**KAREN SUE CONNER**

**v. DOCKET NO. 95-01-031**

**BARBOUR COUNTY BOARD**

**OF EDUCATION**

## D E C I S I O N

Grievant, Karen Sue Conner, was employed by the Barbour County Board of Education ("BBOE") as a regular bus operator until her employment was terminated by action of BBOE on January 23, 1995, as a result of a school bus accident which occurred on December 12, 1994. Grievant appealed her termination directly to Level IV. (See footnote 1)

The accident occurred as Grievant was transporting students home on her evening route. Grievant crossed a one-lane bridge in Belington, Barbour County, West Virginia. A vehicle stopped on the other side of the bridge to allow Grievant's bus to cross the bridge. Grievant had to make a left hand turn onto Talbott Road as soon as she crossed the bridge, and as she neared completion of the left hand turn, the rear of the bus came in contact with the stopped vehicle. The bus was only slightly damaged, and the students on the bus felt only a slight bump. Damage to the stoppedvehicle was over $1,000.00. Grievant was not discharged because she hit another vehicle. She was discharged because of her actions (or inaction) after the accident, which resulted in a finding by BBOE that she "failed to maintain control [of the students on the bus] and perform [her] duties in a competent professional manner".

## Applicable Legal Standard

Pursuant to W. Va. Code § 18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious."

Kitzmiller v. Webster County Bd. of Educ., Docket No. 90-51-352 (Dec. 28, 1990), citing Dillon v. Bd. of Educ., 351 S.E.2d (W. Va. 1986).

W. Va. Code § 18A-2-8 provides that school service personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge. "Insubordination involves 'willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, theemployer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." [Citations omitted.] Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (September 25, 1995). An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). However, Section 5300 of the Policies, Rules and Regulations of the West Virginia Board of Education requires that an employee's termination be based upon an evaluation of job performance, and that the employee be given an opportunity to improve her performance. "The provisions of Policy No. 5300(6)(a) must be strictly construed in favor of the employee to ensure that the employee receives the full guarantee of protection intended to be encompassed by the Policy." White v. Gilmer County Bd. of Educ., Docket No. 11-87-020-3 (Nov. 20, 1987) (citations omitted). This policy is only applicable if the actions of the employee are correctable.

The Supreme Court of Appeals of West Virginia has lent further guidance on how to resolve the conflict which seems to exist between Policy 5300 and W. Va. Code § 18A-2-8.

> What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in Trimboli [v. Bd. of Educ. of the County of Wayne, 254 S.E.2d 561 (W. Va. 1979)], supra.,and in Rogers [v. Bd. of Educ., 25 S.E.2d 537 (W. Va. 1943)], supra., be understood to mean an offense or conduct which affects professional competency.
>
> Accordingly, we hold that the procedures specified in West Virginia Board of Education Policy No. 5300(6)(a) must be followed in every proceeding under W.Va. Code 18A-2-8 [1969] for the dismissal of a school employee on the ground of incompetency.

> While § 5300(6)(a) does not proscribe discharge for irremediable conduct, we note that it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner. Mason County Bd. of Educ. v. State Supt. of Schools, 274 S.E.2d 435, 439 (W. Va. 1980).

In Mason County Bd. of Educ. the Supreme Court of Appeals of West Virginia determined that the employee's (See footnote 2) inability to deal with a disciplinary problem involved professional competency. Likewise, willful neglect of duty has been found to be a job performance deficiency which falls clearly within the purview of misconduct affecting professional competency, and which accordingly requires the application of Policy 5300. White, supra.

Finally, in assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

**The Charges Against Grievant**

On December 22, 1994, Grievant was called to the office of the Barbour County Superintendent, William Phillips. Superintendent Phillips asked Grievant several questions. After Grievant responded to his questions, Superintendent Phillips told Grievant he was suspending her with pay.

By letter dated December 28, 1994, Grievant was notified by Superintendent Phillips that he was recommending to BBOE that Grievant's employment be terminated, and that she was suspended with pay until a hearing could be held before BBOE. By letter dated January 6, 1995, Superintendent Phillips notified Grievant that the hearing on his recommendation for her dismissal would be held January 17, 1995, and that:

> the following charges will be presented...
>
> On December 12, 1994 you were involved in an avoidable accident whereby you:

1. failed to locate the proper warning devices at the scene of the accident.

2. failed to properly notify school officials of the accident.

3. failed to request "back-up" transportation for the stranded students on the bus.

4. failed to secure the proper release form from students regarding their physical condition.

5. allowed various students to disembark from the bus and leave the accident scene without knowledge of:

   a. their mode of leaving the accident scene;

   b. their destination;

   c. with whom they left the accident scene.

In summary you failed to maintain control and perform your duties in a competent, professional manner commensurate with the training, rules and regulations established for school bus operators.

After the hearing before BBOE, Superintendent Phillips notified Grievant by letter dated January 24, 1995, of her termination by BBOE on January 23, 1995, and the charges against her which resulted in her termination. The charges stated in this letter mirrored those set forth in the January 6, 1995 notification letter. By this same letter Grievant was also notified that BBOE had approved her suspension with pay from December 22, 1994, through January 23, 1995. R Ex 14.

The "Findings of Fact and Conclusions of Law" adopted by BBOE effective January 23, 1995, state, among other things, that Grievant

> breached several State and County policies, including the following:
>
> > (a) She failed to consider that her primary concern was the welfare of her student passengers;
> >
> > (b) She failed to notify the Board of Education promptly of her accident and thereby failed to secure "back-up" transportation for her students to be transported to their ultimate destinations;
> >
> > (c) She failed to account for the whereabouts of her charges;
> >
> > (d) She failed to make an examination to ascertain whether or not any of her passengers were injured either physically or psychologically (having very young children, as well as older children as passengers on her bus);
> >
> > (e) She failed to keep the students on the bus, did not maintain her authority as bus operator, allowed the door of the bus to remain open and allowed children to leave thebus without permission or supervision to wander about and be picked up by parties unknown to Ms. Conner;
> >
> > (f) She failed to locate proper warning devices at the scene of the accident and failed to turn on her emergency flashers as well as place warning devices near or in the vicinity of the bus at a scene where such warning devices were practically mandated necessary and also mandated necessary by State and County policies; and,

> (g) She failed to stop immediately after the accident and moved her bus from the scene of the accident. (See footnote 3)

BBOE concluded that Grievant's actions "demonstrate incompetence within the meaning of West Virginia Code §18A-2-8", and that they also amounted to:

> willful neglect of duty within the meaning of West Virginia Code §18A-2-8, by failing to promptly notify the board of education of said accident and by failure to place warning devices as required by law and regulation.

BBOE went on to state:

> Ms. Conner's conduct is not correctable based upon the evidence presented to the Barbour County Board of Education because her conduct placed children, particularly very young children, in grave danger, she claims she did not realize she did anything wrong and could not control the children, even to the extent ofkeeping them on the bus. Ms. Conner's conduct is further not correctable since she has seventeen years of experience, has trained other bus drivers and failed to demonstrate or express remorse over her actions or acknowledge that she in any way did anything wrong in the incident in question. The Board specifically finds that due to the foregoing factors there is no action the Board could take which would correct Ms. Conner's actions and insure the future safety of children riding on a bus which she was operating. The Board further concludes that in-service training would not help Ms. Conner for the foregoing reasons and the danger to students is severe. The Board further finds that a plan of assistance for the foregoing reasons would not help her to understand her responsibility and her failure to understand these responsibilities is not correctable and therefore a plan of assistance would not help her.

Each of the charges against Grievant will be addressed separately below.

**1. Failure to Maintain Control Over Passengers**

The most serious charge against Grievant is that she allowed students to leave the accident scene without knowledge of how they left, with whom they left, and where they were going, and that overall she failed to maintain control and perform her duties in a competent, professional manner. Although not clearly stated in this charge, part of this charge was apparently that even if Grievant knew with whom students rode, she allowed them to catch rides home without a note from their parents.

The accident occurred at approximately 3:30 p.m. Within two minutes of the accident, an ambulance, a police car and a fire truck were on the scene. Grievant told the students on the bus to

sit down and be quiet. A police officer stepped up on the bus step and inquired if there were any injuries, and whether Grievant wanted him to contact anyone. Grievant responded that the studentshad said they were okay, and that someone needed to contact the BBOE office; and the officer said he would do so.

At the time of the accident there were 46 middle school, elementary and high school students on the bus. Grievant opened the bus door immediately after the accident, and left it open. A public telephone and a convenience store with a telephone were close by, and several students asked Grievant if they could call their parents. She told the students they could go one at a time to call. The students did not have to cross the road to reach the telephone or the store. Students of all ages got off the bus to use the telephone, and stood around beside the bus waiting. Grievant once told two students, the Vannoys, to get back on the bus where it was warm, but they responded they were not cold and did not get on the bus. Grievant made no other effort to control the students. Grievant was not aware that a twelfth grade student had gotten some of the children back on the bus two or three times.

Grievant allowed students to ride home with their parents. One or more students who lived close by were allowed to walk home. Grievant allowed 14 students to ride home with a Mrs. Winans, in her minivan, including Mrs. Winans' three daughters and two neighbors. These children had gotten off the bus at varying times in the past at the Winans' house. Grievant allowed students to ride home with their uncles. In one of these cases, the uncle had picked up the same students at their bus stop on occasion. Grievant allowed her nephew to take his first cousin home, as well as another student who was not a relative.

Grievant allowed several students to ride home with the Howells, noting that the Howells usually pick these same children up at the end of Gulf Road and transport them home from that point. Grievant allowed three children to ride home with a teacher at Phillip Barbour, including his son. The other two children board the bus at the teacher's home. Grievant allowed three sisters to ride home with the oldest girl's boyfriend, who also took his nephew home at the request of the child's mother.

Grievant admitted she did not know how one student got home. The two Vannoy girls, ages approximately 8 and 11, began walking down Talbott Road toward their home, eight miles away, without Grievant's knowledge. (See footnote 4) From the testimony presented, it can be concluded that Talbott Road is a dangerous road to walk along because it is narrow, with a steep bank to the river

on one side, and a steep bank up a hill on the other.

Charles Zinn, BBOE Director of Transportation and Vocational Education, was contacted by the 911 Emergency Service regarding the accident. He saw Superintendent Phillips in the hall and asked him if he wanted to go with him to the accident scene. When Superintendent Phillips and Mr. Zinn arrived at the accident scene 30 minutes after the accident had occurred, the ambulance and fire truck were gone, and there were only four students remaining at the scene. Mr. Phillips and Mr. Zinn placed those students in the county van Mr. Zinn was driving to take them home. As they startedalong Talbott Road, they encountered the Vannoys walking, and picked them up to take them home. Shortly thereafter, Mr. Zinn let the Vannoys leave the van to ride home with their mother.

About ten minutes after the accident, Grievant, with the help of a twelfth grade student, marked on her seating chart which students had been on the bus at the time of the accident. She turned the marked seating chart in to BBOE as part of her accident report. The seating chart contained a handful of inaccuracies regarding who had been on the bus at the time of the accident. Grievant became aware of inaccuracies in her report, but did not amend it because she was not concerned with the paperwork. Grievant's report did not indicate how each student had gotten home.

When Superintendent Phillips asked Grievant for the first time, ten days after the accident, with whom each student had ridden home, Grievant could not recall the information, and had no record of the information. However, at both the hearing before BBOE and the Level IV hearing, when Grievant was asked with whom several of the students left the bus on December 12, she was able to recall, with occasional assistance from her notes, with whom all but one student had ridden. While this was obviously a result of Grievant's investigation of this issue after her meeting with Superintendent Phillips, the investigation had helped Grievant to recall the circumstances under which she had allowed students to leave. It is understandable that Grievant would not be able to state from memory ten days after the accident with whom each childleft the accident scene, particularly when she had kept no record of this. Many people do not have the powers of observation and retention that would allow this type of recall even a day later. Respondent did not meet its burden on this issue. The undersigned is not convinced that Grievant did not know on December 12, 1994, how most of the children had gotten home after the accident. While Grievant did not know all the adults picking up children, she believed the children as they identified the adults.

Grievant did not have control of the children as they freely exited the bus and milled around

outside the bus. Three children left the bus without Grievant's knowledge. Had she simply kept the bus door closed and not allowed any telephone calls, it would have been much more difficult for any of the children to wander off into harm's way. Grievant's lack of control represents a problem with the manner in which Grievant imposes discipline, and as our Supreme Court of Appeals has stated, such problems are a matter of professional competency and are correctable. Nonetheless, her actions compromised the safety of her students, particularly those of elementary school age, and therefore, Policy 5300 is not applicable to this situation. See Mason County Bd. of Educ., supra.

Mr. Zinn stated that the state policy is that a bus operator cannot pick up or discharge a student at any place other than hisdesignated stop. This regulation is set forth in R1 (See footnote 5) , at Section VI, B, as follows:

> The county superintendent or transportation director shall designate stops for the pickup and discharge of passengers. Bus operators will pick up and discharge passengers only at their designated stop(s). Any exception shall be clearly stated in the written county school transportation policy.

BBOE policy is that a student has to have a note signed by his parent and signed by the principal to ride a bus other than the designated bus, or to depart the bus at a stop other than his designated stop. Respondent's witnesses testified that this rule would literally prevent a parent from picking up a child without a such a note.

Nonetheless, Mr. Zinn and Mr. Phillips let some of the children they were transporting out of the van at a place other than their designated stop to ride home with their parents, without a note. Mr. Phillips stated that if a parent asks for a child they normally will let the parent take the child without a note. He has told bus drivers that if the driver knows it's the parent asking for the child, rather than get into a fight with a parent, common sense would dictate that you let the child go with a parent. It is concluded that Grievant cannot be disciplined for allowing her passengers to ride home with their own parents.

Cecil Dolan, Director of School Transportation and Facilities for the West Virginia Department of Education, stated that this regulation would prohibit a bus operator from letting students getoff the bus in a parking area, as occurred in this case. Mr. Dolan testified, however, that the primary intent of the regulation that children be let off only at designated stops was to keep the bus operator from letting a child get off the bus at the local drugstore or someplace just because the child wants off there.

Grievant testified that she believed the rule that students are not to be let off the bus anyplace other than their assigned stop means they can't just get off the bus anywhere, or get off at a friend's house, it does not mean they cannot get off if a parent or relative stops for them. She did not believe the rule applied to accidents or breakdowns. As will be discussed later, Grievant had a reason for this belief.

Regardless of Mr. Dolan's belief regarding the intent of the note policy, and Grievant's belief regarding the limits of its applicability, the undersigned concludes that Grievant violated the state regulation and county policy by allowing students to catch rides home from the scene of the accident with persons other than their parents.

An exception to this rule exists for those instances when students exit the bus at a place other than the assigned stop without authorization from the bus operator. In those instances, if the bus operator places the student on report, the bus operator is not disciplined for the student's action. Mr. Zinn testified, "I would hope no driver would allow a student to leave a bus without reporting it." (Emphasis added.) Had Grievant placed the Vannoy girls on report for leaving the bus without permission, shecould not have been disciplined for this lack of control, even though the girls were walking along a dangerous road by themselves.

Grievant knew how to place the girls on report as she had reported one of them for disciplinary problems before the accident. No report was made on the Vannoys for this incident because Grievant did not know she could report them in this situation. Grievant testified she told these particular students to get on the bus, but they did not obey her. This testimony was not rebutted. The undersigned finds the Vannoys left the bus without Grievant's authorization in direct contravention of her directive, and, therefore this falls within the exception, even though Grievant did not ask that these students be disciplined.

**2. Failure to Place Warning Devices**

This is apparently a two-part charge. First, Grievant is alleged to have failed to turn on the bus' four-way flashers, and, second, she is alleged to have failed to place reflective triangles. BBOE found Grievant's failure to place appropriate warning devices to be willful neglect of duty. Grievant testified she did turn on the flashers, but admits she did not set out reflective triangles.

Grievant did not place reflective triangles at the scene because the bus was highly visible, it was a low traffic road, and there was no room to place the triangles at the proper distances. The police car

was beside the bus with its lights flashing, the emergency vehicle and fire truck were behind the bus, and Grievant felt the bus was protected and the triangles were not needed.

The undersigned finds that BBOE has not met its burden of proving that Grievant did not turn on the four-way flashers. The testimony of five witnesses was presented on this issue. Grievant testified she turned on the flashers. The two students who testified did not know whether the flashers were on. The remaining
two witnesses, Mr. Zinn and Mr. Phillips testified the flashers were not on when they arrived on the scene half an hour after the accident.

The undersigned found the testimony of Grievant, Mr. Zinn and Mr. Phillips to be honest and forthright on this issue. However, none of these three witnesses can be labeled completely unbiased. Grievant obviously was fighting for her own job. Mr. Zinn and Mr. Phillips are employed by Respondent, and were called to testify in support of their employer's position. Mr. Phillips served as the employer representative at the hearing. It was obvious from the testimony that Mr. Zinn and Grievant have a strained relationship, to say the least.

It is understandable that Grievant would have automatically turned the flashers on, as she has to perform this act frequently when she brings the bus to a stop. Neither of the two student witnesses, both of whom were off the bus for some time over a period of about 30 minutes, noticed whether the flashers were on, yet Mr. Zinn and Mr. Phillips noted this during the few hectic moments they were on the scene. Also of interest is the fact that Mr. Zinn's recollection of whether the police car's blue lights were flashing was that he believed they were. Mr. Zinn and Mr.Phillips also recalled that the temperature that day was below freezing, when in fact, the temperature was 40 degrees.

The undersigned is troubled by the fact that both parties had available to them several disinterested persons, trained to observe and respond calmly to emergencies (police, emergency medical personnel, and firemen), yet failed to call any of these persons as witnesses.

As to the charge that Grievant failed to properly locate reflective triangles, Respondent failed to prove Grievant was required by law to place reflective triangles at the scene. W. Va. Code § 17C-15-40 is cited in the state transportation regulations as the authority for when reflective triangles should be used. The state transportation regulations (R1, at pp. 48, 51) recommend that "appropriate traffic warning devices" should be properly placed at the accident scene. Those regulations (R1, at p. 21) provide more detail on the proper placement of traffic warning devices as follows:

1. Approved bi-directional reflective triangles shall be carried in each bus at all times. (West Virginia Code, 17C-15-39; 17C-15-40)

a. In case of an emergency which may require the bus to stop in roadway for any length of time, the operator shall display said warning devices in compliance with the above referenced laws.

b. The bus flashing hazard (4-way) lights shall also be used as an additional warning to motorists.

The cited W. Va. Code § 17C-15-40 provides that three portable reflector units, a lighted fusee, electric lanterns, or flares areto be placed at particular distances from a bus "disabled upon the traveled portion of any highway or the shoulder thereof outside of any municipality at any time when lighted lamps are required on vehicles...". Prior to the 1995 amendment, buses were required by W. Va. Code § 17C-15-2 to display lighted head lamps only from "sunset to sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred feet ahead". (See footnote 6) This accident occurred in Belington, which may or may not be a municipality, during the daylight hours, and there is no evidence of decreased visibility requiring the use of headlights.

Grievant was not required by law to place reflective triangles at the accident scene, and violated no policy, law or regulation by failing to do so. Further, with a fire truck, ambulance and police car all on the scene immediately, a reasonable man would conclude that motorists certainly had sufficient warning.

**3. Reporting the Accident**

Grievant was charged with failure "to properly notify school officials of the accident." The state transportation regulations provide (R1, at p. 23) that "[a] verbal report shall be made immediately, and a written report shall be made within 24 hours to the county transportation director of any and all accidents in which the bus or passengers have been involved." The state transportation regulations continue:

Report to county transportation director/maintenance center by two-way-radio or nearest available phone. Identify location and assistance needed. If radio or phone is not available, enlist aid of someone at the scene, or nearby, to convey the information

as quickly as possible.

The state transportation regulations (R1, at p. 19) further provide:

> In case of an accident or breakdown while the bus is transporting pupils, the bus operator shall not leave the bus to summon help until provision has been made for the care and safety of all passengers.

These regulations as applied by BBOE are conflicting. While the passengers are the primary concern, the bus operator is also expected to personally contact BBOE to report an accident. Barbour County is very rural, yet the buses are not equipped with devices such as two-way-radios which would allow a bus operator to contact BBOE, or the police or emergency squad in case of a serious accident, nor are there aides on the buses to assist the bus operators. If a bus operator is in a rural area far from the nearest telephone it would be impossible to both maintain control of the passengers and personally contact BBOE.

In this case, while a telephone was nearby, Grievant would have had to leave the bus unattended to make the call. Grievant cannot be cited both for failure to control her charges and failure to place a telephone call to BBOE, when the discharge of the latter duty would tend to lead to the former occurring. While Grievant was unable to maintain control of her passengers while she was sitting on the bus, this fact does not relieve BBOE from the conflict in the two requirements.

Further, several BBOE bus operator witnesses testified they had either had students or passersby contact BBOE in the past when they had been involved in accidents or their bus had broken down. Mr. Zinn himself testified that he had been contacted by 911 on another occasion when a car had side-swiped a bus (not Grievant's) in Junior.

The state transportation regulations cited above clearly provide that there are certain situations when the bus operator is not required to personally contact the transportation director. The undersigned is not going to analyze these exceptions in a technical manner, as it is clear from directives in the regulations such as, "the bus driver should use her best judgment", and "the pupils come first", that these regulations are not intended to be applied technically. Grievant's decision to trust a police officer to contact the proper person at the BBOE office with the proper report cannot be second guessed. The police officer obviously saw that the proper person was contacted immediately, as Mr. Zinn appeared on the scene within thirty minutes in a county-owned vehicle licensed to

transport up to nine students.

**4. Failure to Request Back-up Transportation**

While Respondent has proven Grievant failed to request back-up transportation, Respondent failed to prove a violation. Given that Grievant's bus was not disabled, Grievant could have continued her route as soon as the police were finished with their investigation, and back-up transportation was not needed. Respondent's own witnesses said as much. Cecil Dolan, Director of SchoolTransportation and Facilities for the West Virginia Department of Education, testified that Grievant should have taken care of the paperwork, and then taken the students home. Mr. Zinn testified that he took the remaining students home because he did not know how long it would be before Grievant could continue on her way.

**5.**

**Failure to Secure Proper Release Form From Students Regarding Their Physical Condition**

Respondent has failed to prove this charge inasmuch as it was Respondent's burden to make it clear to the undersigned and to Grievant what the charge was, and Respondent failed to do so. It remains unclear whether this charge is that Grievant should not have signed a medical release for most of the students which was requested by the emergency squad; or that Grievant should have had a note signed by a parent before letting any student leave. It appears to the undersigned from the evidence presented by both parties that the former is the charge. However, Mr. Zinn stated this was not what the school board was talking about. If the latter was the charge, it has already been addressed.

Before the emergency squad could leave the accident, they had to have a medical release signed for each child. The emergency personnel obtained the signatures of two of the students. Grievant signed the medical release for the remaining students, indicating no one was injured.

Mr. Zinn opined that by signing the medical release, Grievant became liable for an injury to any student, and if she wanted to sign and assume responsibility that was up to her. Mr. Zinn noted that the medical release issue has not been brought up in countybus operator in-service training, and the emergency squad has to have a signed release before they can leave the scene. No policy, law or regulation was cited on this issue.

## Discipline Imposed

The remaining question in this case is whether Grievant's actions justified her dismissal. The answer must be no. The only charges established against Grievant are that she failed to maintain control of her passengers, and she let them leave with persons other than parents.

The undersigned must conclude that the penalty imposed upon Grievant for failure to maintain control of her passengers, and for allowing children to ride home with persons other than their parents was clearly excessive in light of Grievant's 18 years of service, her service from 1985-1992 as a BBOE Bus Operator Instructor, and mitigating circumstances. The testimony of both Grievant and other BBOE bus operators demonstrates that this was not the first time children have left a bus accident with persons other than parents, and that BBOE bus operators have not in the past been asked to keep a written record of how the students got home. The testimony shows that Grievant acted in the same fashion as she and other BBOE bus operators had acted time and again after accidents and bus breakdowns in the past. While this does not make what she did right, it does explain why she did not believe she was doing anything in violation of BBOE rules or regulations. The problem is not with Grievant alone, and is one which needs to be addressed with BBOE bus operators as a group. BBOE needs toclearly address with its bus operators that what was acceptable behavior in the past, is not acceptable behavior in the 1990's.

Albert Annon is a retired BBOE bus operator. He drove a bus for 25 years from 1966 through 1991. He had bus accidents and breakdowns during his employment, and had let students walk home short distances. He let children go home with their parents, and "quite often" with others. He never kept track of how the children got home. His route was in the country and he knew everyone on the route and in the area. He never let children ride with boyfriends, unless it was someone he knew was responsible.

Grievant's husband, Howard Conner, has been a BBOE bus operator for 18 years. Five or six years ago, on a very cold morning, the schools were on a two hour delay. The fuel line on his bus froze on the way to school, on a country route. He knew the children on the route and let them go to a house to call for rides. He let them ride with parents or friends. He didn't keep a record at the time of how the 10 to 15 children got home. If they had stayed on the bus they would have frozen to death. No one came to assist him till 1:30 or 2:00 p.m.

Joseph Barcus has been a BBOE bus operator 17 years. Mr. Barcus recalled a bus accident he had been involved in in 1984. There was a house next door, and he allowed most of the students to go to the house and call for someone to pick them up. He knew the students. He let those who lived close by walk home, but he did not let the younger children off the bus. In a 1987 or 1988 breakdown he had only one high school student on the bus, and heallowed her to walk home about three miles. He also was involved in an accident when he first started driving a bus. He made the children stay on the bus, and some high school students became angry and went out the back door. There was no way for him to stop them, but he did report them to his supervisor. Even today if he had an accident, he would tell the students to stay on the bus, but they may not.

Finally, this is not the first time Grievant has been involved in an accident or breakdown with children on the bus, and Grievant recalled her past experiences. None of these experiences were questioned by Respondent, and Grievant had never been disciplined for the procedure she used after an accident in the past.

When Grievant was a substitute bus operator, she went in a ditch on a slick road. She was out in the middle of nowhere, and left about 15 children on the bus with the motor running to keep them warm, while she walked 1/2 to 3/4 mile to the nearest house and called the bus garage. Ron Skidmore, a bus operator, pulled up in a four-wheel drive vehicle and helped, and took some of the children home. She recalled that Ralph Godwin, a supervisor, stopped by and took some of the children. She reported the incident to her supervisor, but was not required to report how the students got home.

Grievant recounted another experience early in her career when the bus was disabled. She had about five children on the bus. She did not call for help. The children walked home about 1/2 mile. She reported the incident to her supervisor, but did not report how the children got home.

On another occasion five or six years ago, Grievant's bus overheated. A student called the bus garage and reported the problem. Some parents picked up their children. No one asked her to report how the children got home, nor was she asked for any type of documentation. Her supervisor was aware of this incident.

Sometime after 1986, Grievant's bus broke down on the way home with about half the children still on the bus. Grievant put out triangles. The students told her that the third house at the top of the hill had a phone and she went to call. When she returned to the bus, there were only a couple of

children left. These remaining children also caught rides home. No one questioned her about how the children got home.

Mr. Zinn and Superintendent Phillips stated they were not aware of these previous incidents, and that had they been aware, they would have taken the same action as was taken in this case. There was no testimony regarding whether Mr. Zinn's predecessor was aware of the details of the incidents, although, had he asked each driver to make a report on how the children got home, as Grievant was asked to do ten days after the accident, or investigated the accidents as Mr. Zinn did in this case, he clearly would have known. Mr. Zinn became aware of what occurred in this case because he has taken a more active role in responding to and investigating accidents than his predecessors. The past "hear no evil, see noevil" practice of BBOE Transportation Directors cannot be used as a shield and sword against Grievant in this case.

Mr. Zinn testified he had trained BBOE bus operators on proper accident procedure; however, five bus operators other than Grievant and her husband testified they had not been trained recently or in detail on the proper procedure in the event of an accident or breakdown with children on the bus. Three of these bus operators stated they had not been told it was improper to let children go home with parents, relatives or neighbors. Nonetheless, one of these bus operators stated he would not let a child off the bus to ride home with a parent, and the other two stated they would not let children ride home with persons other than parents.

It is also of significance in this case that the mother of the three sisters who rode home with the oldest sister's boyfriend testified that her daughter's boyfriend, Mike Trader, lives on her property, and frequently transports her daughters home, but that she always writes a note so that he may do so. Neither she nor her husband has an operator's license. The oldest child is 18, and the other two are 16 and 13. She had called and asked Mike Trader to pick up her daughters at the scene of the accident after receiving a telephone call from her oldest daughter. This 18 year old told Grievant she had talked to her mother, and asked whether she and her two sisters could wait beside the bus for their ride home. Although Grievant should not have allowed the children to ride home with Mr. Trader without a note, or without talking to Mrs. Gibsonherself, this particular release of children should not result in such a severe penalty.

Grievant stated that she felt at the time of the accident that she was following established policies and procedures as she understood the rules and regulations. When asked at the hearing what she

would do differently if the accident occurred that day, Grievant stated she would make a list of the students and keep a list on board the bus; she would have extra paper on board; she would not release students to anyone except a parent without a note, and if BBOE preferred, she would require a note before a parent could take a child; and she would be willing to sit down with Mr. Zinn and Mr. Phillips to determine what procedures she should follow.

In the instant case, Belington is a small community of approximately 1600 people in a rural county. Grievant, having lived most of her life in Barbour County, and having grown up in or near Belington, felt she was familiar with the families in the area. However, this was a new route for her, and she admittedly did not know everyone. The possible consequences of Grievant's actions, however, were recognized by BBOE, as well as the potential liability, as a factor in discharging Grievant.

W. Va. Code § 18-29-5(b) authorizes the undersigned to "provide such relief as is fair and equitable in accordance with the provisions of this article". In this case, the undersigned concludes that the punishment leveled was too severe under the circumstances, but a lesser sanction is appropriate. See GilmerCounty Bd. of Educ. v. Chaddock, 398 S.E.2d 120 (W. Va. 1990). It is appropriate in this case to reduce the dismissal to a suspension without pay through September 30, 1995.

**Prior Discipline**

BBOE asserted a link between Grievant's actions in this case and three previous disciplinary actions, stating Grievant's discharge was the final step in the progressive discipline. The last two of these actions resulted from responses by Grievant to her supervisor, and clearly involved insubordination. The first occurred many years ago when Grievant got into a fight with a fellow employee, and also may have involved a charge of insubordination.

Grievant was not charged by BBOE with insubordination in this case. Further, the undersigned finds that BBOE has not met its burden of demonstrating that Grievant's failure to follow the note policy was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Rather, Grievant's action resulted from her knowledge of past practice and her interpretation of the note rule. Grievant's interpretation was supported by Mr. Dolan's testimony regarding the purpose of the note rule.

## Retaliation

Grievant alleged she was dismissed in retaliation for grievances she had filed. W. Va. Code §18-29-2(p) defines reprisal as:

> ... the retaliation of an employer or agent toward a grievant or any other participant inthe grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

W. Va. Code §18-29-3(h) states:

> No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

A grievant may make a prima facie showing of reprisal under W. Va. Code §18-29-2(p) by establishing by a preponderance of the evidence: (1) she engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer subsequently took an adverse action against the employee; and, (4) the employer possessed retaliatory motivation, or that the adverse action followed the employee's protected activity within such a short period of time that retaliatory motivation can be inferred. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a "significant," "substantial," or "motivating" factor in the adverse personnel action.

The employer can rebut a prima facie showing of reprisal by offering evidence of a legitimate, non-retaliatory reason for the adverse action. Should the employer succeed in rebutting the prima facie showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive. Mullins v. Kanawha County Bd. ofEduc., Docket No. 94-20-364 (July 31, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Grievant has made a prima facie case of retaliation. Mr. Zinn testified that Grievant had filed 14 grievances during his first two years as Director of Transportation, and that Grievant and her husband

are the only bus operators who have filed grievances during that time, at least one of which is still on appeal.

It is apparent to the undersigned that all but one of the charges against Grievant in this case are either without merit, or mere technical violations, insufficient to warrant the punishment leveled. This raises a red flag.

Respondent spent much time attempting to demonstrate solely through hearsay that a child had been injured as a result of the accident, and that had Grievant personally checked with each child she would have known this, and apparently should not have signed a medical release. The children on Grievant's bus experienced no more than a slight bump. Surely buses traveling through Barbour County experience more serious bumps several times a day as they hit potholes. Why Respondent wants to admit responsibility for an injury to a child in this situation is curious at best.

Mr. Phillips testified that he "welcomed non-frivolous grievances." He pointed out that he does not personally become involved in grievances. He stated that while he doesn't like to have grievances, if they're valid, they can be resolved. However, Mr. Phillips felt that some of Grievant's grievances have not beenvalid. Mr. Phillips stated that this does not outweigh his ability to make a rational decision. Further, he is retiring and opined that therefore he would have no personal interest in the matter. However, Mr. Phillips' answers to certain pertinent direct questions regarding Grievant's continued employment were evasive. When asked: "[h]ave you ever made the statement you'd like to get rid of Sue?", Mr. Phillips responded:

> Oh, I don't know. You get someone to say that I have - ask them. I don't know. ... I may have said that about you. ... I don't know that I haven't made it, or I don't know that I have made it. Ah, so I won't, ah, I won't say.

Despite all of this indicia of retaliation, the undersigned concludes that because the safety of the children was at issue, and because of the potential liability to BBOE had the Winans had an accident with 14 children in their van, or had the Vannoys been hit by a vehicle, BBOE felt it had no choice but to discharge Grievant because of the potential effects of her actions. These are legitimate, non-retaliatory reasons for BBOE's conduct, thus refuting the prima facie case of retaliation.

The following formal findings of fact and conclusions of law are properly made from the record developed by the parties.

## Findings of Fact

1. Grievant has been a bus operator employed by BBOE since 1978, and was a substitute bus operator from 1976 to 1978. She was a Bus Operator Instructor from 1985 through 1992. When Grievant was hired in 1976, bus operators were not required to have a highschool diploma or GED, although Grievant did hold a high school diploma. Newly hired bus operators must have a high school degree.

2. On December 12, 1994, at approximately 3:30 p.m., while driving the bus assigned to her on her evening route, Grievant was involved in a traffic accident in Belington, Barbour County, in which she scraped another vehicle with the bus. While the other smaller vehicle suffered significant damage, the students on the bus were only made aware of the accident by a scraping sound and a very small bump.

3. Grievant pulled the bus as far off the road as possible, turned off the ignition, and turned on her four way flashers.

4. The police, an ambulance and a fire truck arrived within minutes of the accident. A police officer on the scene asked Grievant if she wanted him to contact the BBOE office, and she said she would like him to do so. BBOE was contacted by the 911 emergency service. Grievant did not request back-up transportation.

5. At the time of the accident there were 46 middle school, elementary and high school students on the bus. Grievant opened the bus door immediately after the accident, and left it open.

6. Grievant told the students they could leave the bus one at a time to call their parents. Students of all ages got off the bus to use the telephone, and stood around beside the bus waiting.

7. Grievant once told two students, the Vannoys, to get back on the bus where it was warm, but they responded they were not cold and did not get on the bus. Grievant was not aware that a twelfthgrade student had gotten some of the children back on the bus two or three times.

8. Grievant allowed students to ride home with their parents and relatives. One or more students who lived close by were allowed to walk home. Grievant allowed 14 students to ride home with a Mrs. Winans, in her minivan, including Mrs. Winans' three daughters and two neighbors. These children had gotten off the bus at varying times at the Winans' house.

9. Grievant allowed several students to ride home with the Howells. The Howells usually pick

these same children up at the end of Gulf Road and transport them home from that point. Grievant allowed three children to ride home with a teacher at Phillip Barbour, including his son. The other two children board the bus at the teacher's home. Grievant allowed three sisters to ride home with the oldest girl's boyfriend, who also took his nephew home at the request of the child's mother.

10. Grievant did not have a note signed by the principal and a parent which allowed any of these children to ride home from the scene of the accident as described in the preceding findings of fact.

11. Grievant did not know how one student got home. The two Vannoy girls, ages approximately 8 and 11, began walking down Talbott Road toward their home, eight miles away, without Grievant's knowledge.

12. Grievant did not have control of the children as they freely exited the bus and milled around outside the bus. This lackof control compromised the safety of the students, particularly those of elementary school age.

13. Grievant did not believe the rule requiring a note signed by a parent and the principal before a child could depart the bus at a place other than his designated stop applied to accidents or breakdowns.

14. Charles Zinn, BBOE Director of Transportation and Vocational Education, and Superintendent William Phillips arrived at the accident scene 30 minutes after the accident had occurred. The ambulance and fire truck were gone, and there were only four students remaining at the scene. Mr. Phillips and Mr. Zinn placed those students in the county van Mr. Zinn was driving to take them home. As they started along Talbott Road, they encountered the Vannoys walking, and picked them up to take them home. Shortly thereafter, Mr. Zinn let the Vannoys leave the van without a note to ride home with their mother.

15. About ten minutes after the accident, Grievant, with the help of a twelfth grade student, marked on her seating chart which students had been on the bus at the time of the accident. She turned the marked seating chart into BBOE as part of her accident report. The seating chart contained a handful of inaccuracies regarding who had been on the bus at the time of the accident. Grievant became aware of inaccuracies in her report, but did not amend it because she was not concerned with the paperwork. Grievant's report did not indicate how each student had gotten home.

16. When Superintendent Phillips asked Grievant for the first time, ten days after the accident,

with whom each student had ridden home, Grievant could not recall the information, and had no record of the information. However, at both the hearing before BBOE and the Level IV hearing, when Grievant was asked with whom several of the students left the bus on December 12, she was able to recall, with occasional assistance from her notes, with whom all but one student had ridden.

17. Had Grievant written a disciplinary report on the Vannoys for leaving the bus without permission, she could not have been disciplined because the Vannoys were walking along a dangerous stretch of road. Grievant did not know she could report them in this situation.

18. The Vannoys left the bus without Grievant's authorization in direct contravention of her directive, and, therefore this falls within the exception noted in finding of fact number 17, even though Grievant did not ask that these students be disciplined.

19. Grievant did not place reflective triangles at the scene of the accident.

20. Bus operators are recertified each year, and must have at least 18 hours of in-service training annually. Each county is responsible for the annual in-service training. A written test is administered every two years.

21. BBOE has not recently trained its bus operators, in detail, on the proper procedure in the event of an accident or breakdown with children on the bus.

22. BBOE bus operators have not in the past been asked to keep a written record of how the students got home in the event of an accident or breakdown. Both Grievant and other BBOE bus operators have several times in the past allowed students to call their parents, walk home, and leave the bus with persons other than their parents without a note, after an accident or breakdown.

## Conclusions of Law

1. The employer bears the burden of proving the charges in a disciplinary proceeding by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious." Kitzmiller v. Webster County Bd. of Educ., Docket No. 90-51-352 (Dec. 28, 1990), citing Dillon v. Bd. of Educ., 351 S.E.2d (W.Va. 1986).

3. Pursuant to W. Va. Code § 18A-2-8, school service personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge.

4. "Insubordination involves 'willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." [Citations omitted.] Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (September 25, 1995).

5. Section 5300 of the Policies, Rules and Regulations of the West Virginia Board of Education provides that an employee's termination must be based upon an evaluation of job performance, and that the employee be given an opportunity to improve her performance. This policy is only applicable if the actions of the employee are correctable. Mason County Bd. of Educ. v. State Supt. of Schools, 274 S.E.2d 435, 439 (W.Va. 1980).

6. An offense or conduct which affects professional competency is correctable, if the conduct or offense does not "directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner." Mason County Bd. of Educ. v. State Supt. of Schools, 274 S.E.2d 435, 439 (W.Va. 1980).

7. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must bedetermined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

8. Respondent failed to prove that Grievant did not locate the proper warning devices at the scene of the accident, that she did not properly notify school officials of the accident, that she was required to request "back-up" transportation for the stranded students on the bus, that she did not secure the proper release form from students regarding their physical condition, that she did not know on December 12, 1994, how the children on her bus had gotten home after the accident, and that Grievant's actions amounted to insubordination.

9. Respondent proved that Grievant failed to maintain control of her passengers, and that this compromised the safety of her passengers in a significant manner so that Policy 5300 is not applicable.

10. Respondent proved that Grievant let students leave with persons other than parents in violation of the state regulation and county policy which requires a note signed by the parent and the principal before a child is allowed to depart the bus other than at his designated stop, and that this compromised the safety of her passengers in a significant manner so that Policy 5300 is not applicable.

11. Dismissal was an excessive penalty in light of Grievant's 18 years of service, her service from 1985-1992 as a BBOE Bus Operator Instructor, and mitigating circumstances. Grievant acted in the same fashion as she and other BBOE bus operators had actedtime and again after accidents and bus breakdowns in the past. The problem is not with Grievant alone, but is one which needs to be addressed with BBOE bus operators as a group.

12. W. Va. Code § 18-29-5(b) authorizes the undersigned to "provide such relief as is fair and equitable in accordance with the provisions of this article". In this case, the undersigned concludes that the punishment leveled was too severe under the circumstances, but a lesser sanction is appropriate. See Gilmer County Bd. of Educ. v. Chaddock, 398 S.E.2d 120 (W. Va. 1990). It is appropriate in this case to reduce the dismissal to a suspension without pay through September 30, 1995.

13. Respondent rebutted Grievant's prima facie showing of reprisal by offering evidence of a legitimate, non-retaliatory reason for the adverse action, that is, a concern for the safety of the children. Grievant failed to prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. Respondent is **ORDERED** to reinstate Grievant to her position as a regular bus operator in Barbour County effective immediately. Grievant's request for back pay is **DENIED**, and her personnel file should reflect that she was suspended without pay from January 24, 1995, through September 30, 1995.

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 this decision. W.

Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. 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.

**BRENDA L. GOULD**

**Administrative Law Judge**

**Dated: September 29, 1995**

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*Footnote: 1 After two continuances for good cause, a Level IV hearing was conducted on May 17 and 18, 1995, and this case became mature for decision on July 5, 1995, with the receipt of the last of the parties' post-hearing submissions.*

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*Footnote: 2 The employee was a high school principal.*

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*Footnote: 3 Because Grievant was not given notice prior to the hearing before BBOE that she was being charged with the conduct set out in paragraphs (d) and (g), nor was she given notice in the January 24 the dismissal letter from Superintendent Phillips that she was being dismissed because of this conduct, these actions will not be considered by the undersigned as part of the charges against Grievant. The undersigned would note, however, that even if they were part of the charges against Grievant, Respondent has not met its burden of proof on these two charges. Grievant asked the students if they were okay, which is sufficient in this case where the impact was so slight that the students who testified did not even know an accident had occurred. Further, Grievant was not cited by the proper authorities, the police, for moving the bus out of the way of oncoming traffic after the accident, which should have been an indication to BBOE that her action was appropriate under the circumstances.*

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*Footnote: 4 Grievant had allowed the older Vannoy girl to call her mother, and her mother was on her way to pick up the girls.*

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*Footnote: 5 Respondent's Level IV Exhibits will be identified as "R ", with the exhibit number appearing in the blank.*

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*Footnote: 6 After the 1995 amendment to W. Va. Code §17C-15-2, school buses must now "display lighted head lamps at all times when upon the highway."*