that this analysis is correct, entitling her to paid Witness/Jury Service leave in this instance. The undersigned is compelled, by law, to conclude that Grievant herself had no legally recognizable interest in the criminal proceedings, given that she was not a party to the trial.

Grievant also raised the issue of whether Respondents improperly denied her leave based, in part, on the erroneous belief that Grievant had an immediate family member who was involved in the trial. As BCSE promptly recognized, Grievant did not have any immediate family members who were parties to the trial. Yet despite General Counsel Talmage's earlier very clear analysis of the issue, DOP did not appreciate that Grievant's deceased mother, as the victim of the crime, was not a "plaintiff" in the trial and denied paid Witness/Jury Service leave based, in part, upon its erroneous conclusion that the decedent was the plaintiff.[4] Therefore, Grievant proved that Respondent DOP "misapprehended" and did not properly apply the Administrative Rule's exclusion relating to "immediate family" as "plaintiff, defendant, or other interested party," and/or the DOP Policy's exclusion relating to the employee who has a "familial interest," in the proceedings. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W.Va. 342, 431 S.E.2d 681 (1993)*; Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of DOP. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). However, a discretionary action may also be reversed if it is based upon a misapprehension of the law*. State ex rel. Withers*

[4] This is evidenced by Level III testimony by DOP.

v. Board of Education of Mason County, 153 W.Va. 867, 172 S.E.2d 796 (1970); Respondent was in clear error in this interpretation of the foregoing exceptions. Thus, Respondents' denial of Grievant's leave upon this particular basis was arbitrary and capricious.

Respondents maintain that their interpretation and application of the disputed term, "personal" interest is neither arbitrary nor capricious, because they properly used the ordinary and widely accepted, meaning of "personal" to arrive at their determination. In post-hearing arguments, Respondent DOP provided the following definitions of "personal" as follows: "of, relating to, or affecting a particular person," Merriamwebster.com; "of or affecting a person," Black's Law Dictionary (9th ed. 2009) and "of, affecting, or belonging to a particular person rather than to anyone else" and "of or concerning one's private life, relationships, and emotions rather than matters connected with one's public or professional career". Google.com. The Oxford English Dictionary, 3rd Ed., December 2005, likewise, defines the adjective "personal*"* as:

> "of, relating to, concerning, or affecting a person as a private individual (rather than as a member of a group or the public, or in a public or professional capacity); individual, private; one's own." [5]

However, the undersigned notes that Ms. Robinson of DHHR supplied definitions for both "personal" as "to be of concern to," and "interest" as "a legal share or right" in her April 17, 2014, e-mail to Mr. Jacobs." Respondents did not use the definition of "interest" provided, and applied their chosen definition for "personal." They assert that "Grievant

[5] Merriamwebster.com defines "interest," in its general usage, as "a feeling of wanting to learn more about something or to be involved in something." Clearly, this definition is inapplicable to the Administrative Rule and this analysis.

clearly had a ‘personal’ interest [under their definition] in the outcome of the trial of the man accused of killing her mother as she *willingly* indicated at the Level One hearing.” (*Emphasis added*.) The undersigned finds that there was no "willing” admission of any such thing. Grievant explained the very painful circumstances surrounding her mother's murder at Level I.[6] Her mother was murdered on December 30, 2012, and she reported her mother missing on January 2, 2012. Grievant explained that “ --- we found her--- we pulled her out of the lake on January 6, 2013.” In the Level I hearing, Mr. Simmons asked “… Andrea, in responding to the subpoena to testify at trial, were you … in any position to materially gain from the outcome of that proceeding?” Grievant's response indicates some understandable confusion. She replied, "I guess, you --- I mean --- I don't understand. Yeah I had something to gain because it was my mother being murdered --- but …" Mr. Simmons followed up, "Well no, not materially gained. Did you … ?" Grievant responded "No … nothing.” Mr. Simmons, seeking further clarification, asked, "Did you receive money if you testified … from the outcome one way or another, would you have received money based on that?" Grievance's response was, "No." Opposing counsel at that hearing did not probe further to ascertain this “personal” interest. However, at Level III, when Grievant responded to further personal questions regarding her alleged “personal interest,” she finally and honestly replied “ ... Nothing could bring her back. How could I have any ‘interest’?” This then, is the extent of Grievant’s "personal interest,” in the outcome of the murder trial.

[6] The undersigned hesitated to report these tragic facts, but is compelled to do so, because they illustrate that DOP’s decision to withhold paid Witness/Jury Service leave under the rationale that Grievant would be "unjustly enriched,” if given paid leave was absurd.

Respondents did not provide a precise or “distilled” definition of "personal interest” from the various above-quoted definitions. However, Respondents are apparently arguing that, if a State employee may be “affected” in terms of his “private life, relationships (it is unclear from this definition whether Respondents would extend relationships beyond immediate family), and emotions” by the proceeding in which he has been subpoenaed to testify, then the employee is not entitled to paid court leave. However, upon analysis, Respondents’ interpretation and application of the "personal interest" exception is clearly arbitrary and capricious, leading to unjust results. For example, assuming that the Circuit Court must subpoena a State employee to appear at trial to in order to effectively prosecute a defendant for alleged abuse of that State employee’s minor grandchild,[7] applying Respondents’ interpretation of "personal interest," to these facts, this proceeding arguably “relates to” and “affects,” the employee, and concerns his “private life, relationships and emotions,” as opposed to “matters connected with his or "public or professional career.” Thus, because the employee *may* be “personally affected” by the outcome of that trial, DOP/the State agency employing him would deny him paid court leave; whereas another State employee, who was unrelated to the allegedly abused child, would presumably be “unaffected” and would be entitled to paid court leave. Both would be performing a mandatory public service to aid the State to prosecute crime/criminals, without any tangible personal benefit, gain or enrichment to be derived from the proceedings. Yet, one employee would lose his compensation, while the other would not. There is simply no rational basis for this distinction. Finally, as this is hypothetical and the facts of this

[7] Victims are witnesses in these cases, not parties. The State and defendant are the sole parties in interest.

grievance illustrate, it is patently obvious that any attempt by the employing agency or DOP to determine whether an employee would be "personally affected" based upon the outcome of the "proceedings" is a *completely subjective*, and therefore entirely arbitrary, inquiry.[8] "'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' *N.L.R.B. v. Wheeling Elec. Co.,* 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' *Pristavec v. Westfield Ins. Co.,* 400 S.E.2d 575 (W. Va. 1990), *citing Syl. Pt. 2, Click v. Click*, 98 W. Va. 419, 127 S.E.2d 194 (1925)." *Lasure v. Tyler County Bd. of Educ.,* Docket No. 90-48-330 (Mar. 26, 1992). Therefore, even assuming Respondents' construction of the pertinent provisions of Administrative Rule and DOP Policy is literally warranted by the language at issue, applying this construction will foreseeably result in inequitable and unjust treatment of State employees. Therefore, the exception must be otherwise construed according to the accepted principles of statutory construction.

[8] The employing agency and/or DOP could foreseeably make highly inappropriate and intrusive personal inquiries about State employees, in an attempt to support their subjective suppositions about the employee's alleged "personal interest" in the outcome of various proceedings, in particular criminal proceedings such as this. The questions and responses in the Level III hearing in this matter illustrate how ineffectual and awkward it was for Respondent DOP to try to prove that Grievant was personally interested/personally affected by the outcome of the trial of her mother's accused murderer. Additionally, these questions were distressing to Grievant who was understandably very confused by the inquiries about whether she was "personally" interested in the outcome of the trial. .

However, common definitions of "personal" and "interest" are applicable to describe and interpret the "personal interest" exception to the Administrative Rule, and complex analysis to construe the statutory language is unnecessary. " 'In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.' *Meadows on Behalf of Professional of W. Va. Educ. Assoc*. v. Hey, 399 S.E.2d 657, n. 9 (W.Va. 1990), citing *Hodge v. Ginsberg*, 303 S.E.2d 245 (W.Va. 1983)." The foregoing definitions of "personal" accurately reflect the general usage of the word. As noted, Respondents' argument fails to consider the term "interest," though "personal" describes "interest" in the exceptions. Therefore, the two words must be read in connection with one another to ascertain their meaning. Merriamwebster.com defines "interest" as "participation in, advantage and responsibility." Notably, this very common definition reflects that "interest" may be equated with having an "advantage." The Oxford English Dictionary, 3rd Ed., December 2005, defines "interest" as, "the relation of being objectively concerned in some things, by having a right or title to, a claim upon, or share in**;** the fact or relation of being legally concerned; *legal concern in a thing*;" (Emphasis added.) Black's Law Dictionary, Abridged 8th Ed. (1990), defines "interest" as:

> "1. The object of any human desires; esp., advantage or profit of a financial nature (conflict of interest). 2. *a legal share in something;* all or part of a legal or equitable claim to her right in property (right, title, and interest.) Collectively, the word includes any aggregation of rights, privileges, powers, and immunities; distributively, it refers to any one right, privilege, power, or immunity." (*Emphasis added*.)[9]

[9] The first definition concerning "human desires" is too amorphous, and applying it would lead to the same inequitable results obtained by applying the definition urged by Respondents. However, the example provided for that definition, "advantage or profit of a financial nature," which would imply a "conflict of interest," is both instructive and

The commonality between these last definitions is that they describe a legal concern or legal share in a “thing.” Additionally, though Respondent DHHR/BCSE did not provide a citation for its definition of "interest," as “a legal share or right in,” it comports with the above definitions**.** Applying these “ordinary and accepted" meanings to "personal interest," in order for this exclusion to operate, the State employee must have some “private” (pertaining to his private life, as opposed to his professional life), legal right or concern in the proceeding, such that he/she stands to derive some tangible material (e.g., *interalia*, real or personal property) or financial benefit from the outcome of the proceeding. In addition, the “personal interest” exclusion operates, by its plain language, to exclude payment of Witness/Jury Service leave if the employee stands to derive some private “right, privilege or power” based upon the outcome of the proceeding.

It is realized that this definition of "personal interest,” has some overlap with the other exclusions to the Administrative Rule. Addressing this point, Grievant argues that if "personal interest" is construed as consistent with “financial and vested interest(s),” “it would seem that Grievant would be required to have some sort of tangible gain attached her testimony and participation as a witness.”[10] Respondent DOP counters that the Administrative Rule differentiates "personal" interest from "financial" or "vested" interest, because the DOP as the drafters, and the Legislature, would not have used all three words, separated by commas to list and describe all possible interests in court cases. However, as these interests are in the same clause with “personal,” they should be read

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applicable. The second definition more broadly defines “interest” and is followed by a list of twenty-three various types of "interest."

[10] Neither the Administrative Rule nor Respondents define “Financial and vested interest(s)”.

in context, as they may relate to one another. "Financial and vested interest(s)" given their plain meaning, convey that the employee must have a monetary right (financial) or other consummated property right (vested) at stake in the proceeding.[11] Assistant Director of DOP, Mr. Thomas, indicated that part of the rationale behind the "personal interest" exclusion to the Administrative Rule is to avoid "unjust enrichment," of the employee. It is therefore logical that the "personal interest," exclusion is intended to broadly encompass any other type of private/personal enrichment that participation in the proceedings might confer upon the employee, rather than requiring the State employer to make an entirely subjective determination of whether the employee may be personally affected by the outcome of the proceedings.

Even if this is not the "ordinary and accepted" meaning of the term "personal "interest," it is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof, but such rule of construction should not be invoked so as to contravene the true legislative intention." Syl. Pt. 9, *Vest v. Cobb,* 138 W. Va. 660, 76 S.E.2d 885 (1953). Accordingly, consideration of the legislative intent of the Administrative Rule is required. The Administrative Rule generally operates to provide classified employees with paid witness and/or jury service leave in compliance with a subpoena. The general rationale of the Administrative Rule is, obviously, to prevent the employee from experiencing monetary loss when subpoenaed to appear at

[11] "Vest," *vb*. - To confer ownership of "property" upon a person; to invest with the full title to property; to give an immediate, fixed right of present or future enjoyment. "Vested," *adj.*, Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute, [i.e.] a vested interest in the estate. Black's Law Dictionary, Abridged 8th Ed. (1990).

proceedings, when neither the proceedings nor his participation in them will further his own interests. Grievant asserts that DOP's construction of the "personal interest" exception defeats this rationale of the Administrative Rule, particularly in that it does not operate to protect the State employee from monetary loss, when performing his public duty, by appearing under subpoena at a *criminal trial*, in which the State employee is not a defendant. In support of this contention, Grievant pointed to other State legislative provisions that act to protect the employee from financial loss when he/she is subpoenaed to testify at a criminal proceeding/trial, or to perform jury duty. *Michael v. Upshur County Bd. of Educ.*, 04-49-424 (March 9, 2005), citing W. Va. Code § 18A-5-3a, and *Ballard v. Lewis County Board of Educ*., Docket No. 92-21-346, with a provision parallel to W. Va. Code § 18A-5-3a that relates to anyone called to jury duty.

The Grievance Board in *Michael v. Upshur County Bd. of Educ.*, 04-49-424 (March 9, 2005) considered the rationale for the provision at W. Va. Code § 18A-5-3a, applicable to public education employees, which allows the employee who is subpoenaed to appear as a witness but not as a defendant in any criminal proceeding to make that appearance without loss of pay, as provided by the State Superintendent of Schools in his letter stating:

> "The apparent rationale for [W. Va. Code Section18A-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 a 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 legal days." (Emphasis added.)[12]

[12] The Grievance Board ultimately concluded that Grievant Michael did not establish that the proceeding in which he was subpoenaed to testify was criminal in nature and, therefore, denied the grievance.

Public personnel laws and regulations must be strictly construed in favor of the employees whom they are designed to protect. *Morgan v. Pizzino,* 256 S.E.2d 592 (W.Va. 1979); *Smith v. West Virginia Division of Rehabilitation Services*, 208 W.Va. 284, 540 S.E.2d 152 (2000); *Sutton v. Hancock Board of Education*, Docket No. 2010-1480-HanED (March 30, 2011). Respondents' interpretation of the "personal interest" exceptions in the Administrative Rule and DOP Policy is overly restrictive and limiting, and has not been construed in the light most favorable to the employee. Notably, BCSE's initial legal opinion recognizes that, at criminal law, the only parties in interest are the State and the defendant and, therefore, supports a determination that the Legislature's rationale for the Administrative Rule is consistent with its rationale for W. Va. Code Section 18A-5-3a. The provisions at W. Va. Code Section 18A-5-3a and at DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10.a., the Administrative Rule, though one applies exclusively to public education employees and the other to classified employees of the State, each concern leave for employees to attend court proceedings and, as such, it is proper to read them *in pari materia*. *See Canfield v. W. Va. Dep't of Educ.,* Docket No. 97-DOE-508 (Mar. 31, 1998); *Peters v. Raleigh County Bd. of Educ.,* Docket No. 94-DOE-043 (Sept. 27, 1994). The statutory construction rule of *in pari materia* requires that "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Based upon the foregoing, the undersigned concludes that, as part of its rationale in promulgating the Administrative Rule, the

Legislature intended to protect the State employee from monetary loss, when he is compelled to appear under subpoena, in a criminal action in which he is not a defendant. The State's "prosecutorial arm" has an interest in prosecuting, convicting and punishing those who commit criminal acts. Grievant was compelled by subpoena to appear as a witness at the subject criminal trial by the State, to aid it to prosecute the defendant, and she had no "personal, financial or vested interest" in the proceeding, nor was she otherwise precluded from eligibility for Witness/Jury service leave by the exceptions to the Administrative Rule. Grievant has proved by a preponderance of the evidence that Respondents' decision to charge her accrued annual leave for compliance to a subpoena in a criminal case in which she was not a party was based upon a misapprehension of the law and criterion that were inappropriate for consideration. Therefore, Respondent's decision was arbitrary and capricious.

Finally, Respondent DOP contends that even if Grievant had no conflicting interest in the outcome of the proceedings, and did not fall into one of the exceptions from eligibility for Witness/Jury service leave, she failed to provide a work excuse from the court for the days/times she appeared as a witness as required by the Administrative Rule and DOP Policy, which were necessary for DHHR to verify and account for leave usage. The undersigned finds that Grievant had, without success, asked the Court to provide her with excuses for the duration of her attendance at trial, but did not receive those. However, on May 13, 2015, Grievant produced Circuit Court documentation verifying the duration of the trial of her mother's accused killer and her presence there. The undersigned therefore finds that Grievant sought to comply with this requirement, and ultimately supplied sufficient proof of the days/times she was

present at trial, which now allows Respondents to compensate her for her witness leave accordingly.

In consideration of all of the foregoing facts and evidence, the undersigned concludes that Grievant is entitled to paid Witness/Jury service leave for her appearance at the trial.

CONCLUSIONS OF LAW

1. In a grievance that does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. W. Va. Code ST. R. § 156-1-4.19 (1996); *Payne v. W. Va. Dept. of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *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. "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); *Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

3. The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. *See Bonnett, et al., v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *Aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

4. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W.Va. 342, 431 S.E.2d 681 (1993)*; Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983).

5. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

6. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the DOP. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

7. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W.Va. 342, 431 S.E.2d 681 (1993)*; Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983).

8. A discretionary action may also be reversed if it is based upon a misapprehension of the law. *State ex rel. Withers v. Board of Education of Mason County*, 153 W.Va. 867, 172 S.E.2d 796 (1970).

9. DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10 provides for witness and/or jury service leave in compliance with a subpoena except in certain circumstances; one of those being if the employee has a personal interest in the matter.

10. In furtherance of DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10, the W. Va. Division of Personnel *Witness/Jury Service* DOP Policy (DOP-P10) establishes the process, procedure and requirements for classified employees who receive subpoenas.

11. Based, in some part, upon DOP's erroneous belief that Grievant's deceased mother was a plaintiff in the criminal trial, Respondents determined she was ineligible for paid Court/Jury leave. Therefore, Respondents did not properly apply the DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10, exclusion relating to "immediate family" as "plaintiff, defendant, or other interested party," and/or the W. Va. Division of Personnel *Witness/Jury Service* DOP Policy (DOP-P10) DOP Policy instructions relating to the employee who has a "personal or familial interest" and their denial of Grievant's leave upon this particular basis was arbitrary and capricious.

12. "It is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof, but such rule of construction should not be invoked so as to contravene the true legislative intention." Syl. Pt. 9, *Vest v. Cobb,* 138 W. Va. 660, 76 S.E.2d 885 (1953). *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d

588 (1983). A discretionary action may also be reversed if it is based upon a misapprehension of the law. *State ex rel. Withers v. Board of Education of Mason County*, 153 W.Va. 867, 172 S.E.2d 796 (1970);

13. "'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' *N.L.R.B. v. Wheeling Elec. Co.,* 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' *Pristavec v. Westfield Ins. Co.,* 400 S.E.2d 575 (W. Va. 1990), *citing Syl. Pt. 2, Click v. Click*, 98 W. Va. 419, 127 S.E.2d 194 (1925)." *Lasure v. Tyler County Bd. of Educ.,* Docket No. 90-48-330 (Mar. 26, 1992).

14. Applying the "ordinary and accepted" meanings to the "personal interest," exceptions in DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10.a. and W. Va. Division of Personnel *Witness/Jury Service* DOP Policy (DOP-P10), in order for the "personal interest" exclusion to operate, the State employee must have some "private" (pertaining to his private life, as opposed to his professional life), legal right or concern in the proceeding, such that he/she stands to derive some tangible material (e.g., *interalia*, real or personal property) or financial benefit from the outcome of the proceeding. In addition, the "personal interest" exclusion operates, by its plain language,

to exclude payment of Witness/Jury Service leave if the employee stands to derive some private “right, privilege or power” based upon the outcome of the proceeding.

15. The statutory construction rule of *in pari materia* requires that "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). *See Canfield v. W. Va. Dep't of Educ.,* Docket No. 97-DOE-508 (Mar. 31, 1998)

16. The State of West Virginia has an interest in prosecuting, convicting and punishing those who commit criminal acts and has enacted legislation designed to protect the public school employee from monetary loss, when he is compelled to appear under subpoena in a criminal action in which he is not a defendant, because the employee is fulfilling his public duty, rather than pursuing his own private interests. *See Michael v. Upshur County Bd. of Educ.*, 04-49-424 (March 9, 2005).

17. The State of West Virginia has an interest in prosecuting, convicting and punishing those who commit criminal acts. The undersigned concludes that, as part of its rationale in promulgating DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10, the Legislature intended to protect the classified State employee from monetary loss, when he is compelled to appear under subpoena in a criminal action in which he is not a defendant, because the employee is fulfilling his public duty, rather than pursuing his own private interests.

18. Grievant was compelled by subpoena to appear as a witness at a criminal trial, to aid the State of West Virginia in prosecuting the defendant therein, and she had no "personal interest,” in the proceeding under DOP Administrative Rule, W. Va. Code

St. R. §143-1-14.10 governing witness and jury service or W. Va. Division of Personnel *Witness/Jury Service* DOP Policy (DOP-P10), and was not otherwise excepted by the provisions of the Administrative Rule or Policy. Therefore, Grievant was entitled to paid leave when subpoenaed to attend the trial.

19. Grievant has proved by a preponderance of the evidence that Respondents' interpretation and application of DOP Administrative Rule, W. Va. Code ST. R. §143-1-14.10 and W. Va. Division of Personnel *Witness/Jury Service* DOP Policy (DOP-P10) was erroneous, included factors which were not intended to be considered and was contrary to the Legislative intent of the policy. Thus, their decision to charge Grievant accrued annual leave for compliance to a subpoena in a criminal case in which she was not a party was arbitrary and capricious.

Accordingly, the grievance is **GRANTED.** Respondents are **ORDERED** to pay Grievant for each day of her appearance at the subject criminal trial, based upon the wages she then received, plus interest.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: September 29, 2015

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Susan L. Basile
Administrative Law Judge