GARY DILLON and

RONALD VANCE, SR.,

Grievants,

v. **Docket No. 97-06-570**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Gary Dillon and Ronald Vance, Sr. (Grievants) submitted this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., complaining that their employer, Respondent Cabell County Board of Education (CCBE), is not properly compensating them for the duties they perform as Bus Operators. This grievance was initiated on September 10, 1997. Following denial at Level I, Grievants appealed to Level II where a hearing was conducted on December 10, 1997. (See footnote 1) Following denial at Level II in a decision issued by CCBE Superintendent Richard Jefferson on December 16, 1997, Grievants appealed to Level IV on December 19, 1997, waiving consideration at Level III, as authorized by W. Va. Code § 18-29-4(c). By agreement of the parties, a Level IV hearing was scheduled for March 30, 1998. Following that hearing, which was held in this Grievance Board's office in Charleston, West Virginia, the parties agreed to a schedule for submission of proposedFindings of Fact and Conclusions of Law. This matter became mature for decision upon receipt of the parties' proposals on April 20, 1998. (See footnote 2)

There is no significant dispute regarding the relevant facts necessary for resolution of this grievance. Accordingly, based upon a preponderance of the evidence, the following findings of fact have been developed from the record established at Levels II and IV.

FINDINGS OF FACT

1. Grievants are employed by the Cabell County Board of Education (CCBE) in the school service personnel classification of Bus Operator.

2. During the 1996-97 school year, Grievants received timely notice of transfer for the 1997-98 school year. However, those transfer notices were subsequently rescinded by CCBE. See R Exs 1, 2 & 3 at L II.

3. During the 1996-97 school year, Grievant Dillon's morning bus run ran from Chafin Estates, through Williamsburg Colony, to Barboursville Middle School. After dropping off middle school students at Barboursville Middle School, he loaded high school students who arrived on three separate buses, and transported them to Cabell Midland High School. Grievant Dillon's afternoon bus run during the 1996-97 school year was reversed, picking up students at Cabell Midland High School, unloading and loading students at Barboursville Middle School, and taking students home, ending at Chafin Estates. 4. Prior to the start of the 1997-98 school year, Grievant Dillon received written notice that his bus run was being modified. As a result of these modifications in his morning run, after unloading his bus at Cabell Midland High School, Grievant Dillon now waits approximately twenty minutes to pick up high school students, who are then transported by him to the Cabell County Vocational-Technical Center. After arriving at the Vocational- Technical Center at approximately 8:00 a.m., Grievant Dillon returns to the bus garage at approximately 8:15 a.m.

5. Grievant Dillon's afternoon bus run for the 1997-98 school year is reversed. The run begins at the Cabell County Vocational-Technical Center and ends at Chafin Estates.

6. During the 1996-97 school year, Grievant Dillon's morning and afternoon bus runs were of the shortest duration of all CCBE Bus Operators. This factor was considered in adding the morning and evening trips to and from the Vocational-Technical Center to his regular bus run. As a result of the changes in Grievant Dillon's bus schedule that took effect at the beginning of the 1997-98 school year, he spends an additional forty minutes on the clock in the morning, and approximately forty-five additional minutes on the clock in the afternoon. With this additional time on the clock, Grievant Dillon's total working time, including preliminary and postliminary activities at the bus garage, totals less than four hours per day.

7. Grievant Vance bid into his current bus run prior to the beginning of the 1997- 98 school year. Grievant Vance's current morning bus run starts at Walnut Gap, proceeds to drop off students at Cammack Middle School, and then to Huntington High School. After letting off high school

students, Grievant Vance waits nearly twenty minutes before loadinganother group of students whom he transports to the Cabell County Vocational-Technical Center. Grievant Vance's afternoon bus run is reversed, starting at the Cabell County Vocational-Technical Center and ending at Walnut Gap.

8. During Grievants' afternoon runs, they are required to wait at their respective high schools for approximately fifteen to twenty minutes, after unloading the students they transport from the Vocational-Technical Center, before boarding a different group of students to transport home.

9. Other Bus Operators employed by CCBE perform mid-day “extracurricular” bus runs which involve transporting students to and from the Vocational-Technical Center and either Cabell Midland High School or Huntington High School. These Bus Operators, like Grievants, are free to leave the bus garage after completing their regular morning home-to-school bus runs. These Bus Operators are required to leave the bus garage around mid-morning, drive to the Vocational-Technical Center, pick up students and transport them to one of CCBE's high schools, and then return to the bus garage. They are again on their own time until they are required to report to the bus garage to begin their afternoon school-to-home bus runs. Other Bus Operators drive separate mid-day runs transporting students from the high schools to the Vocational-Technical Center.

10. The service personnel who hold the extracurricular assignments described in Finding of Fact Number 9, above, were selected in accordance with the posting requirements and selection criteria contained in W. Va. Code § 18A-4-8b. These employees receive compensation at the rate of $15 for each mid-day run.

11. Regular Bus Operators are not permitted to bid on extracurricular bus runs which conflict with their regular driving schedule. Although Grievants are free to bid on themid-day bus runs to and from the Vocational-Technical Center, their expanded schedules prevent them from bidding on certain other bus runs, such as CCBE's school to work site runs.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievant Dillon is complaining that CCBE violated W. Va. Code § 18A-4-8a(7) when it improperly

changed his daily work schedule at the beginning of the 1997-98 school year. (See footnote 3) W. Va. Code § 18A-4-8a(7), provides:

> No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a, must be decided on a case-by-case, fact-specific basis. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Sipple v. Mingo County Bd. of Educ., Docket No. 95-23-421 (Mar. 27, 1996). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995) (hereinafter "Conner I"); Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992). ThisGrievance Board has previously observed that a literal interpretation of Code § 18A-4-8a would essentially prohibit any changes in a school personnel employee's work schedule. Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989). Such a literal interpretation would produce an absurd result, inconsistent with the apparent legislative intent of protecting school service employees from involuntary changes in their shift assignments. Sipple v. Mingo County Bd. of Educ., Docket No. 95-29-487 (Mar. 27, 1996). See State ex rel. Frazier v. Meadows, 193 W. Va. 20, 454 S.E.2d 65 (1994).

Therefore, this Grievance Board has determined that, 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 have the freedom to make reasonable changes to a service employee's schedule, within the parameters of his contract, some of which cannot reasonably be effected until shortly after school starts. Stover, supra; Sipple, supra. See Conner I, supra; Froats, supra. Accord, Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1100 (Aug. 2, 1995) (hereinafter "Conner II"). However, when, as here, the change is made during the summer between school years, the county board has greater latitude in changing an itinerant employee's work schedule. See Froats, supra. Grievant Dillon's duties still begin and end at the same bus garage. Although he must work another 40 minutes or more each morning and afternoon, he remains on the clock well under the eight hours per day for which he receives compensation as a full-time employee.

It is well-recognized that county boards of education have substantial discretion in matters related

to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, inthe best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with the substantial discretion recognized in Dillon, this Grievance Board has previously determined that a county board has discretion to combine shuttle runs between schools with home-to- school, or school-to-home, runs in order to create a regular, full-time service personnel Bus Operator position. Conner v. Barbour County Bd of Educ., Docket No. 92-01-191 (Feb. 26, 1993) (hereinafter "Conner III").

Conner III represents substantially the same arrangement developed by CCBE in this matter. According to the record, Grievant Dillon's bus run was selected for supplementation because he previously had the shortest run of any Bus Operator. Further, he was already arriving at Cabell Midland High School in time to transport students to the Vocational-Technical Center. This provides a sufficient rationale for changing an itinerant Bus Operator's schedule before the beginning of the school year so as to withstand scrutiny under W. Va. Code § 18A-4-8a. See Stover, supra; Conner III, supra; Froats, supra.

To the extent Grievant Dillon claims that the changes in his bus route for the 1997- 98 school year constitute a transfer accomplished without following the procedures required by W. Va. Code § 18A-2-7, this claim must be rejected. The changes in Grievant Dillon's morning and afternoon bus runs were not so significant as to constitute a "transfer" governed by W. Va. Code § 18A-2-7. See Conner I, supra. Further, this Grievance Board has concluded that, because a Bus Operator's duties are inherently itinerant in nature, a mere change in their driving schedule does not equate to a transfer under Code § 18A-2-7. Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). See Froats,supra; Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989). Grievants additionally claim they are subjected to unlawful discrimination because they are not compensated in the same manner as other Bus Operators who transport students to and from CCBE's Vocational-Technical Center. W. Va. Code § 18-29-2(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." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case (See footnote 4) of discrimination under W. Va. Code § 18-29-

2(m), a grievant must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01- 543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248(1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991).

In the context of this grievance, Grievants have failed to establish that they are similarly situated to other CCBE Bus Operators who receive separate compensation for driving mid-day runs to and from the Vocational-Technical Center. Grievant's focus upon the students' curriculum and the bus destinations completely ignores the distinction between extracurricular duties and regular duties. Those Bus Operators who are properly receiving additional compensation for mid-day runs are not being compensated because they are driving to and from the Vocational-Technical School, or because they are transporting students enrolled in a particular curriculum. These other Bus Operators are compensated separately because they have agreed to return to duty in the middle of the day after being released from their duties until time to begin their afternoon bus run. There is a substantial distinction between Bus Operators with mid-day vocational runs and Grievants. (See footnote 5) See Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995).

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

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 interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a, which limits changes in a school service employee's 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. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Sipple v. Mingo County Bd. of Educ., Docket No. 95-23-421 (Mar. 27, 1996). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992).

4. 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 havefreedom to make reasonable changes to a service employee's schedule, within the parameters of his contract, some of which cannot reasonably be effected until shortly after school starts. Stover, supra. See Conner, supra; Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989). Accord, Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1100 (Aug. 2, 1995).

5. CCBE did not violate W. Va. Code § 18A-4-8a(7) when it added, respectively, a trip from Cabell Midland High School to the Cabell County Vocational-Technical Center, and a trip from the Cabell County Vocational-Technical Center to Cabell Midland High School, to Grievant Dillon's regular morning and afternoon home-to-school and school-to- home bus runs from the previous

school year, shortly before the beginning of the 1997-98 school year. See Stover, supra; Conner v. Barbour County Bd of Educ., Docket No. 92-01- 191 (Feb. 26, 1993); Froats, supra.

6. A county board of education may properly realign duties that might otherwise constitute separate extracurricular assignments as part of a regular service personnel position. Conner v. Barbour County Bd of Educ., Docket No. 92-01-191 (Feb. 26, 1993).

7. The changes in Grievant Dillon's bus route which became effective at the beginning of the 1997-98 school year did not constitute a transfer under W. Va. Code § 18A-2-7. Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). See Froats, supra; Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989).

8. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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 job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

9. If a grievant makes out a prima facie case of discrimination in violation of Code § 18-29-2(m), the employer may rebut the presumption of discrimination by offering legitimate, job-related reasons for its action. Grievant may then demonstrate that the offered reasons are merely pretextual.

Copley v. Nicholas County Bd. of Educ., Docket No. 97-34-027 (Aug. 18, 1997); Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

10. Grievants failed to establish that they were similarly situated in any relevant particulars to other Bus Operators employed by Respondent Cabell County Board ofEducation who receive separate compensation for performing mid-day, “extracurricular” bus runs to and from the Cabell County Vocational-Technical Center so as to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m). See Copley, supra; Webb, supra; Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Steele, supra. Docket No. 89-50-260 (Oct. 19, 1989).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 29, 1998

Footnote: 1

The record does not explain the delay which transpired between Levels I and II.

Footnote: 2

Grievants were represented by Susan Hubbard with the West Virginia Education Association. Respondent was represented by counsel, Howard Seufer, of Bowles Rice McDavid Graff & Love.

Footnote: 3

Grievant Vance is estopped from making such a claim, as he successfully bid into his 1997-98 run in accordance with a

proper posting under W. Va. Code § 18A-4-8b.

Footnote: 4

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 5

Although Grievants did not allege that CCBE is violating the pay uniformity provisions in W. Va. Code § 18A-4-5b, it is noted that the analysis under that statute would result in the same conclusion reached here under W. Va. Code § 18-29-2(m). See Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Deal, supra.