WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL DINGER,
Grievant,

v. **Docket No. 2011-1746-MerED**

MERCER COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Michael Dinger, filed this grievance against his employer, the Mercer County Board of Education ("MCBE"), Respondent on June 3, 2011, protesting an operating practice of Respondent which Grievant avers creates a financial disincentive that inhibits him (and other bus operators) from accepting extra-duty bus runs. The grievance statement reads:

> I have been denied several extra curricular trips. For the purpose of this grievance I will address trips I could have taken on and after May 23, 2011. These trips were between the hours of 8:00 AM and 2:00 PM. I could do these trips between my regular morning and afternoon runs. I would only need a sub driver for my vocational runs. I was told by Fred Scott that the policy is that any time a driver takes off in the morning up til 12:00 noon that they have to have a sub the whole morning. This meant if I took the trip I would have to lose a half days pay. I contacted my WVSSPA representative and was told no such "policy" could be found. My vocational runs are bided {sic} on and paid for separate. I should be given a sub for my vocational runs and not be forced to take off my morning regular run. My schedule shows I am finished with my morning run at 7:35. I contend that this is not only unfair but also inconsistent of how things have been done in the past and discriminatory. Several times throughout the past few years there have been instances where drivers have needed off only for midday runs because of trips, doctor appointments, or personal reasons, and been given a sub for only the time they needed off.

Grievant requested the following remedy:

> Grievant seeks compensation for all lost wages retroactive to May 23, 2011.

An evidentiary hearing was held at level one on June 17, 2011, and the grievance was denied at that level on July 5, 2011. Grievant appealed to level two on July 19, 2011,

and a mediation session was held on November 15, 2011. Grievant appealed to level three on November 22, 2011. A level three hearing was held before the undersigned Administrative Law Judge on April 20, 2012, at the Grievance Board's Beckley office. Grievant appeared in person and was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love, LLP. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 19, 2012. Both parties submitted fact/law proposals.

Synopsis

Respondent's Transportation Division implemented an operating procedure/practice which permitted a regular bus operator to take an extra-duty assignment and ignore his/her extracurricular run, but on the condition that if the extracurricular run that the operator abandons for the day is one that begins before noon, said bus operator must also give up his/her regular morning run for that day. Similarly, if the abandoned extracurricular run is one that begins after noon, the bus operator must give up his regular afternoon run for that day. Grievant filed a grievance over what he depicts as a financial disincentive that keeps him from accepting extra-duty bus runs.

It has been acknowledged for some time that a county board of education is under no legal obligation to allow any bus operator to accept an extra-duty assignment if, in order to make the extra-duty run, the bus operator would have to miss a run that he is already obligated to perform. Nevertheless, administrative personnel of the transportation department (Respondent's agents) cannot create practices which artificially restrict bus operators' employment in excess of Respondent's statuary authority.

Respondent argues that the current operating practice serves a necessary purpose. Said purpose is recognized as valid. Yet, the operating procedure/practice was not properly implemented. By a preponderance of the evidence Grievant has established that Respondent's practice as implemented is not proper. This grievance is **GRANTED.**

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

Findings of Fact

1. Grievant is employed by Respondent as a regular Bus Operator.

2. Grievant holds a continuing contract which requires him to make daily morning and afternoon runs. Grievant also holds an extracurricular contract which obligates him to make daily mid-day trips between a high school and the Board's Technical Education Center.[1] Grievant receives extra pay for the extracurricular assignment(s). Grievant works in Bluewell-Montcalm and performs extra-duty assignments from that area.

3. In the summer of 2008 or 2009, Respondent adopted a practice addressing when a bus operator is assigned to an extra-duty assignment that conflicts with performance of the bus operator's regular run. The bus operator would be permitted to

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[1]"Extracurricular assignments" like Grievant's daily mid-day bus run, are defined in W. VA. CODE § 18A-4-16(1) as activities that occur at times other than regularly scheduled working hours and on a regular basis. Under the statute, extracurricular assignments are filled through the posting process and reflected in separate extracurricular contracts.

Extracurricular assignments are not the same as "extra-duty assignments," such as a one-time bus trip transporting students to and from a field trip. W. VA. CODE § 18A 4-8b(f) defines an extra-duty assignment as an irregular job that occurs periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips. Under the statute, extra-duty assignments are made by offering opportunities on a rotating seniority basis to regular employees in a particular service personnel classification. No separate contract is issued for an extra-duty assignment.

take the extra-duty assignment, but would be docked for the regular assignment which he or she was unable to perform.

4. At some point Respondent's Transportation Director "adopted" an additional practice concerning when the performance of an extra-duty assignment interfered only with an extracurricular assignment performed by the bus operator and not with his/her regular morning or afternoon run. In such cases the bus operator would be able to perform the extra-duty assignment, however, he/she would have to take either his/her morning or afternoon assignment "off" and be docked for both ½ day of salary, as well as the compensation for the extracurricular assignment.

5. The later practice of which Grievant complains, (finding of fact 4 above) was instituted by the Transportation Supervisor with the Superintendent's approval. The practice was not promulgated and reduced to an official format by the Mercer County Board of Education nor approved by two-thirds of the bus operators in compliance with WEST VIRGINIA CODE §§18A-2-12a(b)(7) and/or 18A-4-8b(f).[2]

6. In the years before the implementation of the practice, when a regular bus operator who accepted a mid-day extra-duty assignment was allowed to make his usual morning and afternoon runs and was absent from only his mid-day extracurricular run, it was often very difficult to find a substitute to make the extracurricular run for the day. Substitutes are paid $15 for taking the place of a regular driver on an extracurricular run.

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[2] Board's Supervisor of Transportation, Fred Scott, and Superintendent testified that the procedure was an administrative decision. It is represented that the practice is spelled out in the policy and procedure manual for bus operators at the bus garage, and that it has been explained to all bus operators at every back-to-school in-service session for at least two or three years. The record is void of any documentation confirming this representation. Grievant questions the accuracy of the information.

It is difficult to convince a substitute, for the sum of $15, to travel from home to where the bus is located, make a midday run, return the bus to its parking place, then return home.

7. The justification for the implementation of the practice was to make taking extracurricular assignments more attractive to substitutes by "bundling" them with a ½ day assignment.

8. It is much more lucrative for a substitute bus operator to drive a regular bus operator's standard morning or afternoon run, since it pays far more than a $15 mid-day extracurricular run. Once a substitute accepts a standard morning or afternoon run, he or she is more likely to be willing to stay over after the morning run, or come in early before the afternoon run to take the absent driver's mid-day extracurricular run.[3] Substituting in the mid-day extracurricular run will still pay only $15, but the substitute will already be making a trip from home and back to make the regular morning or afternoon run.[4]

9. On May 26, 2011, and May 27, 2011, Grievant was offered extra-duty assignments. Grievant declined both assignments.

10. Grievant could have performed both the extra-duty assignment and his morning and afternoon regular assignments. The extra-duty assignments conflicted with Grievant's mid-day extracurricular run.

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[3] It is not argued or established that Respondent impermissibly conditions a substitute's performance of an absent bus operator's usual morning or afternoon run upon the substitute agreeing to also substitute on the mid-day run. Such a practice would run afoul of precedents that consider an absent bus operator's regular and extracurricular duties as separate and distinct substitute opportunities, *see Creakman v. Logan County Bd. of Educ.,* Docket No. 03-23-095 (May 20, 2003). Such contention is not an issue of this grievance.

[4] Respondent's practice reportedly relies upon reason and economic self-interest to motivate a substitute to cover a mid-day run.

11. Depending upon the length of an extra-duty opportunity, it is possible for a bus operator to earn more than usual on a particular day by taking an offered extra-duty run, abandoning any conflicting extracurricular mid-day run, if he is not required to give up either his regular morning or regular afternoon run, as the case may be. Generally, the compensation a bus operator would receive for making an extra-duty run does not offset the amount by which his earnings would be diminished by giving up his mid-day extracurricular run and either his regular morning or regular afternoon run for the day.[5]

12. Grievant's rationale for declining the extra-duty assignments is documented to be because he could not take the trip without giving up the compensation for his extracurricular assignment(s) (2 per day - $30) *and* his morning run (½ day pay). G Ex 1.

13. Grievant challenges the legitimacy of Respondent's operating practice/procedure which requires him (and other bus operators) to take a half-day off, if the bus operator accepts an extra-duty trip.

Discussion

Respondent contends this grievance is untimely filed. While both parties addressed the filing of this grievance, there is unresolved dispute regarding material facts. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a

[5] In the latter case a bus operator might reasonably bypass the opportunity to make the extra-duty run, as Grievant represents he did.

timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd,* Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

Respondent contends the level three appeal of this grievance is untimely filed, as it was not initiated within the timeline contained in W. VA. CODE § 6C-2-4(a)(1) and requests that this grievance be dismissed as untimely. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH- 060 (July 16, 1997).

This matter readily tends to exemplify a classic example of a continuing practice. If viewed, as such, this grievance is timely filed. In that "[t]his Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck." *Matney et al. v. Div. of Highways,* 2009-1413-CONS (Oct. 1, 2010).

It is this Administrative Law Judge's determination that there has not been sufficient evidence of a reliable nature, specific in time and place to credibly rule on the issue of timeliness as presented. The 2011 Level One Decision states: "The procedure has been in place for probably two years, one year at the very least." Emphasis added. It is not established with clarity when the practice grieved of was truly implemented (docking for both ½ day of salary as well as the compensation for the extracurricular assignment). Further, Grievant's testimony regarding his knowledge and understanding of the procedure is inconsistent. When Grievant became aware of the practice, distinguished from a similar "practice" regarding extra-duty runs conflicting with a regular run as distinguished from an extracurricular assignment is unclear. Testimony of administrative personnel and Grievant do not establish time and place certain for crucial points which could or would demonstrate a tolling of critical timeliness issues.[6] Grievant's counsel avers that Respondent's timeliness contention is a red herring while citing traditional exceptions to the issue: (a) If, Grievant did not discover the procedure until May 2011, then the grievance is timely filed under the discovery exception. (b) If, Grievant knew about the procedure prior to May 2011, the grievance was timely filed pursuant to the "continuing practice" statutory language. The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Whalen v. Mason*

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[6] WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time limits for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). Grievant's perception and the facts of the matter are not established to be one and the same.

Respondent raised an affirmative defense as reasons for this grievance to be dismissed.[7] The undersigned is not persuaded that Respondent has established by a preponderance of the evidence that this grievance, as filed, is in violation of time limits specified by applicable article. Respondent had the burden to prove untimeliness by a preponderance of the evidence. Too many details related to the time line of this grievance are illusive, vague and uncertain. To justify a credible ruling on the issue being determined, a proper decision should be supported by reliable information of record. Such a foundation is not duly established in this matter. Consequently, the undersigned will not dismiss this grievance as untimely.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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

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[7] Timeliness is an affirmative defense. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." *See* 153 C.S.R. 1 § 3 (2008)

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, a party has not met its burden of proof. *Id.*

Rather than banning bus operators in all cases from extra-duty assignments that interfere with extracurricular runs, the instant school district's practice *allows* regular bus operators to take such an extra-duty assignment and ignore extracurricular runs, but on the condition that if the extracurricular run that is abandoned for the day is one that begins before noon, said operator must also give up his/her regular morning run for that day. Similarly, if the abandoned extracurricular run is one that begins after noon, the bus operator must give up his/her regular afternoon run for that day. This practice, which Grievant grieves was instituted with the primary purpose of discouraging regular bus operators from accepting extra-duty runs that conflict with their mid-day extracurricular duties and to simultaneously increase the agency's ability to secure substitute bus operators to perform the abandoned extracurricular duties. Respondent asserts among other rationale that the practice, if anything, is a benevolent benefit to regular bus operators, who are contractually obligated to perform certain extracurricular duties. Respondent avers the practice affords Grievant (and other bus operators) the opportunity to take extra-duty runs that Respondent could lawfully ban them from accepting altogether, citing *McClung v. Nicholas County Bd. of Educ.,* Docket No. 02-34-223 (Sept. 16, 2002).[8]

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[8] Respondent's proposed finding of fact document reads, "It has been clear for some time that a county board of education is under no legal obligation to allow any bus operator to ever accept an extra-duty assignment if, in order to make the extra-duty run, the bus operator would have to miss a run that he is already obligated to make. *McClung v.*

In the years before the practice was instituted, when a regular bus operator who accepted a mid-day extra-duty assignment was allowed to make his usual morning and afternoon runs and was absent from only his mid-day extracurricular run, because it was difficult to find a substitute to make the extracurricular run for the day.[9] Respondent avers the procedure (being challenged) as implemented is necessary. Respondent argues, the operating practice serves a necessary purpose.[10] Said purpose is recognized as valid. Yet, the question still remains, is the practice as implemented lawful? Grievant contends it is not.

There is a significant body of law in West Virginia guiding the application of statutes to school service personnel and other county board of education employees. Thus, analysis must begin by recognizing that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary or capricious." Syllabus Pt.

Nicholas County Bd. of Educ., Docket No. 02-34-223 (Sept. 16, 2002) (applying to extra-duty assignments the rule that a county board may deny a bus operator the opportunity to take a run that interferes with his other duties)."

[9] Substitutes are paid $15 for taking the place of a regular driver on an extracurricular run. Experience has shown that it is difficult to convince a substitute, for the sum of $15, to travel from home to where the bus is located, make a mid-day run, return the bus to its parking place, and return home.

[10] The practice challenged by Grievant is designed, as it is to help ensure that a regular or substitute bus operator will be available to make mid-day runs, and that the daily education of students is not interrupted by the Board's inability to find a substitute for a regular bus operator who desires to make an extra-duty trip. The State Board of Education's Transportation Regulations, Policy 4336, *Respondent's Level Three Exhibit 4,* enshrines that goal, stating in clear terms in section 21.1.2 that "[s]chedules for approved trips shall not interfere with the regular transportation schedule."

1, *Hyre v. Upshur County Bd. of Educ.,* 186 W. Va. 267, 412 S.E.2d 267 (1991), quoting Syllabus Pt. 3, *Dillon v. Bd. of Educ.,* 177 W. Va. 145, 351 S.E.2d 58 (1986). Further, "[s]chool personnel regulations and laws 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). *See Trimboli v. Bd. of Educ.*, 163 W. Va. 1, 254 S.E.2d 561 (1979). Likewise, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).

It is debated whether the practice in discussion is truly set forth in a formal written format. It is acknowledged that the concept as implemented is not an official policy. Further, it is factually accurate that the practice was not promulgated and reduced to an official format by the Mercer County Board of Education nor approved by two-thirds of the bus operators in compliance with WEST VIRGINIA CODE §§18A-2-12a(b)(7) and 18A-4-8b(f).

WEST VIRGINIA CODE §18A-2-12a(b)(7) provides that "all official and enforceable personnel policies of a county board must be written and made available to its employees. WEST VIRGINIA CODE §18A-4-8b(f) provides:

> 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:
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> > (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's practice is designed, as it is, to help ensure that a regular or substitute bus operator will be available to make mid-day runs, and that the daily education of students is not interrupted by the Board's inability to find a substitute for a regular bus operator who desires to make an extra-duty trip. Efficiency is not necessarily sufficient to circumvent proper administrative procedure. Respondent did not take sufficient action to properly implement the practice, in discussion, as an operational policy.

Grievant has effectively highlighted that the contested procedure runs counter to Grievant's contractual right to perform his regular assignment by requiring him to relinquish that right in order to exercise his option to perform an extra-duty assignment *even if* there is no legal or practical conflict of schedule. WEST VIRGINIA CODE §18A-4-16(4) erects a wall between performance of extracurricular and regular assignments and clearly indicates that performance of the former cannot be made a condition of performance of the latter.

Grievant's counsel has simultaneously, to some degree, raised the question whether the contested procedure could be legally followed even if the practice had been promulgated in writing and approved by the board of education and/or by two-thirds of the bus operators in compliance with WEST VIRGINIA CODE §§18A-2-12a(b)(7) and 18A-4-8b(f). However, since the practice was not promulgated and reduced to written form by the board of education or in the alternative approved by two-thirds of the bus operators, this question need not be addressed in the current grievance.

It is established by a preponderance of the evidence that Respondent has implemented an artificial condition of employment not properly established as prescribed by applicable procedural and statuary language. The practice as implemented is beyond the authority of Respondent. Grievant has demonstrated the practice enforced by Respondent's agents denied Grievant employment opportunity or defacto prohibited him from accepting extra-duty assignments. It is determined that Respondent functionally exercised authority not properly prescribed or authorized by statutes. Accordingly this grievance is found to be meritorious.

In accordance with the facts of this case, Grievant was indeed impeded from performing two extra-duty assignment, certain. If Grievant had performed the extra-duty assignments, he could have performed his regular assignment run, but he could not have performed his extracurricular runs. Grievant is not entitled to be unduly enriched. Assuming Grievant has been compensated for the run he did perform, (his extracurricular run), he is only entitled to the additional money above and beyond said amount. The amount he could have received if he had performed the extra-duty assignment forgoing the duty he did perform. Grievant is entitled to the sum total of compensation generated for his regular duty run and the extra-duty assignment for the two incidents identified in the facts of this grievance. Grievant is not entitled to the compensation pay from the extracurricular runs and the extra-duty assignments.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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." *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, a party has not met its burden of proof. *Id.*

2. Respondent did not prove by a preponderance of the evidence that the grievance was not filed within the statutory time frame.

3. WEST VIRGINIA CODE §18A-2-12a(b)(7) provides that "all official and enforceable personnel policies of a county board must be written and made available to its employees."

4. WEST VIRGINIA CODE §18A-4-8b(f) provides:

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.

5. WEST VIRGINIA CODE § 18A-4-16(4) provides;

> An employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board.

6. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs, and the fact that a regulation may be generous beyond statutory or constitutional requirements does not preclude a teacher from availing himself of the rights provided by the procedure set out in the regulation. *Powell v. Brown*, 238 S.E.2d 220 (W. Va. 1977).

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. Respondent functionally exercised authority not properly prescribed or authorized by statute.

Accordingly, this grievance is **GRANTED**.

Grievant is awarded the additional amount of compensation and benefits he could have received for performing his regular duty run and the extra-duty assignment versus the amount he received for performing his regular duty run and his extracurricular run of the two incidents identified in the facts of this grievance. Grievant is not entitled to the total compensation pay from the extracurricular run and the extra-duty assignment.

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: January 18, 2013

Landon R. Brown
Administrative Law Judge