

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MICHAEL BROWNING, et al.,
Grievants,**

v.

Docket No. 2015-1287-CONS

**LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievants, Michael Browning, Douglas Skeens, Danny Browning and Jerry Adkins filed this grievance against Lincoln County Board of Education (“LCBE”), Respondent, on May 12, 2015. The Statement of Grievance provides “Emergency Run – the process that they are given out, drivers that are listed feel they are being skipped too often.” For relief Grievants seek “Policy looked over, and paid for runs missed due to Emergency Runs being issued all the time.”

A conference was held at level one on May 29, 2015, and the grievance was denied, in part, at that level on July 20, 2015. Grievants appealed to level two on July 29, 2015, and a mediation session was held on October 19, 2015. Grievants appealed to level three on November 1, 2015.¹ A level three hearing was held before the undersigned Administrative Law Judge on April 28, 2016, and September 7, 2016, at the Grievance Board’s Charleston office. Grievants appeared in person and were represented by their legal counsel John E. Roush, Esquire, WV School Service Personnel Association. Respondent was represented by its counsel Leslie K. Tyree, Esquire.

¹ On October 14, 2015, Grievant Danny Browning, by counsel, provided that he wished to withdraw his grievance at level three. Grievant Danny Browning was dismissed from this matter by order dated November 4, 2015.

Grievants testified individually regarding their individual experiences with regard to the county call out system and presented testimony from agency personnel. Grievants also presented: the log book for extra-duty assignments for the 2014-2015 school year; rotating extra-duty assignment list for the 2014-2015 school year (LCHS); rotating extra-duty assignment list for the 2014-2015 school year; payroll records indicating compensation to bus operators for extra-duty assignments for the 2014-2015 school year; county policies concerning assignment of extra-duty assignments to bus operators in effect during the 2014-2015 school year; transportation for curricular/co-curricular and extra-curricular county-sponsored trips; an email dated May 15, 2016 regarding emergency assignments and a table of emergency runs. LCBE presented testimony from its Director of Transportation Rodney Cummings, Transportation Supervisor Lisa Thompson and Superintendent Jeff Midkiff.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 7, 2016. Both parties presented fact/law proposals.

Synopsis

Grievants, bus operators for Lincoln County Board of Education, contend that they are not receiving their fair share of emergency extra-duty assignments. Grievants maintain this inequity is the direct result of Respondent's conduct. Grievants contend that Respondent has been implementing faulty call out procedure(s) alleging violation of W. VA. CODE § 18A-4-8b and/or discrimination/favoritism actions. Respondent denies any wrong doing and contends that while it attempts to utilize the extra-duty call out list for emergency bus runs as long as time permits, there is no requirement that they do so.

Grievants seek alleged lost wages and desire an equitable distribution of emergency extra-duty assignments henceforward.

The instant Grievants were not called upon and/or did not receive any emergency extra-duty assignments during the 2014-2015 school year, a time period in which there were approximately 34-58 so-called emergency extra-duty assignments. Respondent allegedly systematically assigns such assignments. Grievants while eligible and in line did not receive any, not one, emergency extra-duty assignment. Grievants persuasively clarified and demonstrated lost economic opportunity. This grievance is **GRANTED**.

After a detailed review of the entire record, the undersigned Administrative Law Judge finds that the following facts were either stipulated by the parties, where so indicated, or proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1. Michael Browning, Douglas Skeens, Danny Browning and Jerry Adkins, Grievants, are employed as regular bus operators for the Lincoln County Board of Education, Respondent.

2. Respondent maintains extra-duty trip lists for the awarding of regular extra duty trips. Grievants are listed on the extra-duty trip list for the Harts area of Lincoln County, as well as the list for Lincoln County High School. Respondent uses the trip lists to award extra-duty assignments when they become available.

3. Respondent assigns extra-duty bus operator assignments based upon the area from which the trip originates. The trips for each area are also divided into when

the trip occurs, mid-day, evening or weekend. Within the Harts and Lincoln County High School area there are separate lists for day trips, evening trips and weekend trips.

4. In addition to regular extra-duty assignments, there are also extra-duty assignments that become “emergency” extra-duty assignments.

5. A trip becomes an emergency if an employee cancels at the last minute, if a school sends a request at the last minute or any other time a need arises to transport students that does not allow enough time to go through the list as you would for a regular extra-duty assignment.

6. Lisa Thompson, who is responsible for assigning extra-duty trips normal or emergency, testified that when assigning emergency trips she started where the regular rotation stopped and called bus operators in seniority order until someone accepted the trip in question.²

7. In the 2014-2015 school year, Respondent assigned 58 “emergency trips”.³ Acceptance or refusal of an emergency trip does not count as an employee’s turn in the regular rotation.

8. Of the 58 “emergency trips” for the 2014-2015 school year, a total of 34 were either from the Harts area or the Lincoln County High School area.

9. If no one accepts, as Bus Supervisor Thompson is going down the list and time is running out, she will use any available driver that can accept the run in time to transport the students.

² Bus Supervisor Thompson testified that she makes every attempt to go down the extra-duty trip list when it becomes necessary to fill an emergency run. Further, Ms. Thompson admitted that other employees had also called out emergency assignments and that she was not sure whether these employees followed the rotation system or not.

³ Grievants’ Exhibit 7. Grievants’ Exhibit 7 is a compilation of relevant data from Grievants’ Exhibits 1 - 6.

10. Individually, Grievants did not receive a single opportunity for an emergency trip during the 2014-2015 school year. See Grievants' L-3 Testimony.

11. During the 2014-15 school year, there were a total of 34 emergency assignments within the Harts and Lincoln County High School areas. The average emergency trip for the Harts and Lincoln County High School areas for the 2014-15 school year was approximately 6 hours.⁴

12. Grievants did not establish he or she, individually, was the indisputable "next-in-line" for a particular emergency trip; however, they did demonstrate their position undoubtedly "in line" for many, if not all, of them and received none.⁵

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Lechlitter v. W. Va. Dep't of Health & Human Res.*, Docket

⁴ Rounded up from 5.9333. Grievants' counsel calculation derived by matching 30 of the 34 emergency assignments from G Ex 1 with time sheets from G Ex 4. The total was 178 hours, which divided by 31 trips yields 5.75 hours.

⁵ Term "in line", meaning that they were located on the seniority list between the employee "next in line" and the employee who ultimately received the assignment.

No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievants, voiced their objection to Respondent's call out procedure(s) for emergency extra-duty assignments. Grievants are of the opinion that Respondent has abused the device of the emergency trip in such a way as to contravene both the spirit and letter of West Virginia Code §18A-4-8b (Seniority rights for school service personnel).

In part §18A-4-8b provides:

(a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

Respondent underscores that by its very nature an emergency assignment is outside the scope of the normal seniority rotation for extra duty assignments. Extra-duty assignments are awarded pursuant to West Virginia Code § 18A-4-8b(f) in the normal course of events, and absent an emergency. West Virginia Code §18A-4-8b(f) provides, in pertinent part, the following:

Extra-duty assignments –

(1) For the purpose of this section, "extra-duty assignment" means an irregular job that occurs periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

(2) Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments are made in the following manner:

(A) A service person with the greatest length of service time in a particular category of employment is given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all employees have had an opportunity to perform similar assignments. The cycle then is repeated.

(B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is

approved both by the county board and by an affirmative vote of two-thirds of the employees within that classification category of employment.

Respondent emphasizes that emergency assignments are simply that, emergencies, and the school system is within its rights to use whatever method necessary to find a bus operator to transport the students. Respondent avers there is absolutely no legal requirement in West Virginia Code or case law that indicates that a school system may not call employees out of order to fill emergency assignments. Respondent specifically highlights that Grievants did not establish error in the awarding of emergency assignments nor did they establish that they were the next employee in line to receive any such emergency assignment.

It is understood that emergency bus runs occur in the school system due to unforeseen last minute circumstances. When these arise it is clear that timely action must be taken to provide transportation for the students. It is specifically recognized that an emergency "can" establish a legitimate basis for stepping outside of the normal rotation for assignments. *Tate v. Monongalia County Bd. of Educ.*, Docket No. 02-30-318D (Jan. 8, 2003) (failure to follow rotation for extra-duty assignments excused in an emergency), *Sizemore v. Monongalia County Bd. of Educ.*, Docket No. 98-30-428 (Jan. 26, 1998). *See also Thompson v. Logan County Bd. of Educ.*, Docket No. 05-23-068 (Sept. 1, 2005). However, the undersigned is not of the belief that such "recognized urgency" was present in the totality of the emergency extra-duty assignments at issue. In the fact pattern of this case Respondent's working definition of an emergency is not necessarily precise, but it is akin to a general interpretation that an emergency assignment means the regular method of obtaining a bus driver for an assignment will not work because the assignment

is going to occur in a very short period of time and must be filled.⁶ See L-3 testimony. This trier of fact is not persuaded that an urgency dictating a time crisis forbidding the use of a seniority based call out existed in the totality of emergency extra-duty assignments at issue.

Respondent indicates a total of 58 “emergency trips” for the 2014-2015 school year. See FOF 8. Bus Supervisor Lisa Thompson testified that she attempts to go down the extra-duty trip list when it becomes necessary to fill an emergency run. If no one accepts as Ms. Thompson is going down the list and time is running out, she will use any available driver that can accept the run in time to transport the children. Ms. Thompson also admitted that other employees called out emergency assignments and that she was not sure whether these employees followed the rotation system or not. Supervisor Thompson further testified that while trying to cover an emergency run, she did not call someone on the list if she knew that they were unavailable to take the emergency call out due to their regular bus schedule or due to them being on another trip or run at the time. This was done without independent verification, i.e., phone calls to drivers. The testimony of Supervisor Thompson was informative and served to explain the call out procedure in theory and day-to-day application. The testimony of Ms. Thompson, who testified at both the April 28, 2016, and September 7, 2016 level three hearing, is perceived to be credible.⁷

⁶ A trip becomes an emergency if an employee cancels at the last minute, if a school sends a request at the last minute or any other time a need arises to transport students that does not allow enough time to go through the list as one would for a regular extra-duty assignments. Bus Supervisor Lisa Thompson L-3 testimony.

⁷ An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law

For purposes of the grievance procedure, discrimination is defined as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). Favoritism is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievants tend to use the term discrimination more readily than favoritism but the terms many times are the flip side of the same coin.

The employees Grievants compare themselves with are similarly situated bus operators. In fact, several of those other bus operators received emergency runs. See lists of assignments, G Ex 1 and 2. A subset group of bus operators received emergency runs, more readily than Grievants, thus receiving fiscal advantages and/or treated with

judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

preference. Determining the basis for this difference in treatment is more difficult than recognizing the existence of the phenomenon. While Grievants may truly believe that they were purposefully skipped due to some preconceived notion of Respondent's agents, Grievants did not readily establish such prejudice was present. Bus Supervisor Thompson testified that she liked the Grievants and did not ever intentionally skip them for the award of an emergency run. Neither Grievants' testimony nor evidence presented tend to verify a malicious pattern of conduct or intentional deceptive actions by Respondent's agents. Grievants established the act, they were NOT provided equitable opportunity, they were skipped. Evidence of record tends to indicate that their individual seniority was not provided due consideration. Perhaps, Grievants may have also alleged that the call out procedure used was an abuse of discretion or was arbitrary and capricious.⁸ The fair distribution of bus run assignments is of grave importance to bus operators.

Grievants introduced into evidence various documents regarding bus driver seniority, assigned emergency runs, dates and log book of extra duty assignments. Including as an exhibit of this case is a table of Emergency Runs in 2014-2015, G Ex 7, prepared by Grievants' counsel. Information identified on the chart includes dates and description of various emergency runs, the bus operator assigned, the length of the assignment and prospective next in line bus operators for the 2014-2015 school year.

⁸ An action is recognized as arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case. *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

The assignment of bus runs, be it regular, extra or emergency, it is a very serious matter. At issue is the procedure or practice which resulted in select bus operators being given advantages and/or treated with preference (received emergency runs) while Grievants, who, pursuant to information of record, were just as eligible received no such opportunity for fiscal gain.

The undersigned is persuaded that Grievants endured an identifiable economic loss. However, a pivotal question is whether Grievants are entitled to compensation for the identified extra-duty assignments, which occurred. Respondent argues that Grievants cannot establish that they, individually, would have been “next in line” for a particular assignment. This long-standing doctrine of the Grievance Board would require that a grievant prove that there is no possibility that another individual would not have a greater claim than a grievant to a particular position.⁹

Grievants’ counsel wrestled with this barrier on at least two fronts. While he attempted to demonstrate the call-out system adopted by Respondent was used inconsistently or flawed he also heroically demonstrated the futility of the “next in line doctrine” within the fact pattern of this grievance. See G Ex 7. The undersigned is persuaded that in this unique circumstance, the “next in line” approach to determining whether Grievants are entitled to relief is an ever-moving rebalancing target. The Next-in-Line Doctrine is not being overlooked by the undersigned, but it is also recognized that some facts of this case are inexplicable. In this unique circumstance, the “next in line”

⁹ This board has ruled that, in a case involving multiple applicants for a posted position, grievants attempting to demonstrate entitlement to a position or compensation, need to establish that he or she was "next in line." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); See *Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 26, 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, 1997).

approach to determining whether Grievants are entitled to relief is misguided and inappropriate. The doctrine is intended to avoid the possibility that a board of education would have to pay more than one grievant for a single job. If twenty employees had filed a grievance, it is clear that only one with the greatest preference would be entitled to back pay and not everyone with greater hiring priority than the person illegally employed. The current case is in a different posture in that the record established that while the Lincoln County Board of Education allegedly attempted to utilize the extra-duty call out list for emergency bus runs as long as time permits, its agents did not truly feel obligated to do so.¹⁰ The emergency exception is noted; nevertheless, it is evident that some drivers got several calls for assignments while others received none. The call out process is multi layered and complicated, with that there is no doubt. A priority of the school bus transportation system is to safely deliver students on time. This is recognized, but it is not done without some established and acknowledged constraints. The seniority-based rotation system required under WEST VIRGINIA CODE § 18A-4-15 should not be habitually overlooked for convenience. Respondent's so called emergency exception is not established as an absolute excuse to disregard seniority based call-out procedure. If Respondent's position that an emergency means the regular method of obtaining a bus driver for an assignment will not work is validated, to the degree requested in this case, unclear procedure and lack of preparation would constitute emergency assignments in perpetuity. This is not believed to be the intent of "Seniority Rights for School Service Personnel" [W. VA. CODE §18A-4-8b].

Grievants demonstrated that Respondent's actions resulted in an abnormally

¹⁰ Respondent is of the stated opinion that an emergency means the regular method of obtaining a bus driver for an assignment will not work because the assignment is going to occur in a very short period of time and must be filled by any means necessary to transport the students.

inequitable distribution of emergency extra-duty trips. Grievants have met the burden of proof necessary to persuade this trier of fact that Respondent abused the device of the emergency trip in such a way as to contravene Grievants' seniority rights. The undersigned finds that a seniority-based rotation system was NOT truly implemented when a so-called scheduling event arose, but more likely than not overlooked for expediency and suitability.

Grievants did not establish that they, individually, were ever next in line to receive an identified emergency run, Grievants did however validate they were undoubtedly "in line" and somehow "never" got a call.¹¹ Allegedly, not once all year. This is problematic! The number of so called emergency trips, 27 in Lincoln County High School area and 7 in the Harts area, amounts to almost a complete rotation in each area. A grievant must sustain an actual injury by being passed over for a position to which he was actually entitled; otherwise any award of back pay would be a windfall. See *Saddler v. Raleigh County Bd. of Educ.*, Docket No. 02-41-420 (Apr. 29, 2003), *Young v. Kanawha County Bd. of Educ.*, Docket No. 2011-1845-KanED (Nov. 19, 2012). It is this trier of facts opinion that Respondent cannot now use the uncertainty of the next in line principle as a shield to its actions in an attempt to create doubt as to appropriate equitable relief in the case. See generally, *Thompson v. Wayne County Bd. of Educ.*, Docket No. 2014-1593 WayED (Jun. 18, 2015); *Altizer, et al., v. Greenbrier County Bd. of Educ.*, Docket No. 89-13-679 (Jan. 31, 1991); *Skeen v. Lincoln County Bd. of Educ.*, Docket No. 99-22-171 (Aug. 31, 1999).

Grievants' counsel suggest a variety of scenarios suggesting Grievants Browning,

¹¹ Term "in line", meaning that they were located on the seniority list between the employee "next in line" and the employee who ultimately received the assignment.

Skeens and Adkins were skipped multiple times.¹² Interesting, but not conclusive. The undersigned finds that Grievants endured an identifiable economic loss, but is hard pressed to affix a specific number higher than one per Grievant.¹³ There was a limited amount of emergency runs, mathematically there are only so many potential assignments, to award Grievants any additional potential lost wage is beyond sound rationale. Grievants cannot double dip. One assignment for each Grievant per area was considered, but dismissed as too speculative and tended to be more akin to punitive than equitable. It is not established that Respondent was intentionally attempting to deprive select bus operators emergency extra-duty assignments, only that Respondent's actions did in deed facilitate that result.

With regard to foreseeable events, the seniority-based rotation system under West Virginia Code section 18A-4-15 need not be overlooked for convenience. When an emergency arises, planning and a clearly communicated procedure is thought to be prudent. With regard to the assignments in discussion, the undersigned finds that not all the so-called emergencies were urgent events to the degree seniority needed to be haphazardly circumvented. Grievants have met the burden of proof necessary to persuaded this trier of fact that Respondent abused the device of the emergency trip in such a way as to contravene both the spirit and letter of West Virginia Code applicable to seniority rights for school service personnel.

Conclusions of Law

¹² See Grievants' Exhibit 7.

¹³ This trier of fact accepts the calculation of 6-hour average for an emergency extra-duty assignment trip.

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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).

2. West Virginia Code §18A-4-8b Seniority rights for school service personnel, in pertinent part:

(a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

3. West Virginia Code §18A-4-8b(f) provides, in pertinent part, the following:

Extra-duty assignments –

(1) For the purpose of this section, "extra-duty assignment" means an irregular job that occurs periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

(2) Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments are made in the following manner:

(A) A service person with the greatest length of service time in a particular category of employment is given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all employees have had an opportunity to perform similar assignments. The cycle then is repeated.

(B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an

affirmative vote of two-thirds of the employees within that classification category of employment.

4. West Virginia Code § 6C-2-3 provides, in pertinent part, the following:

(d) "Discrimination" means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.

...

(h) "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.

5. Grievants demonstrated that Respondent's actions resulted in an abnormally inequitable distribution of emergency extra-duty trip in such a way as to contravene both the spirit and letter of West Virginia Code applicable to Seniority rights for school service personnel.

6. West Virginia Code §6C-2-3(c) provides, in pertinent part, the following:

Defenses and limitations.

(1) Untimeliness. -- Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two.

(2) Back pay. -- When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

7. School personnel laws and regulations must be strictly construed and in favor of the employees that they were designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

8. A grievant must sustain an actual injury by being passed over for a position to which he was actually entitled; otherwise any award of back pay would be a windfall.

See *Saddler v. Raleigh County Bd. of Educ.*, Docket No. 02-41-420 (Apr. 29, 2003),
Young v. Kanawha County Bd. of Educ., Docket No. 2011-1845-KanED (Nov. 19, 2012).

9. Grievants established identified and recognizable loss of economic opportunity.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to pay each of the Grievants, Michael Browning, Douglas Skeens, and Jerry Adkins back pay in the amount of 6 hours pay, the average period for one emergency extra duty assignment trip. Respondent is further **ORDERED** to fill extra-duty assignments in a manner that is not contrary to applicable school service personnel law, i.e., in recognition of a seniority-based rotation system.

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 W. VA. 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: March 31, 2017

Landon R. Brown
Administrative Law Judge