WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD JAMES
Grievant,

v. **Docket No. 2008-1028-PutED**

PUTNAM COUNTY BOARD OF EDUCATION
Respondent.

D E C I S I O N

Grievant, Richard James, is employed by Putnam County Board of Education ("PCBOE") as a regular half day bus operator. He filed a level one grievance on December 6, 2007, challenging the action of Respondent PCBOE in that he was "not permitted to step up to a full day run-Bus (995)." As relief, Grievant requests "Backpay for all days I was denied run-Bus 995."

A level one conference was held on January 4, 2008, and Grievant was notified the grievance was denied by letter dated January 10, 2008. Grievant appealed and thereafter the parties agreed to waive level two. A level three hearing was convened in the Public Employees Grievance Board's Charleston office on May 29, 2008. At the hearing, Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Rebecca Tinder, Esquire, of Bowles Rice McDavid Graff & Love LLP. Prior to proceeding with level three testimony, the parties stipulated to the facts as outlined in the level one decision. This matter became mature for decision on or about June 27, 2008, following the submission of the parties' proposed Findings of Fact and Conclusions of Law. This matter is now ripe for decision.

Synopsis

Grievant, a regular half day bus operator, challenged Respondent Putnam County Board of Education's action of using a substitute to fill a full day position of an absent employee whose absence was prolonged. Grievant contends Respondent has established a pattern of removing substitutes from runs where a step up service person is interested in the position. Grievant maintains he is entitled to relief (lost wages) in that Respondent had notice of his interest and should have allowed him the opportunity to fill the full day run position.

It is undisputed that in an emergency, the normal rotation used for making substitute bus operator assignments does not have to be followed. A substitute was called to fill an absent regular driver's afternoon run, on short notice. However, shortly thereafter, Respondent became aware that the absence would be extended. In the facts of this matter, the substitute should not have been given priority in filling the position throughout the extended period of the regular employee's absence. Pursuant to applicable statutes, the so-called "step-up" provision is implicated, requiring that other drivers be offered the opportunity to accept the assignment throughout the period of the regular employee's extended absence.

Grievant is not the only, or most senior, regular half day, bus operator with an interest in filling an extended absence of a full time operator. Grievant did not demonstrate he was next in line to be placed in an extended assignment, or that he was otherwise entitled to the position at issue. Grievant did not establish that he, exclusively, lost wages as a result of this prospective full day assignment.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact based upon a preponderance of the evidence presented:

Findings of Fact

1. Grievant is employed as a regular half day bus operator by Respondent. Grievant is not the most senior regular bus operator in Putnam County.

2. On November 26, 2007, Gina Gibson, the regular bus operator of the full day run 995, completed the morning portion of her run and then called off the afternoon portion of her run because she had a doctor's appointment. Respondent was not initially informed by Ms. Gibson that her absence would be for an extended period of time.

3. There was an expedited need for a bus operator to complete the afternoon portion of run 995 after Ms. Gibson, the regular bus operator, called off.

4. Respondent utilizes an automated call out system to fill absences of regular employees. Flora Frye, a substitute, was called for the absent driver using the automated call out system.

5. On November 26, 2007, with knowledge of an absence, Grievant notified Putnam County Board of Education that he would be interested in any opportunity to "step up" into a full day run if one became available for an extended time due to the absence of another employee. Specifically, Grievant left a message for Sue Meadows, Secretary in the Transportation Department, regarding his desire to step up.

6. The next day, on November 27, 2007, Grievant was advised by Ms. Meadows that a substitute had been called by the automated call out system to fill the position and was scheduled to remain in the position through November 30, 2007.

7. Grievant had no objection to the substitute filling that position for such a short period (three to five days), but advised Ms. Meadows that he believed that Ms. Gibson's (the regular bus operator) absence would be for a time period longer than anticipated by Respondent.

8. Grievant and Ms. Gibson communicated regarding her absence. Ms. Gibson indicated to Grievant that she anticipated her absence would exceed four to six weeks beyond November. Ms. Gibson agreed to contact Respondent and advise respective individual(s) of that expectation.

9. Respondent was contacted by Ms. Gibson and informed that her absence would be for an extended period.

10. Prior to the events of this grievance, PCBOE instituted a system which permitted bus operators to choose whether or not they wish to be provided opportunities to "step-up" to other runs.[1] Individuals interested were placed on a list in the order of seniority.

11. PCBOE procedure for dealing with "step up" issues has been in effect since October of 2007. Regularly employed bus operators, who have expressed an interest in "stepping up," are called first to fill the position. If no regularly employed bus operator is interested, the assignment is then given to a substitute bus operator. *See Bowles v. Putnam County Board of Education*, Docket No. 2008-0313-PutED (October 31, 2008).

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[1] Generally, a "step-up" program enables a regularly-employed bus operator to drive the bus routes of other bus operators when those other bus operators were absent. The step-up program, administered by the transportation department, basically permitted a regular driver to "enroll" in the program and to substitute for an absent driver.

12. Respondent's records indicate that several regular half day bus operators were interested in stepping up to a long term vacancy.[2] Grievant was not the most senior regular bus operator interested in stepping up into a long term absence of a full time operator. There were no less than six bus operators, with seniority dates greater than Grievant, who expressed an interest in stepping up to fill long term vacancies.

13. At the time Grievant was questioning the length of Ms. Gibson's absence, he was advised that Respondent was not sure that it would be Grievant's turn to step up into this (long term) absence.

14. Ultimately, no one was permitted to step up into bus run 995.

15. Respondent did not provide any regular bus operator the opportunity to step up and fill the full day bus run 995. The substitute, who was initially called out by the automatic call out system, for the absent regular driver, served as the driver for run 995 during the entire period of Ms. Gibson's absence.

Discussion

In that this is not a disciplinary case, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No.

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[2] Upon review of the Board's records, those regular bus operators interested in stepping up to a long term vacancy include Jill Halstead, with a seniority date of August 23, 2001; Paul Hyre, with a seniority date of January 24, 2006; Chris Saunders, with a seniority date of January 23, 2007; Scott Casto, with a seniority date of August 22, 2007; William Nease, with a seniority date of August 22, 2007; Joe Garnes, with a seniority date of October 2, 2007; and Grievant, with a seniority date of October 2, 2007.

33-88-130 (Aug. 19, 1988). "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 employee has not met his burden. *Id.*

Of dispute in this matter, is the manner in which Respondent filled a bus operator position for an extended period and Grievant's entitlement to an alleged opportunity and lost wages. Grievant finds fault with Respondent's refusal to allow a regular (half day) bus operator the opportunity to step up and fill the position after it became known that the regular bus operator's absence would be for an extended period. Pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-15(b), regular bus operators are to be given the opportunity to "step up" into the position of another absent regular bus operator, on a rotating and seniority basis. *Bowles v. Putnam County Board of Education*, Docket No. 2008-0313-PutED (October 31, 2008); *Mullins v. Hancock County Bd. of Educ.,* Docket No. 07-15-324 (Feb 29, 2008); *See also Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31, 2006).

WEST VIRGINIA CODE § 18A-4-15 contains provisions concerning the employment of service personnel substitutes. Specifically, W. VA. CODE § 18A-4-15(b)[3] provides in pertinent part:

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[3] W. VA. CODE § 18A-4-15(b), amended in 2007, Acts 2007, c. 86, effective June 8, 2007, rewrote the section. The level one decision and Respondent's proposed findings of fact cited the language of the statute prior to 2007. The instant grievance was filed on December 6, 2007. The above cited language was in effect throughout the course of relevant events and is applicable to the proceedings in this case.

(b) Service personnel substitutes shall be assigned in the following manner:

(1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b [§ 18A-4-8b] of this article. Length of service time is calculated from the date a substitute service person begins assigned duties as a substitute in a particular category of employment.

(2) All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments.

(3) Any regular service person employed in the same building or working station and the same classification category of employment as the absent employee shall be given the first opportunity to fill the position of the absent employee on a rotating and seniority basis. In such case the regular service person's position is filled by a substitute service person. A regular service person assigned to fill the position of an absent employee has the opportunity to hold that position throughout the absence. For the purpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.

This amended statute became effective June 8, 2007. A "purpose of W. VA. CODE §18A-4-15(b)(3) is to offer regular employees (employees with greater seniority) a 'benefit' - the opportunity to hold temporarily a position the employee considers more advantageous. A regularly employed bus operator may have many reasons for wishing to 'step up.' The position may be closer to home, have a shorter running time, may contain a midday run, or, as here, enable a regular half-time employee to obtain a regular full-time position, at least temporarily." *Bowles, supra.* Pursuant to this statute, when a regular bus operator is absent for all or a portion of his or her workday, the so-called "step-up" provision is implicated, requiring that other drivers be offered the opportunity to substitute, on a rotating and seniority basis. *Mullins v. Hancock County Bd. of Educ.,* Docket No. 07-15-324 (Feb 29, 2008) *citing Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31,

2006); *Prickett v. Monongalia County Bd. of Educ.*, Docket No. 06-30-326 (March 20, 2007). The 2007 amendments in the wording of WEST VIRGINIA CODE § 18A-4-15(b) have not altered this application.

It is undisputed that in an emergency the normal rotation used for making substitute bus operator assignments does not have to be followed. *See Thompson v. Logan County Bd. of Educ.*, Docket No. 05-23-068 (Sept. 1, 2005); *Prickett v. Monongalia County Bd. of Educ.*, Docket No. 06-30-326 (March 20, 2007). The instant matter was a situation where Respondent needed a bus operator on short notice. Respondent contends this equates to an emergency situation. The record is void regarding the amount of time between when Ms. Gibson reported off and when the afternoon run commenced. Respondent maintains there was insufficient time to make arrangements for a step up bus operator and an immediate need for a bus operator for the afternoon bus run 995, existed. It has not been established that Respondent is overstating the urgency. Time was of the essence. Thus, the context of an emergency is present in these facts. *See*, *Thompson*, *supra*.

Grievant does not contest Respondent's use of a substitute in an emergency situation. Grievant finds the fault with Respondent's refusal to allow a regular (half day) bus operator the opportunity to step up and fill the position after it became known that the regular bus operator's absence would be for an extended period. Initially, Grievant was advised that the substitute *could not be removed* from the run after being lawfully placed there. During the grievance proceedings, Respondent maintained that it gave the substitute operator priority in filling bus run 995 in that, W. VA. CODE § 18A-4-15(b) also provides that the substitute "shall be given priority in accepting the assignment throughout the period of the regular employee's absence." Respondent's Director of Personnel,

Barbara Brazeau, testified the agency was faced with what it perceived to be conflicting interests. Respondent was aware that regular employees had a right to step up and chose to make a decision in favor of the substitute driver.

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996); *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997).

Further, that discretion is limited when there is specific statutory or regulatory authority addressing the issue in question. The issues in this grievance being: (1) the opportunity of regular (half day) bus operators' to step up and fill a full day position in the absence of the regular employee, once a substitute has commenced the duties, and (2) PCBOE's authority and/or obligation to remove a substitute, if the regular employee's absence becomes extended, and the Board is aware that regular employees have expressed interest in stepping up to fill the position.

Grievant, in opposition to Respondent's position (that the substitute could not be removed from the run after being lawfully placed), provided that Respondent had previously removed substitutes from runs where a step up service person was interested in the position. In an attempt to demonstrate this, Grievant presented three instances; those of Gary Bowles, Jeremy Hicks, and Charity Luikart. Each, a substitute bus operator, testified that he or she was bumped from a run by a regular driver wishing to step up.

Grievant is not similarly situated with bus operators Bowles[4] or Hicks.[5] The information provided was enlightening, but much regarding those two examples is distinguishable from the instant grievance. The circumstance involving the removal of Charity Luikart from a substitute assignment is not so easily distinguished from the case at hand. Ms. Luikart was called as a substitute for Debbie Lett's run at the beginning of the school year in advance of the start date, not as a last minute emergency; however, she

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[4] The circumstances involving the removal of Gary Bowles from a substitute assignment are distinguished from the case at hand in that he was called as a substitute well in advance of the start date, not as a last minute emergency; the Board knew when he was called out that the absence was going to be long term; he worked one day, only pre-tripping the bus, and was removed before he took the first run with students; and he was removed as a result of bus operators calling to the Board's attention that the step-up provisions of the law were not being followed; thus, it was correcting an error. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. (citations omitted). *Bowles, supra.*

[5] The circumstances involving the removal of Jeremy Hicks from a substitute assignment are distinguished from the case at hand. On January 8, 2007, Mr. Hicks was called as a substitute for a regular bus operator, Melinda Bailey, well in advance of the start date, not as a last minute emergency. Ms. Bailey was absent due to an extended medical leave of absence. Hicks was removed as a substitute on March 5, 2007, not to make room for a step-up bus operator, but as a result of the leave of absence position being posted and filled. Further, all parties agreed that the step up provisions were not utilized by the Board until the 2007-2008 school year, which is clearly *after* Mr. Hicks was removed from a substitute position.

was removed from the position after performing the duties of the position for a substantial period, approximately three weeks (August 24, 2007 - September 17, 2007). Respondent contends the distinction is that Ms. Luikart was placed in that run in error and when the error of having contacted a substitute rather than a step up was brought to the attention of the Board, the error was immediately corrected. The undersigned is not convinced by Respondent's contention. Respondent removed a substitute from a bus run where regular employees desired to step up and fill the position. It is not an action to be taken lightly, but Respondent can and has removed a substitute from a position in deference of a regular employee. This is what Grievant requested of Respondent with regard to the full day bus run 995.

"[I]t might be helpful to note that statutes governing board of educations typically favor employees with regular seniority as demonstrated by W. VA. CODE § 18A-4-8b which controls the hiring of school service personnel." *Bowles, supra.* W. VA. CODE § 18A-4-8b indicates a preference for regularly employed/more senior employees. Service personnel positions shall be filled on the basis "of seniority, qualifications, and evaluations of past service." A preference for hiring the employee with the most seniority is indicated by the statement that if the most senior employee is not hired a board "must show valid cause." *See* W. VA. CODE § 18A-4-8b. This emphasis on seniority was discussed in *Harrison County Bd. of Educ. v. Coffman*, 189 W. Va. 273, 430 S.E.2d 331 (1993). The West Virginia Supreme Court of Appeals stated "the legislative intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." *Id*. at 274. *See Edmonds v. Kanawha County Bd. of Educ.*, Docket No. 00-20-023 (Mar. 31, 1999).

Grievant opposed PCBOE's determination that a substitute bus operator, who is placed in an assignment, in an emergency situation, is entitled to retain the position until the regular employee returns, over regular bus operators interested in stepping up. Grievant's opposition has validity. Respondent was aware that the absence would be extended. Respondent chose to make a decision in favor of the substitute driver and not allow regular employees the opportunity to step up. Respondent's decision contravenes applicable statutes' intent and application. The "step up" provision is in keeping with the preference shown senior, regular employees, and rewards regular employees by allowing them to fill temporarily positions beneficial to them. *Bowles, supra*. Pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-15(b), regular bus operators are to be given the opportunity to "step up" into the position of another absent regular bus operator, on a rotating and seniority basis. *Id*. A contrary ruling would ignore the statutory scheme established by the legislature and the jurisprudence therein.

The undersigned finds that PCBOE erred in not offering the opportunity to "step up" to regularly employed bus operators, in that it was readily established that the regular bus operator's absence was to be for an extended period.

Lastly, this administrative law judge must consider what precise relief Grievant is entitled. It has been long-held that "[i]n order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line.'" *See Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonEd (Aug. 27, 2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.,* Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha*

County Bd. of Educ., Docket No. 96-20-352 (Apr. 30, 1998). Thus, for Grievant to demonstrate entitlement to compensation for the alleged missed assignment, it is necessary for him to establish that he was "next in line" to receive a long term step up opportunity. Grievant has not met this burden of proof. There is no indication Grievant would have received the extended assignment under discussion. Indeed, the only testimony on this particular element is that Grievant was *not* the most senior regular bus operator interested in stepping up into a long term absence. Respondent's records indicate that no less than six bus operators, with seniority dates greater than Grievant, expressed an interest in stepping up to a long term vacancy. It is unknown, but entirely possible, that one of these individuals may have taken bus run 995 if asked, before Grievant would have had the opportunity to take or refuse it.

The award of compensation for an assignment which there is no evidence that the Grievant would have been offered is speculative and "the Grievance Board does not render opinions which are speculative in nature." *Pierson v. Ritchie County Bd. of Educ.*, Docket No. 98-43-006 (May 29, 1998). "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). *See Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998). In this instance, assuming Grievant has established a violation of law, there is no indication he is entitled to lost wages as he has not established that he was "next in line" or would have, more likely than not, received the step up assignment.

Accordingly, although PCBOE, in the facts of this case, failed to properly implement

the step up provision of W. VA. CODE § 18A-4-15, no other specific relief may be granted. The following Conclusions of Law are appropriate in this matter.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. *Procedural Rule of the W. Va. Public Employees Grievance Bd.* 156 C.S.R. 1 § 3 (2008); *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).

2. A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying; [this] determines the weight of the testimony. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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).

3. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The discretion must be reasonably exercised in the best interest of the schools and not arbitrarily and capriciously. *See Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W.Va 145, 351 S.E.2d 58 (1986).

4. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)*."* *Trimboli v. Dep't of Health and Human Resources,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

5. Pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-15(b), regular bus operators are to be given the opportunity to “step up” into the position of another absent regular bus operator, on a rotating and seniority basis. *Bowles v. Putnam County Board of Education*, Docket No. 2008-0313-PutED (October 31, 2008); *Mullins v. Hancock County Bd. of Educ.,* Docket No. 07-15-324 (Feb 29, 2008); *Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31, 2006).

6. It is established by a preponderance of the evidence that Respondent did not properly implement the step-up provision of WEST VIRGINIA CODE § 18A-4-15(b), in the facts of this case, and allow regular bus operators the opportunity to fill an extended absence. PCBOE erred in not offering the opportunity to "step up" to regularly employed bus operators.

7. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *MacCumbee v. Morgan County Bd. of Educ.*, Docket No. 05-32-190 (Nov. 18, 2005); *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *See Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

8. Grievant has failed to establish that, had the opportunity to "step up" been offered to regular bus operators interested in stepping up into a long term absence, that he would have been the bus operator entitled to the position. It is not the province of this tribunal to assume facts that were not presented into evidence. *See generally Board of Educ. of Mercer v. Townsend*, 207 W. Va. 285, 531 S.E.2d 664 (2000) (per curiam); *John D.K. v. Polly A.S.*, 190 W. Va. 254, 438 S.E.2d 46 (1993).

9. Grievant has failed to prove, by a preponderance of the evidence, that he is entitled to any relief.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. Grievant's request for compensation for the missed opportunity to step up is denied due to its speculative nature. Respondent is hereby **ORDERED** to observe the applicable statutory provision(s) allowing regular employees to "step up" and fill the absences of regular employees.

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 WEST VIRGINIA 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* 156 C.S.R. 1 § 6.20 (2008).

Date: February 6, 2009

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Landon R. Brown
Administrative Law Judge