ALTON JARMAN and

MARK ALIFF,

Grievants,

v v.

Docket No. 97-10-541

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Alton Jarman and Mark Aliff (Grievants) are substitute school service personnel employed by Respondent Fayette County Board of Education (FCBE) as Bus Operators. Grievants filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on October 14, 1997, alleging that FCBE violated W. Va. Code §§ 18A-4-8a and 18-29-2 when it failed to compensate them for attending required inservice training. The grievance was denied at Level I, and Grievants appealed to Level II where an evidentiary hearing was conducted on November 18, 1997. The grievance was denied at Level II by Peggy F. Martin, the Superintendent's designee, on December 8, 1997. As authorized by W. Va. Code § 18-29- 4(c), Grievants by-passed Level III, appealing to Level IV on December 11, 1997. The parties subsequently agreed to submit this matter for decision on the record, and agreed to a briefing schedule. In accordance with that schedule, written arguments were receivedfrom the parties (See footnote 1) on February 13, 1998. Thereafter, this matter became mature for decision upon receipt of the Level II hearing transcript on February 18, 1998.

The facts in this matter are essentially undisputed. Accordingly, the following Findings of Fact are made from the testimony and exhibits presented at Level II.

FINDINGS OF FACT

1. Alton Jarman and Mark Aliff (Grievants) are employed by the Fayette County Board of

Education (FCBE) as substitute school service personnel in the classification of Bus Operator.

2. By correspondence dated August 7, 1997, Galen Horrocks, FCBE Transportation Supervisor, advised Grievants that FCBE would be offering inservice training from 7:30 a.m. to 4:30 p.m. on August 19, and 22, 1997, and from 7:30 a.m. to 11:30 a.m. on August 20, 1997. G Ex 1; HT at 12-13.

3. Grievants were required to attend the training offered for FCBE Bus Operators in order to be recertified as substitutes in the Bus Operator classification of employment.

4. Grievants were advised by Mr. Horrocks in his August 7 letter that they would not be compensated for attending the inservice training. See G Ex 1.

5. Grievants attended the inservice training as required, and have not been compensated for their time. FCBE's regular Bus Operators who attended the same training were compensated as part of their regular term of employment. 6. FCBE does not compensate substitute Bus Operators for obtaining initial certification or for obtaining required recertification. HT at 41.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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.

Grievants contend that they are entitled to compensation for attending required inservice training in accordance with an opinion issued by State Superintendent of Schools Tom McNeel on October 7, 1985. That opinion contains the following language pertinent to resolution of this grievance:

> **A substitute driver from last year - even one who has been driving for the board for a few years - nevertheless, must become recertified each year if he or she wants to continue to drive.**
>
> **If the substitute driver chooses to take in-service training to help prepare him/herself for recertification, then the driver is not entitled to be paid salary for**

> **the period of the training. The bus operator takes the training on his or her own time.**
>
> **On the other hand, if the county board of education insists that a substitute bus operator go to in-service training in order to become certified to drive for the school year, then the board must pay salary to the driver for his or her time spent in the in-service training.**

The foregoing opinion, rendered pursuant to the State Superintendent's authority under W. Va. Code § 18-3-6, is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v.Board of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994). See Blankenship v. Mingo County Bd. Of Educ., Docket No. 96-29-334 (Apr. 22, 1997); Chafin v. Boone County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993); Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989). The undersigned administrative law judge is unable to conclude that the State Superintendent's opinion is clearly erroneous as a matter of law. (See footnote 2) **Therefore, the only issue remaining is whether Grievants qualify for compensation under the terms of that opinion.**

Grievants established that they were required to obtain a minimum of 18 hours of inservice training as a condition of retaining their employment status as substitute Bus Operators for FCBE. Although FCBE states that they could have obtained the required training at another time and place, from another county board of education for example, the State Superintendent's opinion focuses upon the requirement, not the time or place the requirement is met. So long as Grievants attended training as required, and not training that they simply elected to take for their personal convenience, FCBE is required to compensate them for the time spent in such training.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievants have the burden of proving their

grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. &State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. An opinion of the State Superintendent of Schools interpreting a provision of the laws applicable to the West Virginia schools is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775, 188 W. Va. 430 (1992); Smith v. Board of Education, 341 S.E.2d 685 (W. Va. 1985); Jerden v. Lewis County Bd. Of Educ., Docket No. 93-21-349 (Aug. 19, 1994). See Security Nat'l Bank v. First W. Va. Bancorp, 277 S.E.2d 613 (W. Va. 1981).

4. A 1985 opinion by the State Superintendent of Schools stating that a county board of education must pay substitute Bus Operators for attending inservice training that is required in order for them to continue working in that capacity is not clearly erroneous.

5. Grievants established that they were required to attend inservice training as a condition of retaining certification necessary to maintain employment as substitute Bus Operators and, in accordance with a 1985 opinion by the State Superintendent of Schools, should have been compensated for their time.

Accordingly this Grievance is hereby GRANTED and Respondent Fayette County Board of Education is ORDERED to compensate Alton Jarman and Mark Aliff at theirregular rate of pay as substitute Bus Operators for the hours they spent attending inservice training on August 19, 20, and 22, 1997.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and

transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 13, 1998

Footnote: 1

Grievants were represented by Perry Bryant, UniServ Consultant, of the West Virginia Education Association. Respondent was represented by Douglas L. Kincaid, FCBE Director of Personnel.

Footnote: 2

The State Superintendent's opinion does not specify which provisions of the school laws he is applying in reaching his conclusion.