KAREN CONNER, .

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Grievant, .

.

v. . Docket Nos. 93-01-543

. & 93-01-544

BARBOUR COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

Karen Conner (Grievant) is employed by the Respondent Barbour County Board of Education (BCBE) as a Bus Operator. On September 29 and 30, 1993, Grievant filed two separate grievances that were processed through Level III without satisfactory resolution. Grievant timely appealed to Level IV on December 23, 1994, and Level IV hearings were duly scheduled. On February 8, 1994, Grievant invoked W. Va. Code § 18-29-5, asking that these grievances be heard by a different Administrative Law Judge than the one who had heard one or more previous grievances. Accordingly, these grievances were administratively reassigned to the undersigned for hearing at Level IV. Following several continuances, each of which was granted for good cause, a Level IV hearing was conducted in this Board's office in Elkins, West Virginia on September 21, 1994. At that time, the parties agreed to consolidation of these grievances for hearing and decision. The parties further agreed tothe submission of Grievance 93-01-543 for decision on the basis of the record developed through Level II. Thus, evidence presented at the Level IV hearing was limited to Grievance 93-01-544. Upon timely receipt of post-hearing submissions, this matter became mature for decision on October 25, 1994.

Grievant has been employed by BCBE as a full-time bus operator for over fifteen years. On March 24, 1993, Grievant was notified, per W. Va. Code § 18A-2-7, that she was being recommended for placement on the administrative transfer list for the 1993-94 school year. Grievant questioned her

immediate supervisor at the time, Edward Larry, in regard to the proposed transfer. Mr. Larry assured Grievant, both verbally and in writing, that the only change contemplated involved "Rt. 119 overload students to the High School." Grievant, satisfied that her interests would not be adversely affected, did not request a hearing before the Board of Education. However, BCBE's Superintendent of Schools, William Phillips, testified that Mr. Larry had no authority to revise, qualify or amend the notice of transfer which Mr. Phillips issued to Grievant.

On July 1, 1993, Charles Zinn replaced Mr. Larry as BCBE's Transportation Director. Mr. Zinn testified that he held meetings with most of the bus operators, including Grievant, in August of 1993 before school started, to go over their bus routes. No changes were made at that time since pupil counts generally remain speculative until at least a week after school starts. According to Mr. Zinn, Grievant drives one of five buses that transportstudents to Philip Barbour High School (PBHS). All five of these regular morning and afternoon runs traverse U.S. Route 119. After the beginning of school in September 1993, Mr. Zinn learned that one of the five buses, operated by Willis Freeman, was arriving at PBHS at approximately 8:15 a.m. School officials indicated that to allow students to eat breakfast and get to class on time, they needed all buses to arrive no later than 8:10 a.m. Mr. Zinn asked three of the affected drivers, including Grievant, to meet and attempt to resolve the problem among themselves. (See footnote 1) Grievant met with Mr. Freeman and another driver, Pam Bartley, on September 17 or 18, 1993, in an effort to work out the problem. However, the drivers did not reach an agreement.

Shortly thereafter, Mr. Zinn rode with each of the five drivers on his or her morning run to obtain first-hand information upon which to base route adjustments. He then decided upon certain alterations to three bus routes and notified Grievant on the afternoon of September 24, 1993, so that she could advise affected students of the changes affecting her route on their way home. The changes became effective on September 27, 1993. (See footnote 2) Grievant did not consent, either verbally or in writing, to the change in her bus route. Because the overload problem developed on a bus route which primarily involved Route 119, Mr. Zinn thought that the changes heinitiated were consistent with the statement of his predecessor that the only contemplated change on Grievant's route would involve "Rt. 119 overload students to the high school."

Prior to September 27, 1993, Grievant's regular morning route started at the Bus Garage on Chestnut Street in Philippi, West Virginia. She then proceeded North on U.S. Route 250, through

downtown Philippi and the covered bridge, turning right on U.S. Route 119 North. She proceeded North on 119 to Corders Crossing near Berryburg Junction. She then turned left onto State Route 76 to Needmore Road (County Road 77/6). She would turn right onto Needmore going to the end of the road to pick up students and then return to 76, turning right and proceeding West through Berryburg. She turned left onto Camp Run Road (County Road 77/1), proceeding about one mile before turning around, returning to 76 and turning left. She proceeded through Galloway on 76 to Bear Mountain Road (County Road 16). She turned left onto Bear Mountain Road and went to Mount Vernon Elementary School (MVES). She returned to 76 from MVES and proceeded East on 76 directly to 119, turning right onto 119 and proceeding South past Alderson-Broaddus College (A-BC) turning left onto 250 through the covered bridge and into downtown Philippi. She proceeded South on 250 past State Route 38 to PBHS, which is just South of County Road 250/4. Grievant's evening run was similar, except that she would additionally go a short distance past MVES in the evening to drop off some students.

As of September 27, 1993, Grievant's evening run was reduced by elimination of the extension on Bear Mountain Road past MVES. Her morning run was extended by a side trip off U.S. Route 119 up and back on Norris Ridge Road (County Road 119/18) before reaching Corders Crossing. According to Grievant's uncontroverted testimony at Level IV, this involves an additional two miles of driving. In addition, when proceeding South on 119, Grievant now turns right on Cherry Hill Road (County Road 7) behind A-BC to Philippi Elementary School and Philippi Middle School to drop off students at both locations. Grievant then drives back to 250 and across the covered bridge. According to Grievant's undisputed testimony at Level IV, this new loop covered 3.4 miles. According to Grievant, this 3.4 mile loop comes out 1 mile South on U.S. Route 250, so that 2.4 miles was actually added to her morning run by the addition of the loop past the Middle and Elementary Schools. Thus, Grievant's morning route was extended a total of 4.4 miles as a result of the two additions. Grievant estimated that these additions to her route added approximately 15 to 20 minutes or more to the duration of her morning run. Mr. Zinn estimated that the new schedule added only eight to ten minutes of driving time to her morning run. The official schedules entered into the record at Level II by Respondent indicate that Grievant's morning run was extended 17 minutes. (See footnote 3) (See R Ex 1 & 2.) These schedules indicate that Grievantwas actually required to leave the Philippi Bus Garage five minutes earlier to start her morning run while returning to the Bus Garage 12 minutes later following

her evening run.

The Respondent noted through the testimony of Mr. Zinn that service personnel in Barbour County are paid on the basis of a seven and one-half hour day. Grievant's actual driving time after the alterations to her route was just under four hours, allowing ample time for completion of preliminary and postliminary duties such as safety and maintenance checks, cleaning the bus interior, washing the bus on a weekly basis, etc.

The bus schedule Grievant followed at the beginning of the 1993-94 school year was essentially the same schedule as she followed in 1992-93. Mr. Zinn testified that the student population along U.S. Route 119 had been increasing as a result of new housing being constructed in that area. He also noted that graduation and new enrollment inevitably affected the student population along certain bus routes from year to year. As this was Mr. Zinn's first year as Transportation Director, he did not feel he had sufficient information to mandate a change in the bus schedule until the student population was firmly established and he had the opportunity to personally review the routes where the current drivers could not agree on a necessary change. (See footnote 4)

Mr. Zinn indicated that the bus operated by Mr. Freeman, a new bus operator, was overloaded. Mr. Zinn concluded that this overload condition was directly contributing to Mr. Freeman's arriving later than desired at PBHS. Mr. Zinn indicated that Grievant was arriving at PBHS earlier than any of the other drivers and had only 20 students on a 65-passenger bus at the time of arrival at PBHS. (Grievant claims that she had 47 high school students assigned and, although not all of them rode the bus each day, her "average" load upon arrival at PBHS was "between 30 and 40.") Mr. Zinn determined that Grievant had both time and seating capacity available to accommodate alterations to relieve Mr. Freeman's overload. (See footnote 5) Thus, the previously described changes in Grievant's route were made, along with certain changes in the routes of Ms. Bartley and Mr. Freeman.

On September 28, 1993, Grievant was notified in writing by Mr. Zinn that she was not to make her morning run on September 29, 1993. Instead, Mr. Zinn rode Grievant's bus with a substitute driver following the new route which had begun on September 27th. (See footnote 6) Consistent with her instructions from Mr. Zinn, Grievant rode another bus operated by her husband, Howard Conner, and receivedher regular rate of pay for that day. Based upon his observations while covering Grievant's route with a substitute bus operator, Mr. Zinn established the specific times Grievant was to be at certain points on her recently revised bus route. Grievant claims that this was the only time BCBE

has ever followed such a procedure in regard to setting a bus operator's schedule.

Mr. Zinn's explanation for this action at Level II was that on September 27 and 28, 1993, Grievant arrived at PBHS 25 to 30 minutes later than she had been arriving prior to the alteration in her bus route. Since Mr. Zinn had previously ridden over each of the affected routes, he was surprised to find that Grievant needed an additional 25 to 30 minutes to complete her route. His calculations led him to believe that Grievant's route would only be extended by approximately 10 minutes. In addition, Mr. Zinn began receiving telephone calls from concerned parents who stated that Grievant had told their children that they would have to start leaving for school half an hour earlier each morning. (See footnote 7)

Mr. Zinn elected to verify the amount of time required to cover Grievant's revised route, and selected a 69-year-old, retired bus operator, "Digger" Schola, to drive the route on the 29th of September while Mr. Zinn rode along as an observer. Because Mr. Schola was a substitute bus operator with no prior knowledge of this particular route, Mr. Zinn felt he was sufficiently neutral toprovide a fair indication of the actual driving time required. Mr. Zinn indicated that Mr. Schola did not exceed any speed limits and they arrived at each critical point on Grievant's route on schedule, including PBHS where they arrived about 22 minutes earlier than Grievant's arrival on the 27th. Based on that "trial run," Mr. Zinn clarified Grievant's bus route through a memo noting the times she should arrive at certain "critical points" on her route.

DISCUSSION

The alterations in Grievant's bus route on September 27, 1994, Grievance 93-01-544, will be discussed first. Grievant's claim that she was improperly transferred in violation of W. Va. Code § 18A-2-7 must be rejected for a number of reasons. First, it should be noted that the changes in Grievant's route were not so substantial as to result in a transfer of Grievant within the meaning of W. Va. Code § 18A-2-7. Second, this Grievance Board has held that because a bus operator's duties are inherently itinerant in nature, a change in driving schedule does not constitute a transfer under § 18A-2-7. Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). See Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989). Here, Grievant's route at the beginning of the 1993-94 school year was essentially the same route she had driven during the 1992-93 school year and it remained essentially the same,

even after the changes in late September.

Third, although Grievant was not effectively transferred at the beginning of the 1993-94 school year, BCBE had full authority to complete such a transfer under § 18A-2-7, notwithstanding Mr. Larry's unauthorized representations regarding the limited changes he contemplated occurring in her route. As was apparent from Mr. Phillips' testimony, the purpose of giving Grievant § 18A-2-7 notice was to provide BCBE with additional flexibility in revising school bus routes at the beginning of the next school year. Moreover, transfer decisions fall within the purview of the Superintendent and the Board, making any limiting representations by BCBE's Director of Transportation ultra vires, as he was clearly without authority to bind BCBE.

Because the changes to Grievant's bus route were not so substantial as to result in a transfer, Grievant has little, if any, standing to complain about relatively minor alterations in her route. Where, as here, BCBE had taken appropriate steps in accordance with § 18A-2-7 to obtain authority to transfer Grievant, the employer should not be penalized for making less substantial changes which impacted on Grievant's conditions of employment.

Fourth, and finally, it must be remembered that county boards of education have broad discretion to transfer personnel, provided they comply with applicable procedural requirements established by state law. See State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980). The record here indicates that BCBE in no way abused its discretion in regard to the changes made in Grievant's bus route.

Grievant also alleges that this alteration in her bus route was made in violation of W. Va. Code § 18A-4-8a. That statute provides, in pertinent part, "[n]o service employee shall have his or her daily work schedule changed during the school year without such employee's written consent . . . ." Claims relating to alterations in bus routes contrary to § 18A-4-8a have generated a considerable amount of litigation before this Grievance Board. In order to assess the merits of Grievant's claim, a review of our prior holdings on the scope of protection afforded school service employees by the previously quoted portion of § 18A-4-8a is in order. **(See footnote 8)**

In one of this Board's earliest encounters with this issue, Coburn v. Kanawha County Board of Education, Docket No. 20-86-087 (Sept. 10, 1986), aff'd sub nom. Kanawha County

Bd. of Educ. v. Coburn, Civ. Action No. 86-C-AP-212 (Kanawha County Cir. Ct. Mar. 14, 1989), a unilateral 11.6 mile per day addition to a bus operator's route was found to violate § 18A-4-8a. However, it was noted in a footnote: "This is not to say, however, that slightmodifications of the work schedule cannot be made pursuant to Code, 18A-4-8a, and each case will be decided on its own merits." (citation omitted) Coburn, supra, at 8 n. 8. Consistent with Coburn, this Board noted in Smith v. Lewis County Board of Education, Docket No. 21-88-043-3 (Dec. 30, 1988), that "[s]light alterations of a bus operator's driving schedule during a school year may be necessary due to need; however, an arbitrary alteration, which adds time or distance to the operator's workday and which serves no useful purpose, constitutes an unlawful schedule change as contemplated by W. Va. Code § 18A-4-8a." In Froats v. Hancock County Board of Education (Froats I), Docket No. 89-15-164/202 (Aug. 31, 1989), a violation of § 18A-4-8a was found where a bus operator's work day was extended approximately 12 minutes by a mid-year addition of a "junior high run" at the end of the day. However, in Froats v. Hancock County Board of Education (Froats II), Docket No. 89-15-414 (Dec. 18, 1989), no violation was established when the same run was added to a bus operator's schedule in the summer between school terms.

Payton v. Lincoln County Board of Education, Docket No. 89-22-649 (Feb. 16, 1990), clarified Smith in one particular by noting that "additions of twelve to fourteen and eighteen miles are generally not such 'slight alterations.'" Payton may well be the most significant change addressed to date, because the Grievant there had two separate runs of 12 and 18 miles added to his established schedule.

In Ross v. Preston County Board of Education, Docket No. 91-39-026 (July 12, 1991), this Grievance Board determined that adding a single stop to an established bus route did not warrant additional compensation to the bus operator in question, notwithstanding that such stop had been part of a supplemental run during the previous school year. Roberts v. Lincoln County Board of Education, Docket No. 92-22-131 (Aug. 31, 1992), continued to follow this Board's earlier holdings, stating that "[s]light mid-year alterations in bus schedules are not per se violations of Code § 18A-4-8a; such alterations must be analyzed, however, on a case-by-case basis." Nonetheless, the reassignment of one student from another route, causing the bus operator to drive an additional mile each day, was found to violate § 18A-4-8a since there

was "no compelling reason" for the reassignment. Roberts, supra, at 9.

Finally, Titus v. Wood County Board of Education, Docket No. 92-54-023 (Apr. 30, 1992), citing Coburn and Smith, found that a bus operator's daily work assignment was "not significantly altered" by a change in his route which added 5.3 miles but reduced total driving time by 15 minutes.

As noted in Froats II, supra, a strict, literal interpretation of § 18A-4-8a would preclude a school board from ever changing a bus operator's schedule since one school year technically ends on June 30 and a new school year begins each July 1. Froats II at 8 n. 20. As stated in Froats II, "a county board of education must, at least between school terms, have freedom to make at least reasonable, small changes to a bus operator's daily work schedule,within the parameters of her contract, many of which cannot reasonably be effected until shortly before school starts for pupils in any given year." Froats II at 10-11.

By notifying Grievant of a possible transfer for the 1993-94 school year, Respondent was clearly attempting to put Grievant on notice that certain alterations in her bus route were contemplated at the beginning of the new school year. While the alterations which were ultimately made were not sufficiently significant to constitute a transfer within the meaning of § 18A-2-7, that does not bar the school board from making appropriate, less significant alterations to bus routes at the beginning of the new school year.

Likewise, the fact that the modifications, as implemented, may have exceeded the scope of change anticipated by Mr. Zinn's predecessor, Mr. Larry, does not limit the school board's discretion to make necessary alterations. Clearly, there was no demonstrated intent on the part of Mr. Larry, Mr. Zinn or anyone else within BCBE to mislead Grievant or to obtain a waiver of her right to a hearing on her proposed transfer under "false pretenses." While the alterations in Grievant's bus route were not made until September 27th, Grievant was aware, as a result of her proposed transfer notice, her meeting with Mr. Zinn in August before school started, the meeting with the other two affected bus operators, and the fact that Mr. Zinn rode her bus route as an "observer," that some alteration to her "carryover" 1992-93 schedule was virtually inevitable.

The record indicates that the bus route changes at issue were made for proper and rational reasons at the earliest practicable point in the new school year. Implementation of the

changes was deliberately delayed here in an effort to allow the employees to amicably resolve the situation among themselves rather than the employer imposing a solution upon them. Mr. Zinn should be commended for his considerable initiative in striving to reach a prompt decision that was fair to all parties concerned.

Moreover, this alteration in bus routes did not extend Grievant's workday beyond the parameters of her current contract. Certainly, the legislature did not contemplate that a custodian who is required to sweep an additional corridor of a school building that is opened after the school year begins would have to consent to a change in his "daily work schedule," even though his workday still did not exceed seven and one-half hours. Thus, consistent with this Grievance Board's earlier holding in Froats II, a school board may make modifications in existing bus routes at the beginning of the new school year, as necessitated by such factors as new equipment, road construction and shifting student population. (See footnote 9)

Grievant further contends that BCBE's actions in regard to both the alteration of her bus route (Grievance 93-01-544) and the use of a substitute driver to establish the times in her new busschedule (Grievance 93-01-543) violated W. Va. Code § 18-29-2(m) and (o). Subsection "m" defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Subsection "o" defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to prevail on claims of this nature, Grievant must prove the allegations in her case by a preponderance of the evidence. Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

In order to establish a prima facie case of discrimination under W. Va. Code §18-29-2(m), this Board's ruling in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), requires a grievant to demonstrate the following:

> **(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,**

> **(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing. Steele, supra, at 15.**

Addressing Grievance 93-01-543 first, Grievant complains that BCBE's assignment of a substitute bus operator to drive her busroute on September 29, 1993 was discriminatory. (See footnote 10) Consistent with the standard for establishing a prima facie case of § 18-29-2(m) discrimination adopted by this Grievance Board in Steele, the undersigned finds that as Grievant received her normal pay and no adverse comment was entered into her personnel record, the Respondent's action in assigning a substitute bus driver to drive her morning route for the purpose of verifying her schedule did not constitute treatment to her detriment. Thus, Grievant failed to establish a prima facie case of § 18-29-2(m) discrimination. Steele, supra. Moreover, even if Grievant did make out a prima facie case of discrimination, the Respondent articulated sufficient non-discriminatory factors, including the need to assure the safe and efficient transportation of students to their schools, to refute any inference of improper motives. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va.Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

In regard to Grievance 93-01-544, the alterations to Grievant's bus route, the undersigned finds that BCBE's extensions to her morning and evening runs in terms of distance traveled and driving time constitute adverse changes in Grievant's terms and conditions of employment sufficient to make out a prima facie case of discrimination under § 18-29-2(m). However, based upon BCBE's considerable effort to alter bus routes in a reasoned and rational manner, as heretofore discussed, the Respondent established sufficient non-discriminatory factors for its actions so as to refute Grievant's prima facie case. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). Similarly, Grievant failed to produce sufficient evidence to establish that the actions she complains of amount to "favoritism" prohibited by § 18-29-2(o).

Grievant also claims that BCBE's actions in altering her bus route and employing a

substitute to establish the time schedule for her altered bus route constituted harassment. Harassment is defined by W. Va. Code § 18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy or profession." Grievant cannot prevail on this issue because a preponderance of the evidence demonstrates that Mr. Zinn's actions in behalf of BCBE were not "contrary to the demeanor expected by law, policy orprofession." See Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Indeed, Grievant's delay in arriving at PBHS on the first two mornings following alteration of her bus route would cause a reasonable employer to suspect that she was engaging in a deliberate effort to thwart her schedule change in a manner bordering on insubordination or willful neglect of duty.

Finally, Grievant claims that these actions were taken in reprisal or retaliation for previous grievances which Grievant had filed against BCBE. Reprisal is defined by W. Va. Code § 18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." Similar to the Steele proof analysis for determining when a grievant has proven a prima facie case of discrimination, a grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> **(1) that he/she engaged in protected activity, e.g., filing a grievance;**
>
> **(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**
>
> **(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and**
>
> **(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.**

See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Of course, if a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its action. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Consistent with the foregoing requirements, Grievant made out a prima facie case of retaliation in regard to the alterations in her bus route which became effective on September 27th, as her bus route became less desirable because she was getting paid the same for doing more driving. In addition to Grievant's evidence that she filed one or more grievances of which Mr. Zinn became aware shortly before this action occurred, the undersigned takes administrative notice that Grievant prevailed before this Grievance Board in two decisions issued a few months before the events at issue here. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-421 (Apr. 20, 1994); Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994). (See footnote 11) **Nonetheless, BCBE countered with preponderant evidence that the route changes were madefollowing a careful and painstakingly fair analysis of the situation, with controlling consideration being given to the safe and efficient transportation of public school students while conserving BCBE's fiscal resources. None of Grievant's evidence persuasively tended to demonstrate that these reasons were either pretextual or a subterfuge for retaliation. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).**

In regard to the grievance relating to the substitute bus operator driving Grievant's route, the undersigned is not persuaded that this event was necessarily adverse to Grievant. Certainly there was no evidence of a documented adverse action which could negatively impact on Grievant's employment status. Moreover, Grievant was paid her regular rate of pay for not driving her bus, establishing at least a benign situation in terms of her daily wage.

While Grievant complains about being removed from her run, her primary quarrel appears to be with the fact that certain critical arrival times on her altered schedule were established

based upon the one-time coverage of her route by a substitute driver. Had Mr. Zinn arbitrarily established these critical times, Grievant's perception of retaliation would be understandable. However, Mr. Zinn merely employed the substitute bus operator to verify the schedule times he had previously established on September 24th. Thus, there was no substantive change adverse to Grievant as required to establish a prima facie case of retaliation.

In any event, assuming for the sake of argument that replacing Grievant with a substitute driver and establishing the critical times on her bus route based upon the substitute's completion of her route is an action from which Grievant is protected by the § 18-29-2(p) prohibition against reprisal, BCBE presented preponderant evidence that this action was taken for legitimate, nonretaliatory reasons. As noted, Mr. Zinn had previously ridden on each of the five buses transporting students to PBHS earlier in the month and had carefully revised the bus routes to assure that all buses could arrive at PBHS not later than 8:10 a.m. Thus, he was understandably nonplused when Grievant began arriving at PBHS 10 to 20 minutes later than expected on the first two mornings following the change. Under these circumstances, it was not unreasonable to infer that Grievant was engaging in a deliberate effort to sabotage the revised schedule. Accordingly, Mr. Zinn's response in arranging for a substitute driver to complete Grievant's route without any loss of pay or adverse notation in her personnel record, does not demonstrate intent to retaliate against Grievant for her previous protected activity. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant is employed by the Barbour County Board of Education (BCBE) as a Bus Operator.

2. Grievant was notified by letter dated March 24, 1993 that she was being recommended for transfer pursuant to W. Va. Code § 18A-2-7.

3. Grievant's immediate supervisor, Edward Larry, thereafter advised her, both verbally and in writing, that the only contemplated change to her current bus route involved "Rt. 119 overload students to the High School."

4. Grievant did not request a hearing before BCBE in regard to her proposed transfer.

5. On July 1, 1993, Charles Zinn replaced Mr. Larry as BCBE's Director of Transportation.

6. Before school started in August 1993, Mr. Zinn held meetings with BCBE's regular bus operators, including Grievant, in an effort to establish revised bus routes and schedules before school started. Mr. Zinn concluded that he could not establish firm routes and schedules as he was lacking accurate information in regard to graduations and families moving into the area, factors which impacted on the student population experienced during the previous school year, 1992-93.

7. Grievant began the 1993-94 school year following the same bus route and schedule she had followed in 1992-93.

8. Shortly after school started, Mr. Zinn learned that a bus operated by Willis Freeman, a new bus operator, was arriving at Philip Barbour High School (PBHS) later than 8:10 a.m., the desired arrival time for high school students.

9. Mr. Zinn found that Mr. Freeman's bus was overloaded. Of the five BCBE buses transporting students to PBHS, only Grievant and Pam Bartley were either arriving at PBHS early enough or had sufficient unused seating capacity to accommodate Mr. Freeman's overload.

10. Mr. Zinn arranged for Grievant, Ms. Bartley and Mr. Freeman to meet on or about September 18 or 19 in an effort to voluntarily adjust their routes to resolve the problem. The bus operators were unable to agree on a solution.

11. Mr. Zinn thereafter rode each of the five buses on their regular runs in an effort to determine what route adjustments could be made.

12. On Friday afternoon, September 24, 1993, Mr. Zinn advised Grievant of certain changes in her bus route that would take effect on September 27, 1993, the following Monday.

13. The bus route alterations directed by Mr. Zinn required Grievant to drive approximately 4.4 additional miles on both her morning and afternoon runs. These alterations increased the driving time on each of Grievant's two bus runs by 10 to 15 minutes.

14. Grievant did not give verbal or written consent to the changes and was not provided any additional compensation by BCBE.

15. BCBE pays school service personnel, including bus operators, on the basis of a seven and one-half hour day. Even after the additions to her bus route, Grievant normally spent no

more than four hours per day driving her bus route, allowing ampletime for preliminary and postliminary duties such as safety and maintenance checks, interior and exterior cleaning, etc.

16. On the mornings of September 27 and 28, 1993, Grievant's bus arrived at PBHS 25 to 30 minutes later than it had been arriving prior to the route change.

17. Consistent with written notice provided to Grievant on the afternoon of September 28, 1993, Mr. Zinn rode Grievant's bus on the morning of September 29, 1993, while the bus was operated by a substitute bus operator, "Digger" Schola.

18. Grievant was permitted to ride on the bus of her choice on the morning of September 29, 1993, and suffered no loss in pay. No adverse comments were entered in her personnel records.

19. Based on Mr. Schola's successfully meeting the revised schedule without violating any speed or safety laws, Mr. Zinn established certain "critical times" when Grievant was required to arrive at certain points on her revised bus route.

20. Prior to Mr. Zinn's assumption of duties as BCBE's Director of Transportation, Grievant filed at least two grievances under the established statutory grievance procedure for education employees, W. Va. Code § 18-29-1 et seq., of which Mr. Zinn had personal knowledge based upon his involvement at the lower levels. In addition, in April 1994 Grievant prevailed against BCBE before the West Virginia Education and State Employees Grievance Board in two Grievances filed against Mr. Zinn's predecessor. The Grievance Board concluded in those cases that Grievant was the victim ofreprisal prohibited under W. Va. Code § 18-29-2(p) and awarded appropriate remedies against BCBE.

CONCLUSIONS OF LAW

1. The changes in Grievant's bus route which became effective on September 27, 1993, did not constitute a transfer under W. Va. Code § 18A-2-7. Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). See Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989).

2. Grievances contending that a bus operator's route has been changed in violation of the

provision in W. Va. Code § 18A-4-8a, which limits changes in a school service employees' daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis. Roberts v. Lincoln County Board of Education, Docket No. 92-22-131 (Aug. 31, 1992). See Coburn v. Kanawha County Board of Education, Docket No. 20-86-087 (Sept. 10, 1986), aff'd sub nom. Kanawha County Bd. of Educ. v. Coburn, Civ. Action No. 86-C-AP-212 (Kanawha County Cir. Ct. Mar. 14, 1989).

3. Notwithstanding the language in W. Va. Code § 18A-4-8a restricting changes in a service employee's daily work schedule, "a county board of education must, at least between school terms, have freedom to make at least reasonable, small changes to a bus operator's daily work schedule, within the parameters of her contract, many of which cannot reasonably be effected until shortly before school starts for pupils in any given year." Froats v.Hancock County Board of Education, Docket No. 89-15-414 (Dec. 18, 1989).

4. Where, as here, alterations in a bus route are made at the beginning of the school year based upon factors largely beyond the school board's control, such as a transitory student population, the schedule being followed is simply a "carryover" from the prior school year, the bus operator was placed on notice of a potential transfer at the end of the prior school year, and the actual "daily work schedule" for which the employee is compensated has not been exceeded, such alterations do not violate W. Va. Code § 18A-4-8a.

5. In order to establish a prima facie case of discrimination under W. Va. Code §18-29-2(m), a grievant is required to demonstrate the following:

> **(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,**
>
> **(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.**

Steele v. Wayne County Board of Education, Docket No. 89-50-260

(Oct. 19, 1989).

6. Although Grievant made out a prima facie case of discrimination under W. Va. Code § 18-29-2(m) in regard to the alterations in her bus route described in Finding of Fact No. 13, BCBE presented sufficient non-discriminatory reasons for its actions so as to refute Grievant's prima facie case. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va.Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

7. Under this Grievance Board's standard for determining when a grievant has established a prima facie case of § 18-29-2(m) discrimination, Grievant failed to establish a prima facie case of discrimination in regard to BCBE's actions in assigning a substitute operator to drive her route as more fully described in Findings of Fact Nos. 17 - 19, since there was no showing that such actions operated to Grievant's detriment in any significant way. Steele, supra.

8. Even if, for the sake of argument, Grievant established a prima facie case of § 18-29-2(m) discrimination in regard to being taken off her regular morning run on September 29, 1993, the Respondent established sufficient non-discriminatory factors, including the need to provide for the safe and efficient transportation of students to their schools, to refute any inference of improper discriminatory motives. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

9. Inasmuch as a preponderance of the evidence demonstrates that Mr. Zinn's actions in these matters was not "contrary to the demeanor expected by law, policy or profession," Grievant failed to demonstrate that she was the victim of harassment as defined in W. Va. Code § 18-29-2(n). See Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Fareydoon-Nezhad v. W. Va.Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994).

10. Reprisal is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. Va. Code § 18-29-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> **(1) that he/she engaged in protected activity, e.g., filing a grievance;**

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

11. Although Grievant made out a prima facie case of retaliation in regard to the alterations in her bus route which became effective on September 27th, BCBE countered with preponderant evidence that the route changes were made following a painstakingly fair analysis of the situation, with due consideration for the safe and efficient transportation of public school students and BCBE's fiscal resources. None of Grievant's evidence persuasivelytended to demonstrate that these reasons were either pretextual or a subterfuge for retaliation. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

12. In accordance with the rationale set forth in Conclusion of Law No. 7, the undersigned finds that Grievant failed to make out a prima facie case of reprisal in regard to BCBE's assignment of a substitute bus operator to drive her route on September 29, 1993. However, assuming that this is an adverse change in her working conditions from which Grievant is protected by the § 18-29-2(p) prohibition against reprisal, BCBE presented preponderant evidence that the action was taken for legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace v. Pizza Hut, Inc., 377 S. E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

13. Grievant's claims alleging Title VII-type discrimination on the basis of age, sex and

religion are not properly within the jurisdiction of this grievance board. Norton v. W. Va. Northern Community College, Docket No. 89-BOR-503 (Apr. 28, 1993).

Accordingly, these Grievances are DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Barbour County and such appeal must be filed within thirty (30) days of receipt of thisdecision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: January 31, 1995

Footnote: 1*Mr. Zinn excluded two drivers whose current passenger load was near the maximum for their buses and had no seats available to alleviate the problem noted.*

Footnote: 2*This change formed the basis for the grievance represented by Docket No. 93-01-544.*

Footnote: 3*Grievant also testified as to such matters as the width of the respective highways, their inclination, speed limits and priority for maintenance under snow and ice conditions. At best, these factors may be relevant to support her estimate of additional time required to drive the miles added to her morning run. It is not necessary to go beyond essential considerations of time and distance to determine if a bus operator has had "his or her daily work schedule changed" within the meaning of § 18A-4-8a.*

Footnote: 4*Mr. Zinn testified that he had wanted to publish the bus routes in the local newspaper prior to the beginning of school for the benefit of the affected parents. However, after meeting with the drivers and obtaining their schedules for the previous year, Mr. Zinn recognized that alterations would be necessary and he did not have sufficient information to publish an accurate schedule.*

Footnote: 5 *Grievant indicated that following the alterations in her route, she had more than two high school students assigned to each seat but the number of students assigned to her bus did not exceed the rated capacity of 65 passengers. Grievant speculated that Mr. Freeman was either deliberately driving too slowly or was unfamiliar with his route at the beginning of the year, causing the delay in his arrival at PBHS. This interpretation is not supported by a preponderance of the evidence.*

Footnote: 6 *This action by Mr. Zinn forms the basis for the grievance identified by Docket No. 93-01-543.*

Footnote: 7 *Grievant testified that she only told the students that they would have to leave "early" without specifying any amount of time. She blames the children for this statement being "blown out of proportion." Despite Grievant's quibbling as to her exact words, Mr. Zinn clearly had a valid basis to look into the situation.*

Footnote: 8 *This analysis will focus primarily on alterations to bus operators' "regular runs" as these runs are subject to far greater change from students moving from one residence to another, the opening of new highways and other factors beyond the school board's control. Supplemental runs are generally treated differently. See e.g., Light v. Lincoln County Board of Education, Docket No. 89-22-144 (May 30, 1989), where this Board found that adding a second student (and, thereby, an additional 30 minutes) to a one-hour, one-student supplemental run, violated the bus operator's contract and warranted additional compensation of $2.00 per run; and Terek v. Ohio County Board of Education, Docket No. 35-87-294-3 (July 20, 1988), aff'd Civ. Action No. 88-C-AP-45 (Ohio County Cir. Ct. Mar. 13, 1992), where adding a 30-minute mid-day supplemental run to Grievant's work day was found to violate § 18A-4-8a.*

Footnote: 9 *It is noted that this interpretation of W. Va. Code § 18A-4-8a is consistent with the provision of the West Virginia Constitution calling for a thorough and efficient system of free schools. W. Va. Const., Art. XII, § 1.*

Footnote: 10 *Grievant similarly complains that these actions constituted unlawful discrimination on the basis of her age, sex and religion. However, this Board has previously determined that grievances claiming Title VII-type discrimination are not properly within the jurisdiction of this grievance board. Norton v. W. Va. Northern Community College, Docket No. 89-BOR-503 (Apr. 28, 1993). Accordingly, these aspects of Grievant's claim will not be addressed in this decision. However, it is noted that to the extent that Grievant made out a prima facie case of discrimination on the basis of age and sex, any inference of discrimination was refuted by the same evidence which the Respondent produced to refute the charge of discrimination under § 18-29-2(m). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). There is insufficient evidence in the record to support even a prima facie case of discrimination on the basis of religion. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).*

Footnote: 11 *In each of the decisions cited, it was concluded that BCBE, through its agents, engaged in various acts of reprisal against Grievant in violation of § 18-29-2(p).*