DENNIS MATHENY,

Grievant,

v v.

Docket No. 02-26-354

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dennis Matheny, filed this grievance on April 29, 2002, against his employer the Mason County Board of Education ("MCBOE"). His Statement of Grievance reads:

> Grievant contends that the board of education improperly made deductions from his salary. He contends that the board of education erred in determining that he had received military leave [payment] in excess of the amount to which he is entitled by law. He alleges a violation of West Virginia Code §15-1F-1.
>
> Relief sought: Grievant seeks: (a) repayment of all funds deducted from his salary for the alleged overpayment of military leave; and (b) interest for any sums to which he is entitled.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on November 1, 2002. A Level IV hearing was held on January 23, 2002, and this case became mature for decision on February 14, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by MCBOE as a bus operator.
2. Grievant also serves in the National Guard. Prior to September 11, 2001, Grievant had

utilized 24 days of military leave.

3. In September 2001, Grievant was called up by Governor Bob Wise for four days. He then had served 28 days.

4. On October 7, 2001, Grievant was recalled by Governor Wise, and he did not return from this call-up until March 15, 2002. Grievant stayed within his home area. (See footnote 2) Grievant was compensated for this service.

5. On October 26, 2001, the Legislature amended W. Va. Code § 15-1F-1(b) to grant an additional thirty days of paid leave per year in certain circumstances. This Code Section states:

> Leave of absence for public officials and employees for drills, parades, active duty, etc.
>
> . . .
>
> (b) Effective the eleventh day of September, two thousand one, all officers and employees of the state, or subdivisions or municipalities thereof, who are ordered or called to active duty by the properly designated federal authority shall be entitled to military leave of absence from their respective offices or employments without loss of pay, status or efficiency rating for a maximum period of thirty working days for a single call to active duty: Provided, That an officer or employee of the state, or subdivisions or municipalities called to active duty who has not used all or some portion of the thirty working days of military leave of absence granted by subsection (a) shall be entitled to add the number of unused days from that calendar year to the thirty working days granted by this subsection, up to a maximum of sixty days for a single call to active duty: Provided, however, That none of the unused days of military leave of absence granted by subsection (a) may be carried over and used in the next calendar year.
>
> (c) The term "without loss of pay" means that the officer or employee shall continue to receive his or her normal salary or compensation, notwithstanding the fact that such officer or employee may have received other compensation from federal or state sources during the same period.

(Emphasis added).

6. This Code Section was passed on October 26, 2001, to go into effect retroactively on September 11, 2001. (See footnote 3) A change in the Code Section substituted "properly designated federal authority" for "President of the United States".

7. After the passage of this legislation, MCBOE's Director of Finance, Chris Campbell, attempted to find out how long moneys should be paid to their employees who had been called up by Governor Wise.

8. Grievant received payment from MCBOE for all the time he served in 2001, 72 days. Grievant was also scheduled to receive payment for more than thirty days in 2002, but this payment was stopped before it was paid.

9. In January 2002, Director Campbell was referred to Lt. Col. Michael Barber in the Adjutant General's Office. He had been listed as a resource in a Division of Personnel memo discussing the recent legislation. Lt. Col. Barber informed Mr. Campbell that a call up by the Governor was a state call-up and covered in 32 U.S.C. 1 et seq., and a federal call-up was covered under 10 U.S.C. 1 et seq. and was by the President or his designee. Lt. Col. Barber advised Mr. Campbell the Governor was not considered aproperly designated federal authority, and he could only call-up the National Guard for state business.

10. MCBOE devised a repayment plan and sent it to Grievant for reply. Grievant did not agree with the repayment, but did not object to the plan. It was instituted and by the time of the Level IV hearing, all the money had been repaid.

Issues and Arguments

Grievant asserts the Governor is a properly designated federal authority because he is identified in the Federal Code as a person with the authority to call-up the National Guard. (See footnote 4) Grievant also asserts the opinion of Lt. Col. Barber should be ignored, and the statute interpreted on its face. Additionally, and in the alternative, Grievant argues that since there was no bad faith on his part, he should be allowed to keep this money, and the problem should be corrected in future.

Respondent contends Grievant has the burden of proof and has not demonstrated the Governor is a properly designated federal authority whose call-up should result in an additional thirty days of compensation. Respondent maintains it is required by statute to seek repayment of moneys, if it has improperly paid them for an unauthorized purpose.

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); Holly v. LoganCounty 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 first issue is the meaning of W. Va. Code § 15-1F-1(b). This Code Section states that employees of the state, who are ordered to active duty by a "properly designated federal authority" are entitled to an additional thirty days of paid military leave of absence. When the meaning of a statute is plain on its face, there is no need for interpretation. "'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 Employees 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)." Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992).

A governor is the chief executive official of a state or commonwealth. Black's Law Dictionary 356 (5th abridged ed. 1083). The Governor of West Virginia is granted the authority to call troops to the service of the State by the West Virginia Constitution at Article VII, §12. This Section states, "[t]he Governor shall be commander-in-chief of the military forces of the State (except when they shall be called into the service of the United States) and may call out the same to execute the laws, suppress insurrection and repel invasion." Accordingly, the Governor's authority to call-up the National Guard is based on the West Virginia Constitution not the Federal Code. 10 U.C.S. Chapter 1211 §12406 speaks to the right of the President to call-up troops as needed. Respondent avers its support for Grievant's work in the National Guard, but notes it is required by W. Va. Code § 11-8-26 to recover moneys it did not have the authority to spend. This statute discusses "Unlawful expenditures by local fiscal body" and states:

> Except as provided in sections fourteen-b, twenty-five-a and twenty-six-a [§§ 11-8-14b, 11-8-25a and 1-8-26a] of this article, a local fiscal body shall not expend money or incur obligations:
>
> (1) In an unauthorized manner;
>
> (2) For an unauthorized purpose;

(3) In excess of the amount allocated to the fund in the levy order;

(4) In excess of the funds available for current expenses.

As noted in Thomas v. Board of Education, 164 W. Va. 84, 261 S.E.2d 66 (1979), any expenditure of levy funds in an unauthorized manner or for an unauthorized purpose constitutes an unlawful diversion of funds. (See footnote 5) Accordingly, Respondent did not have the option of allowing Grievant to keep these moneys, once MCBOE discovered it did not have the authority to compensate Grievant for an additional thirty days.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rulesof 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). See W. Va. Code § 18-29-6.

2. The Governor receives his authority to call-up the National Guard based on the West Virginia Constitution Article VII, §12.

3. Because a governor is not a properly designated federal authority within the meaning of W. Va. Code § 15-1F-1(b), Grievant was not entitled to an additional thirty days of compensation from MCBOE.

4. Grievant did not meet its burden of proof and demonstrate he was entitled to additional compensation over the thirty days he was paid for both 2001 and 2002.

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 22, 2003

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and MCBOE was represented by Attorney Greg Bailey from Bowles Rice McDavid Graff and Love.

Footnote: 2

None of these orders were placed into evidence, but Grievant testified they were all from Governor Wise.

Footnote: 3

The statute creates two categories of benefits for military reservists; the first category gives non-active reservists thirty working days of paid leave for drills, parades, or other non-active duty during a calendar year; however, if the employee is called to active duty by the properly designated federal authority, the activated reservist is entitled to additional leave with pay. See Op. Att'y Gen., July 16, 1991.

Footnote: 4

No authority for the argument was cited, and no U.S.C. Section was given.

Footnote: 5

West Virginia Code § 11-8-28 also discusses the recovery of unlawful expenditures, and indicates there should be recovery of any money unlawfully paid out by a district board of education. This section addresses the obligation to recapture public funds improperly expended. Bd. of Educ. v. Commerce Cabell Alternative School. Ins. Co., 116 W. Va. 503, 182 S.E. 87 (1935).