EARLEY SHREVE,

Grievant,

v. Docket No. 04-52-339

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Earley Shreve ("Grievant"), employed by the Wetzel County Board of Education ("WCBE") as a custodian, filed a level one grievance on July 12, 2004, in which he alleged employees required to work on snow days were also required to work when out of school environment ("OSE") days were changed to instructional days. For relief, Grievant requests compensation or compensatory time off for the additional days worked.

Larry West, principal at New Martinsville School, lacked authority to make a decision at level one. The grievance was denied following an evidentiary hearing at level two, and Grievant elected to bypass consideration at level three. Appeal was made to level four on September 16, 2004. Grievant, represented by Owens Brown of the West Virginia Education Association, and WCBE, represented by Howard E. Seufer, Jr., Esq., of Bowles Rice McDavid Graff & Love, agreed to submit the grievance for decision based upon the lower-level record. The case became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on December 1, 2004.

The following essential facts have been derived from a preponderance of the evidence admitted into the record.

Findings of Fact

1. Grievant has been employed by WCBE for approximately twenty years, and has held the classification title of custodian at all times pertinent to this grievance. 2. Wetzel County schools were closed due to inclement weather on January 26, 27, 28, and 30, 2004.

3. WCBE requires all custodians to work on days school is cancelled due to snow. Other employees are also required to report to work on snow days, including all 261-day employees, maintenance employees, mechanics, county office employees, principals, and

assistant principals.

4. Grievant reported to work on the days schools were closed in January, and completed his regular daily schedule.

5. As a result of the four "snow" days, only 176 instructional days were left in the 2003-2004 school year calendar. To meet the mandated 180 instructional days, four non-instructional days, June 3, 4, 7, and 8, were converted to instructional days.

6. Grievant, along with those other employees previously identified, was required to work his regular schedule during the four converted days in June. These employees did not receive any additional compensation for working the four snow days in January and the four instructional days in June.

7. Grievant was not required to work more than 261 days - his contracted annual term of employment.

Discussion

WCBE asserts that it acted in compliance with an interpretation by the State Superintendent of Schools which stated that employees who are required to work on a snow day may also be required to work on a make-up day, without additional compensation. WCBE also relies on W. Va. Code § 18A-5-2, which provides whenschools are closed due to weather conditions, contagious disease, or other calamitous cause, a board may provide appropriate alternative work schedules for affected professional and service personnel. Grievant argues that the Superintendent's opinions applied only to administrators, and does not address the issue relating to service personnel. Although not specifically stated, Grievant's claim essentially alleges discrimination.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The 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. W. Va. Dep't of Health & Human Res.,

Docket No. 92-HHR-486 (May 17, 1993).

WCBE relies upon an interpretation issued by State Superintendent of Schools David Stewart, dated September 24, 2003, in which the following question was posed:
When school is canceled because of a "snow day" and I (or any other employee with over 200 day contracts) am required to work that day, how must or should I be compensated for also being required to work the make-up day?

Superintendent Stewart responded:
you are not entitled to any additional compensation for working on a make-up day. A day lost due to snow will necessarily be scheduled to [be] made up on a day which is already included as a paid day within your employment term. Even if teachers are not required to report to work on a snow day, that day is not a vacation day. It is included as part of your employmentcontract for which you are paid. Working on both the make-up day and the snow day does not add any days to your employment term. Thus, no additional compensation will be owed to you.

This interpretation is consistent with a State Superintendent's interpretation issued March 21, 1988, in which it was determined that central office personnel who were required to work a snow day when other school personnel did not, were required to work the make- up day, and that the practice did not extend the calendar for those personnel, or entitle them to any additional compensation.

Interpretations by the State Superintendent of Schools of statutes affecting education personnel are to be accorded great weight unless clearly erroneous. Smith v. Greenbrier County Bd. of Educ., 192 W. Va. 321, 452 S.E.2d 412 (1994). The 1988 interpretation has been consistently upheld by the Grievance Board in cases involving various job classifications. Peal v. Mercer County Bd. of Educ., Docket No. 01-27-114 (Sept. 25, 2001) (teachers); Sullivan v. Jackson County Bd. of Educ., Docket No. 96-18- 087 (Aug. 30, 1996)(maintenance workers); Bennett v. Fayette County Bd. of Educ., Docket No. 95-10-256 (Aug. 31, 1995)(bus garage employees). The 2003 interpretation is essentially a restatement of the earlier document, and will also be upheld.

As with the above-cited cases, WCBE did not engage in discrimination, defined by W. Va.

Code 18-29-2(m) as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." As a custodian, Grievant is responsible for snow removal on days other employees are not required to report to school, thus, the difference in treatment is clearly based upon actual job responsibilities. Further, Grievant was paid for both days worked,and both days were within his contracted employment term. He is not entitled to additional compensation or compensatory time off.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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 Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Interpretations by the State Superintendent of Schools of statutes affecting education personnel are to be accorded great weight unless clearly erroneous. Smith v. Greenbrier County Bd. of Educ., 192 W. Va. 321, 452 S.E.2d 412 (1994).

3. Grievant failed to prove the September 2003 interpretation of the State Superintendent, regarding snow days and make-up days, was clearly erroneous or limited only to administrative personnel.

4. The difference in treatment is this case is clearly based upon actual job responsibilities, and was not discrimination, defined by W. Va. Code § 18-29-2(m) as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

Accordingly, the grievance is DENIED.

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

DATE: DECEMBER 30, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE