WILLIAM REDMAN,

Grievant,

v. Docket No. 04-18-366

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant William Redman is employed as a bus operator by the Jackson County Board of Education ("JCBOE"). He filed this grievance on May 7, 2004, requesting additional payment for an extracurricular trip.

The grievance was denied at Levels I and II, and waived at Level III. Grievant appealed to Level IV on October 15, 2004, and the parties agreed to submit the case on the record. This case became mature for decision on February 14, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts he is entitled to eight hours of overtime compensation for his three and one half hours of work on early Sunday morning, March 21, 2004, and alleges JCBOE violated W. Va. Code § 18A-4-8e when it failed to pay him for a full day. He seeks compensation for this time with interest.

Respondent asserts there was no violation of this Code Section, and cites a recent State Superintendent's Opinion to support its reasoning and the Level II outcome. Respondent contends Grievant was not entitled to payment for the full eight hours onSunday, as he was completing his assignment from the prior day, Saturday, and, thus, only reported to work one day, Saturday.

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

Findings of Fact

1. Grievant has been employed as a regular bus operator for seven years.

2. Grievant accepted an extra-duty assignment to take a school choir to Martinsburg for a weekend trip.

3. The extra-duty assignment began at 11:00 a.m. on Friday, March 19, 2004, when the students from Ripley High School were loaded on the bus.

4. Grievant completed his duties for Friday, March 19, 2004, at 11:45 p.m.

5. Grievant's Saturday duties began at 10:45 a.m.

6. Grievant began the return trip on Saturday, March 20, 2004, at 7:00 p.m.

7. This return trip continued until Sunday, March 21, 2004, at 3:15 a.m., and Grievant finished his duties with the bus at 3:45 a.m. It is unclear why the return trip took so long.

8. Grievant received $658.35 for this trip, which included 24 hours of overtime and 3.75 hours at his regular pay.

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 (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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

This case involves the language of W. Va. Code § 18A-4-8(e). This Code Section states:

> If an employee whose regular work week is scheduled from Monday through Friday agrees to perform any work assignments on a Saturday or Sunday, the employee shall be paid for at least one-half day of work for each day he or she reports for work, and if the employee works more than three and one-half hours on any Saturday or Sunday, he or she shall be paid for at least a full day of work for each day.

(Emphasis added).

Grievant asserts he should receive eight hours of compensation for his three and three fourths hours of work on Sunday because he worked more than three and one half specified in W. Va. Code § 18A-4-8(e).

After this grievance was filed, JCBOE requested an interpretation of W. Va. Code § 18A-4-8(e) from the State Superintendent of Schools, David Stewart. Specifically, JCBOE Superintendent Ronald Ray asked if an extra-duty assignment began on a Friday, but did not end until the early morning of the next day, Saturday, or if the trip began onSaturday evening and ended at 4:00 a.m. Sunday morning, is the bus operator entitled to be paid for two full days? A response was not received before the Level II Decision was issued.

On September 30, 2004, State Superintendent Stewart responded to Superintendent Ray's questions. He noted that in each scenario the driver reported to work on a given day, but the shift continued on to the next calendar day. He stated the driver only reported to work once, did not report to work on two separate days, and would only be entitled to the hours worked in each case, as it was "one continuous work shift." He noted that if the bus operator had reported to work for four hours on both a Saturday and Sunday, the outcome would be different, and the employee would be entitled to a full day's wages for both days.

W. Va. Code § 18-3-6 authorizes formal opinions by the Superintendent of Schools in the following terms: "At the request in writing of any citizen, teacher, school official, county or state officer, the state superintendent of schools shall give his interpretation of the meaning of any part of the school law or of the rules of the state board of education." "Under the West Virginia Supreme Court of Appeals' well-settled doctrine regarding interpretation of statutes by bodies charged with their administration, a State Superintendent's opinion 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. Bd. of Educ., 341 S.E.2d 685, 689-690 (W. Va. 1985); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994). See 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)." Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996).

After a review of the State Superintendent's Opinion and the applicable statute, the

undersigned is unable to conclude the opinion of the State Superintendent of Schools is clearly wrong. Additionally, Grievant did not address the State Superintendent's opinion or present any law that would support concluding the State Superintendent's opinion on this issue to be clearly erroneous. (See footnote 2) See Hanner v. Fayette County Bd. of Educ., Docket No. 95-10-288 (Oct. 12, 1995).

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 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). Where the evidence equally supports both sides, the employer has not met its burden. Id. 2. The State Superintendent's opinion 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); Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996).

3. The State Superintendent's opinion finding a bus operator, who reports to work on one day, but continues at work and completes the assignment the next day, reported to work only once and was only entitled to the hours worked on the second day, (as well as the appropriate compensation for the first day) is not clearly erroneous.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jackson 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: March 8, 2005

Footnote: 1

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by Howard Seufer, Esq., of Bowles Rice McDavid Graff and Love.

Footnote: 2

Grievant did cite an old Grievance Board case, Stevens v. Tyler County Bd. of Educ., Docket No. 94-48-067 (Feb. 7, 1995). This case was not applicable, as it dealt with a different issue and involved the bus operators' approval of another method of payment for extra-duty assignments.