THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LESLIE RIDDLE,

Grievant,

v. **Docket No. 2018-2029-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,**

Respondent.

DECISION

Grievant, Leslie Riddle, is employed by Respondent, Department of Health and Human Resources (DHHR)/Bureau for Children and Families (BCF). On April 2, 2018, Grievant filed this grievance against Respondent stating:

> Grievant charged annual leave acting as an employee representative, informed by management on 3/16/2018 that the charge was based on a September 13, 2011, policy titled Union Representation Guidelines: "7.a. An employee who wishes to participate in a predetermination meeting must apply & be approved for…leave…in advance of attending the meeting."

For relief, Grievant seeks "To be made whole in every way including restoration of leave charged under improper policy."

A level one hearing was held on May 10, 2018, and a decision was issued on June 1, 2018, denying the grievance. Grievant appealed to level two on June 4, 2018, and a mediation session was held on August 14, 2018, wherein the parties agreed that since the facts were not disputed they would submit their case to level three for a decision on the record[1] using the level one hearing transcript. Grievant appealed to level three of the

[1] "Decision on the record" refers to the process of reaching decisions through review of a transcript from a prior hearing rather than holding a new hearing.

grievance process on August 14, 2018. Grievant was represented by Gordon Simmons, steward, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Brandolyn Felton-Ernest, Esquire, Assistant Attorney General. Each party submitted Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on September 20, 2018.

Synopsis

Respondent charged Grievant annual leave rather than paid time off for appearing at a coworker's predetermination meeting as the employee representative. The West Virginia Code permits Grievant to represent fellow employees, upon request, at any stage of a "grievance proceeding" or at a non "grievance proceeding" meeting to consider disciplinary action. The Code requires Respondent to provide Grievant paid time off to attend and prepare for a coworker's "grievance proceeding". The Code does not require paid time off for attending disciplinary meetings that fall outside the definition of "grievance proceeding". The Code's definition of "grievance proceeding" is ambiguous enough to include predetermination meetings. The parties have not provided sufficient facts to enable this Board to determine whether the predetermination meeting Grievant attended on March 16, 2018, falls within the definition of "grievance proceeding". Respondent's grievance policy excludes predetermination meetings from the definition of "grievance proceeding" in its requiring employee representatives to use annual leave[2] time to attend predetermination meetings. Grievant did not prove by a preponderance of the evidence that Respondent either violated the law or Respondent's own policy when Respondent

[2] "Annual leave" is paid vacation time that an employee earns on a monthly basis.

charged Grievant annual leave for representing a coworker at a predetermination meeting rather than providing her paid leave. Accordingly, this grievance is DENIED.

The following findings of fact are based upon the record developed at level one. The underlying facts of this grievance are not in dispute.

Findings of Fact

1. Grievant has been employed with Respondent as an Economic Service Worker for approximately 19 years.[3]

2. On or about March 16, 2018, Grievant appeared as an employee representative for her coworker at a predetermination meeting which lasted approximately 30 minutes.[4]

3. Grievant was a union shop steward for at least one year prior to the meeting that resulted in the instant grievance.[5]

4. At the predetermination meeting, Respondent informed Grievant that she was required to apply for 30 minutes of annual leave for the time Grievant spent as an employee representative at her coworker's predetermination meeting.[6]

5. Grievant maintains that Respondent should have provided her with paid leave for attending her coworker's predetermination meeting[7] rather than requiring her to use annual leave.

[3] Level one Decision.
[4] *Id*.
[5] Level one transcript, p. 10.
[6] Level one Decision.
[7] "Predetermination meetings" are quasi disciplinary meetings where employers may reprimand and consider disciplinary action against employees.

6. Respondent contends that Grievant was properly charged annual leave for her time spent as a representative in her coworker's predetermination meeting.[8]

7. In requiring Grievant to use annual leave for time spent as an employee representative in a predetermination meeting, Respondent relied upon a memorandum referred to as "Union Representation Guidelines" issued by the Office of the Deputy Secretary for Legal Services of DHHR on September 13, 2011.[9]

8. The DHHR Representation Guidelines § 7.a. states: "An employee who wishes to participate in a predetermination meeting as a representative must apply and be approved for appropriate leave with his/her supervisor in advance of attending the meeting. A representative may appear by telephone or video-conferencing."[10]

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Respondent charged Grievant annual leave rather than paid time off for appearing as an employee representative at a coworker's predetermination meeting. Grievant is employed by Respondent as an economic service worker. Grievant represents fellow

[8] Level one Decision.
[9] *Id*.
[10] Grievant's Exhibit 1, level one hearing.

coworkers at “grievance proceedings” and predetermination meetings in her voluntary role as employee representative. The West Virginia Code requires Respondent to provide paid leave to employee representatives for the time they spend attending “grievance proceedings” for fellow employees during work hours and for up to four hours of “grievance proceeding” preparation time during work hours. Respondent informed Grievant that predetermination meetings are outside the definition of “grievance proceedings” and required her to use a half hour of annual leave for attending her coworker’s predetermination meeting in her capacity as employee representative.

Grievant contends that she is entitled to paid time off to represent coworkers at predetermination meetings. She acknowledges that the West Virginia Code only grants employee representatives paid leave to attend or prepare for “grievance proceedings”, but argues that the spirit of the Code and the body of cases dealing with the grievance process also grants employee representatives paid leave to assist coworkers in predetermination meetings.

Respondent contends that the West Virginia Code obligates it to only provide Grievant paid leave to attend or prepare for “grievance proceedings” in her capacity as employee representative. It asserts that the definition of “grievance proceeding” is limited by West Virginia Code § 6C-2-2(j) to “a conference, level one hearing, mediation, private mediation, private arbitration or level three hearing, or any combination, unless the context clearly indicates otherwise”, and that a predetermination meeting falls outside this definition.

Grievant counters that West Virginia Code § 6C-2-3(g)(1) states that “[a]n employee may designate a representative who may be present at any step of the

procedure, as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." She argues that, even though this section does not mention paid time off, any vagueness or ambiguity in the Code as it relates to paid leave for employee representatives to attend these disciplinary meetings must be construed in favor of a grievant. She asserts that wherever there is vagueness and ambiguity in the Code governing public employee grievances, the Code must be construed in favor of the grievant.

Grievant contends that the West Virginia Code is ambiguous in both granting paid time off for employee representatives and in its definition of "grievance proceedings". While the Code is not ambiguous in addressing paid time off for employee representatives, its definition of "grievance proceedings" is ambiguous.

The West Virginia Code clearly and precisely addresses paid time off for employee representatives. There are two sections which address paid time off for employee representatives: one covers attendance of "grievance proceedings" and the other covers preparation for these proceedings. The section on attendance states that "[t]he grievant, witnesses and an employee representative shall be granted reasonable and necessary time off during working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits." W. VA. CODE § 6C-2-3(p)(1). The section on preparation states that "the grievant and an employee representative shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits." W. VA. CODE § 6C-2-3(p)(2). These sections clearly show

legislative intent to provide paid time off to employee representatives to attend "grievance proceedings" and prepare the grievance.

The West Virginia Code seems straight-forward in its definition of "grievance proceeding." "'Grievance proceeding', 'proceeding" or the plural means a conference, level one hearing, mediation, private mediation, private arbitration or level three hearing, or any combination, unless the context clearly indicates otherwise." W. VA. CODE § 6C-2-2(j). A closer analysis reveals ambiguity. The definition of "grievance proceeding" appears to refer, in part, to the three levels of the grievance process. While the above definition mentions level one and level three, it does not specifically mention level two. The three levels of the grievance process are set forth in West Virginia Code § 6C-2-4. "Level two" is defined as mediation, private mediation, and private arbitration, which are placed under the umbrella of "alternative dispute resolution". W. VA. CODE § 6C-2-4(b). This definition for "level two" overlaps, in part, with the definition of "grievance proceeding". However, had the West Virginia Legislature intended for "grievance proceeding" to mean the three levels of the grievance process, it could have defined "grievance proceeding" as "level one hearing or level one conference, level two of the grievance process, or level three hearing." While the Legislature did specify "level one" and "level three hearing" in its definition of "grievance proceeding", it curiously left out "level two" and instead chose to include the alternative dispute resolution options outlined in the definition of "level two". The Legislature added ambiguity to the definition of "grievance proceeding" in that it did not limit "mediation, private mediation, and private arbitration" to level two of the grievance process, thereby opening the door to the possibility that the "mediation, private mediation, and private arbitration" could still fall

within the definition of "grievance proceeding" if it occurred outside of the formal grievance process. Regardless, a predetermination meeting does not appear to be either a mediation, private mediation, or private arbitration.

Even if we interpret "grievance proceeding" to mean, in part, "level one hearing, level two of the grievance process, or level three hearing", we still have the mysterious inclusion of the word "conference" at the beginning of the definition and the phrase "or any combination" near the end. Black's Law Dictionary defines "conference" as "[a] meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes."[11] This definition is vague enough to include predetermination meetings at which multiple persons are present to either deliberate, exchange opinions, or address a dispute. Another definition of "conference" is provided in West Virginia Code § 6C-2-4(a)(2), where it is set out as an alternative to a level one hearing and is defined as "a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance." Again, if the Legislature had meant to define "conference" as "a level one conference", it could have included "a level one conference" in the definition of "grievance proceedings," just as it had included "level one hearing" therein.

When interpreting statute, caselaw directs this Board to assign words their plain meaning and not to construe language which is unambiguous. "Where, however, the statutory language is not certain, the statute is ambiguous and must be construed to ascertain its legislative intent: 'A statute that is ambiguous must be construed before it

[11] BLACK'S LAW DICTIONARY 296 (6th ed. 1990).

can be applied.' Syl. pt. 1*, Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992)." *Hammons v. W. Va. Office of the Ins. Comm'r*, 235 W. Va. 577, 584, 775 S.E.2d 458, 465 (2015). In defining "grievance proceeding", the Legislature's use of the terms "conference" and "mediation, private mediation, private arbitration" seems ambiguous, especially considering that it could have easily clarified the definition by using "level one conference" and "level two of the grievance process" if it had so desired.

"The first step in statutory construction is to identify the intent expressed by the Legislature in promulgating the provision at issue. 'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syl. pt. 1*, Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Next, we look to the particular language used by the Legislature. 'Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.' Syl. pt. 2*, State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *Accord* Syl. pt. 5*, State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959)" *Weimer v. Sanders*, 232 W. Va. 367, 374, 752 S.E.2d 398, 405 (2013). Unfortunately, the definition of "grievance proceeding" is murky and ambiguous.

Fortunately, the Legislature has provided a definition of "conference" as it applies to the grievance process. "Further guidance states that, '[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.' Syl. pt. 1*, Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled* on other grounds *by Lee—Norse Co. v.*

Rutledge, 170 W. Va. 162, 291 S.E.2d 477 (1982)." *Weimer v. Sanders*, 232 W. Va. 367, 374, 752 S.E.2d 398, 405 (2013). Section 6C-2-4(a)(2) of the West Virginia Code provides that "[a] conference is a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance." "'Chief administrator' means, in the appropriate context, the commissioner, chancellor, director, president, secretary or head of any state department, board, commission, agency, state institution of higher education, commission or council, the state superintendent, the county superintendent, the executive director of a regional educational service agency or the director of a multicounty vocational center who is vested with the authority to resolve a grievance." W. VA. CODE § 6C-2-2(b). Given these definitions, it is possible that the predetermination meeting Grievant attended with her coworker was a "conference". It is possible that a "chief administrator" was present if the requisite person with the authority to resolve the grievance was at the meeting. A predetermination meeting can fall within the definition of "conference" and "grievance proceeding" if it facilitates discussion of a grievance and if a "chief administrator" participates in the meeting. The burden of proof in this case is on Grievant. Grievant did not provide sufficient facts to enable this Board to determine whether the predetermination meeting that Grievant attended was a "conference" and whether Respondent was a "chief administrator". Therefore, Grievant has not met her burden of proof.

Grievant meritoriously contends that ambiguity in laws governing public employee grievances should be construed in favor of the grievant.[12] However, agencies are given leeway in interpreting ambiguity in the Code. "As we noted in Syllabus Point 7, in part, of *Lincoln County Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992): 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' (Citations omitted). *See also* Syl. pt. 2*, West Va. Dept. of Health and Human Resources/Welch Emergency Hosp. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Boley v. Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992); *Blennerhassett Historical Park Comm'n v. Public Serv. Comm'n of W. Va.*, 179 W. Va. 250, 366 S.E.2d 758 (1988). . . .*Martin v. Randolph Cnty Bd. of Educ*., 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995)." *Lewis Cty Bd. of Educ. v. Bohan*, 2015 W. Va. LEXIS 263. Had the Code clearly included predetermination meetings in the definition of "grievance proceeding", and thereby awarded employee representatives paid time off to attend predetermination meetings, Respondent's policy to the contrary would violate the law.

Because Grievant has not proven by a preponderance of the evidence that the predetermination meeting she attended as a union representative on behalf of a coworker was within the definition of "conference" or that said predetermination meeting is directly covered under the definition of "grievance proceeding", the definition of "grievance proceeding" remains ambiguous in its applicability to this meeting. Given the ambiguity

[12] "[I]f statutory construction [of school and other public employee personnel laws] is necessary and warranted, such construction should go in the direction of expanding or preserving employee protection, and not in the direction of limiting that protection." *Smith v. West Virginia Div. of Rehabilitative Servs*., 208 W. Va. 284, 287, 540 S.E.2d 152, 155 (2000).

in the definition of "grievance proceeding", Respondent's policy excluding predetermination meetings, as it applies to this specific predetermination meeting, must be honored because it does not clearly conflict with the West Virginia Code. The DHHR Representation Guidelines § 7.a. states: "An employee who wishes to participate in a predetermination meeting as a representative must apply and be approved for appropriate leave with his/her supervisor in advance of attending the meeting. A representative may appear by telephone or video-conferencing."

As Grievant has not proven by a preponderance of the evidence that the predetermination meeting she attended as a union representative is within the definition of "grievance proceeding", this grievance is DENIED.

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. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "The grievant, witnesses and an employee representative shall be granted reasonable and necessary time off during working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits." W. VA. CODE § 6C-2-3(p)(1).

3. "'Grievance proceeding', 'proceeding" or the plural means a conference, level one hearing, mediation, private mediation, private arbitration or level three hearing, or any combination, unless the context clearly indicates otherwise." W. VA. CODE § 6C-2-2(j).

4. "A conference is a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance." W. VA. CODE § 6C-2-4(a)(2) "'Chief administrator' means, in the appropriate context, the commissioner, chancellor, director, president, secretary or head of any state department, board, commission, agency, state institution of higher education, commission or council, the state superintendent, the county superintendent, the executive director of a regional educational service agency or the director of a multicounty vocational center who is vested with the authority to resolve a grievance." W. VA. CODE § 6C-2-2(b).

5. "The first step in statutory construction is to identify the intent expressed by the Legislature in promulgating the provision at issue. 'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Next, we look to the particular language used by the Legislature. 'Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.' Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *Accord* Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ('When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and

in such case it is the duty of the courts not to construe but to apply the statute.'). Further guidance states that, '[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.' Syl. pt. 1*, Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled* on other grounds by *Lee—Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982)." *Weimer v. Sanders*, 232 W. Va. 367, 374, 752 S.E.2d 398, 405 (2013).

6. "As we noted in Syllabus Point 7, in part, of *Lincoln County Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992): 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' (Citations omitted). *See also* Syl. pt. 2*, West Va. Dept. of Health and Human Resources/Welch Emergency Hosp. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Boley v. Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992); *Blennerhassett Historical Park Comm'n v. Public Serv. Comm'n of W. Va*., 179 W. Va. 250, 366 S.E.2d 758 (1988). . . .*Martin v. Randolph Cnty Bd. of Educ*., 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995)." *Lewis Cty Bd. of Educ. v. Bohan*, 2015 W. Va. LEXIS 263.

7. Grievant has failed to prove by a preponderance of the evidence that the March 16, 2018 predetermination meeting she attended on behalf of a coworker as an employee representative is within the definition of "grievance proceeding".

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: October 24, 2018

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Joshua S. Fraenkel
Administrative Law Judge