



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**Herman H. Jones
Executive Director**

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

June 13, 1997

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Re: Conner v. Barbour County Board of Education
EREP-285-93

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KAREN S. CONNER,

Complainant,

v.

DOCKET NUMBER: EREP-285-93

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on February 19, 1997, in Barbour County, at the City Council Chambers, Philippi, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Karen S. Conner, appeared in person and by counsel for the West Virginia Human Rights Commission, Stephanie C. Schulz, Assistant Attorney General, for the West Virginia Office of the Attorney General, Civil Rights Division. The respondent, Barbour County Board of Education, appeared by its representative, F. Edward Larry, Director of Transportation, and by counsel, Seth Thomas Rubenstein and Bethann R. Lloyd, with the firm Kay, Casto, Chaney, Love & Wise. The case was briefed by John McFerrin, Assistant

Attorney General, on behalf of the Commission; and by F. Thomas Rubenstein, on behalf of the respondent.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT -

1. The respondent, Barbour County Board of Education, has more than twelve employees in the State of West Virginia. Tr. pp. 103 and 121.

2. The respondent is a "person" and an "employer" as those terms are defined by W. Va. Code §§ 5-11-3(a) and 5-11-3(d) respectively.

3. The complainant, Karen Sue Conner, began working for respondent in 1976 as a substitute bus operator. The complainant became a permanent bus operator in 1978 and served as a bus operator until 1995. Tr. p. 121.

4. In 1985, the complainant took on the additional duties of a bus operator instructor. A bus operator instructor trains other bus drivers. Tr. p. 121.

5. In 1965, the complainant was baptized a Seventh Day Adventist. At all relevant times, the respondent knew that both the complainant and her husband were practicing Seventh Day Adventists. The tenets of their religion require that they not drive a bus from sundown Friday to sundown Saturday. Joint Stipulations of Fact Nos. 2, 3 and 4; Tr. p. 34.

6. On May 11, 1992, the West Virginia Human Rights Commission entered its final order and sent that order to the parties in favor of complainant's daughter's complaint that respondent had failed to accommodate the daughter's religion to enable her participation in a spelling bee during the 1988-1989 school year in Docket No. PAREL-356-89. Joint Stipulation of Fact No. 1; Tr. p. 33.

7. The complainant timely filed her complaint which was amended to allege that on or about October 5, 1992, the complainant was denied extra duty runs which did not conflict with their religious beliefs, in contravention of the Commission's order entered May 11, 1992; on or about November 12, 1992, the respondent hired

less senior employees as bus driver instructors instead of complainant, who had previously handled these assignments; and that these actions were in retaliation for the filing of the complaint against the respondent in Docket No. PAREL-356-89. Complaint and Amended Complaint.

8. Drivers are given opportunities to earn extra income by making extra duty trips for extra curricular activities. Extra duty trips are distributed by asking the most senior person if he or she would like to work the trip. If that individual declines, the next most senior person has the opportunity to accept or decline the next available extra duty run. A more senior driver is not given a second opportunity to accept or decline a run until all the less senior drivers are first given the opportunity to accept the next available run. Tr. pp. 79-80, and 105-109.

9. On several occasions in the Spring of 1992, the complainant approached her immediate supervisor, Mr. Larry, to request accommodation of her religious beliefs, so that she could be assigned an extra duty trip during the week when she declined a trip which required her to work on her Sabbath. Complainant's purpose was "to try to figure out something and see what could be worked out." Although Mr. Larry indicated he would investigate the matter and get back in touch with complainant, he did not respond to the request. Tr. pp. 133 and 190.

10. From June 1992 up to and including most of August 1992, the complainant had no contact with respondent. Tr. pp. 126-127.

11. When the school year again commenced in the Fall of 1992, complainant again approached Mr. Larry concerning the possibility of

being offered an extra duty trip during the week when she had to decline work falling on her Sabbath. Mr. Larry advised her that he did not have the authority to grant such an accommodation, and advised her to put her request in writing and direct it to Sharon Harsh, Assistant Superintendent and Title IX Director for respondent. Tr. pp. 133 and 139.

12. By letter dated September 8, 1992, complainant and her husband advised Ms. Harsh of their religious beliefs and requested accommodation as follows:

Our question is simply this, when we are offered an extra duty assignment on a Friday night or Saturday for which the time will cause a religious conflict, could we be offered a trip during the week so that we might have an equal opportunity for the extra pay assignment.

We are obviously placed at a disadvantage when most of the extra duty assignments occur on the weekends and are usually longer hours. Respondent's Exhibit No. 1; Joint Stipulation of Fact No. 4; Tr. p. 34.

13. On September 9, 1992, Ms. Harsh wrote to the Prosecuting Attorney for Barbour County, seeking legal advice with respect to complainant's request for religious accommodation, and enclosed a copy of the letter from complainant and her husband. Respondent's Exhibit No. 2.

14. By letter dated September 23, 1992, the Prosecuting Attorney for Barbour County advised Ms. Harsh of the alternative rotation provision in West Virginia Code § 18A-4-8b as follows:

It would be my suggestion that the Board of Education come up with a procedure whereby, when the Connors are offered weekend extra-duty runs, and refuse the same for religious beliefs, that they be allowed to "bump" other employees for a commensurate run during the week.

This policy would, of course, have to be submitted to, and ratified by, an affirmative vote of two thirds of the employees within that classification category of employment, to wit, bus drivers. Respondent's Exhibit No. 3.

15. The advice of the Prosecuting Attorney was forwarded to the Superintendent by Ms. Harsh by Memorandum dated September 29, 1992. She understood the recommendation to mean that the bus drivers would vote to modify the procedure of assigning extra duty runs by providing that, "All extra duty runs would continue to be assigned on a rotating seniority basis except in those instances where a driver cannot accept a weekend run due to a religious conflict, the driver be allowed to "bump" other drivers for a commensurate run during the week." Respondent's Exhibit No. 5.

16. On October 1, 1992, Mr. Larry posted a Memorandum advising all bus operators that there would be a mandatory meeting to be held on October 5, 1992 to discuss assignment of extra duty trips. Respondent's Exhibit No. 7.

17. Mr. Larry drew up a ballot requiring two votes regarding whether drivers would continue to assign extra duty runs on the basis of location within Barbour County; and second whether the bus operators desired to change the statutory procedure for rotation of extra duty assignments to allow bus operators to bump other drivers for commensurate runs during the week when they are unable to accept weekend employment because of religious reasons. Commission's Exhibit No. 2.

18. Mr. Larry drew up the ballot based upon the language in the Prosecuting Attorney's letter. Tr. p. 354.

19. Mr. Larry understood the accommodation to mean that complainant would get equal hours of runs during the week to make up for the run declined. Tr. pp. 347-348.

20. Mr. Larry did not explain the nature of the accommodation other than to say that complainant and her husband could bump the other drivers during the week, until such time as they had the same number of hours extra duty as the run they declined. Mr. Larry (and the Superintendent) did not understand how the accommodation would work as far as resuming the seniority list order following allowing the complainant to "bump" the drivers with runs during the week. Thus Mr. Larry was not able to explain how the accommodation would work in regards to those drivers whose extra duty runs would be bumped. Mr. Larry did not assure them that having been bumped themselves they would then be offered the extra duty assignment that complainant or her husband had to refuse. Tr. pp. 357-363.

21. Ms. Harsh understood the Conner's letter of September 8, 1992, to be a request for alternate runs and not a request for commensurate runs. Nevertheless, after receipt of the Conner's letter dated September 8, 1992, no attempts were made by the respondent to understand the nature of the accommodation she sought and Ms. Harsh allowed the Prosecuting Attorney's letter to be the basis of the vote to be taken, without any agent of respondent ever clearly formulating a methodology of reordering the list each time by dropping the Conner's names on the list to reflect their being offered the next available run not falling on their Sabbath, while the person whose assignment they would take would receive the extra duty run falling on the Sabbath. Tr. pp. 275, 290-291 and 140-141.

22. The meeting at which the vote was taken regarding accommodation, was very unruly, with several bus drivers very upset. At least one bus driver was allowed to speak, for the purpose of expressing hostility toward the complainant. Tr. pp. 91-97, 112-113, 142-143, 151, and 200.

23. Mr. Larry told the bus operators to mark one at the top and one at the bottom. This would result in a vote which denied the accommodation. Mr. Larry also commented that some of the laws are crazy. Tr. pp. 151 and 199.

24. The complainant did not speak to the meeting as the overall tone of the meeting was extremely hostile. The complainant never was given a satisfactory opportunity to explain the accommodation which she sought prior to the vote being taken. Tr. pp. 200-202 and 211.

25. Complainant also sought accommodation on her own by asking another driver, Tom Kittle, to trade runs. Although Mr. Kittle agreed, Mr. Larry would not allow the complainant and Mr. Kittle to trade runs. The respondent did not permit the trading of runs among the respondent's bus operators. Tr. pp. 149-150, 82-83 and 118.

26. Mr. Larry knew of complainant's daughter's Human Rights complaint in May of 1992 because complainant discussed it with Mr. Larry at that time. Tr. pp. 132-133.-

27. The respondent retaliated against complainant for filing her daughter's Human Rights Act case against respondent and for attempting to enforce the religious accommodation order in that action by refusing to reasonably accommodate her religious beliefs in the assignment of extra duty runs.

28. The parties have stipulated that complainant's damages with respect to the failure to accommodate the complainant's religion with respect to extra duty assignments would be \$286.44 for the period between September 1992 and December 1994. Interest is calculated based upon the assumed loss entirely occurring in November 1993, the mid point for the period. Total back pay and interest until May 1997 is \$400.09. Correspondence from F. Thomas Rubenstein to John McFerrin dated April 23, 1997 and Exhibit A, of Commission's Reply Memorandum of Law.

29. Complainant became certified as a bus operator instructor in 1985 and taught her first class in October of 1985. Respondent's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law in Support Thereof p. 8; Commission's Exhibit No. 1.

30. From 1985 until 1992 the respondent had three bus operator instructors who were certified to teach; those being, Ralph Goodwin, Larry Moore, and complainant. Joint Stipulation of Fact No. 6; Tr. pp. 34-35.

31. Bus operator training sessions were conducted by the respondent on an as needed basis. Joint Stipulation of Fact No. 7, Tr. p. 35.

32. Mr. Larry would select individuals for the position of bus operator instructor and make the recommendation to the Superintendent. The position was never posted. Joint Stipulations of Fact No. 10 and No. 11; Tr. p.35.

33. Mr. Larry attempted to rotate instructors so each would have an opportunity to teach. Respondent's time sheets indicate that complainant taught her first class in October 1985. Mr. Goodwin also

instructed classes in October 1985; and classes held during the Winter and Fall of 1986. Mr. Goodwin again taught in the Spring and Fall of 1986. Complainant also taught in the Fall of 1986. Mr. Goodwin again taught classes in the Spring and Fall of 1987. Complainant taught in the Spring of 1988. Although Mr. Moore was asked to teach classes, he declined and eventually relinquished his teaching certificate. Complainant did not teach any other classes until she instructed a training session held in March 1992. Complainant was also selected to teach in service training for all bus operators in August of 1992. Commission's Exhibit No. 1; Tr. pp. 301-302, 311 and 314.

34. Complainant was the only certified bus operator instructor respondent had in August 1992. Mr. Larry had attended a transportation conference put on by the State of West Virginia in August 1992, at which time he had already inquired about the opportunity for bus operator instructor certification training because he wanted to send two other people for certification as bus operator instructors. Tr. pp. 305, and 319-321.

35. In October 1992, Mr. Larry and complainant became involved in a conference concerning an additional bus stop which he added to complainant's bus route for the benefit of a student at risk for dropping out of school and changed the students seating on her bus. Complainant challenged Mr. Larry's authority with respect to the extra stop as out of compliance for standards for distances between stops and his switching of the student's seat as interfering with her right to maintain order on her bus. She told Mr. Larry that if he didn't trust her to keep discipline on her bus then he couldn't trust

her to train his drivers. Mr. Larry responded that he would find someone else to train the new drivers. Tr. pp. 325 and 329.

36. In November of 1992, Mr. Larry sent Carl Bolton and John Edge to become trained as bus operator instructors. Tr. pp. 326-327.

37. During the period from September, 1992 through December 1994 (when complainant was terminated from employment), Mr. Edge and Mr. Bolton were the only people who instructed bus operator classes for respondent.

38. After the Summer of 1993, bus operator instructor positions were posted and the respondent's failure to assign complainant runs after this point in time are the subject of a separate complaint pending investigation by the West Virginia Human Rights Commission.

Therefore damages arising out of this complaint and not the subject of the pending complaint, are based upon Mr. Edge and Mr. Bolton working 20 hours and 24.5 hours respectively in November and December 1992; at \$12.00 per hour. This totals \$534.00 worth of bus operator instruction which took place that year. Assuming complainant would have had an equal opportunity for such assignments, complainant would have earned \$178.00 had the respondent not retaliated against her for obtaining a judgment against respondent in her daughter's Human Rights case.

39. The respondent had a legitimate business purpose in training additional bus operator instructors to be certified to conduct this training for respondent.

40. Mr. Larry retaliated against respondent for attempting to enforce the Commission's order in her daughter's case by requesting religious accommodation in the assignment of extra duty runs; and, by

failing to offer complainant any opportunities to assume instructor assignments after October of 1992.

41. The complainant suffered emotional distress as a direct result of the respondent's retaliatory actions and failure to accommodate her religious beliefs. After the vote by the bus drivers, the complainant's fellow bus drivers began treating the complainant in a negative manner. Tr. pp. 160-161, 205 and 223.

B.

DISCUSSION

The respondent raised objection to the jurisdiction of the West Virginia Human Rights Commission to this case based upon the failure of the Commission to meet the statutory deadlines for action under the Human Rights Act and under Allen v. West Virginia Human Rights Commission, 324 S.E.2d 99 (W.Va. 1984). The undersigned finds that dismissal of the timely filed complaint would prejudice the rights of the complainant based upon an agency failure to act; where the delay was in no sense attributable to the complainant, and where no prejudicial effects to the respondent in the delay were proffered. Thus dismissal of the complaint is not the remedy afforded respondent for failure to comply with the deadlines for investigation and hearing of the case. Allen, supra.

Next the respondents have objected to the hearing of this case under any theory involving failure to accommodate complainant's religion, because the complaint and amended complaint do not specify any other reason for the complaint of failure to accommodate religion

of the complainant in assignment of extra duty runs, other than in retaliation for the decision rendered against the respondent in the complainant's daughter's case before the West Virginia Human Rights Commission. The undersigned ruled in advance of hearing that the complaint and amended complaint sufficiently raised the facts giving rise to a cause of action for failure to accommodate to support a claim for failure to accommodate religion; despite the fact that a specific reason of retaliation for filing her daughter's case was alleged in those complaints as well. The original complaint stated in relevant part, "Further, the Respondent denies me the opportunity to be considered for extra duty runs which do not conflict with my religious beliefs." The amended complaint states in relevant part, "Furthermore, on numerous occasions, the Complainant and her husband, Howard Conner, requested the opportunity to work extra runs which did not conflict with their religious beliefs. After the Final Order was issued in the Human Rights complaint, Complainant's request was denied."

In actions alleging failure to accommodate religious beliefs, the complainant must first make a prima facie case. A prima facie case is made by proving: (1) complainant has a bona fide belief that compliance with a certain requirement or condition is contrary to her religious beliefs; (2) she informed the respondent about the conflict; and, (3) she was discharged because of her refusal to comply with the requirement, Brown v. General Motors Corporation, 601 F.2d 956 (8th Cir. 1979); Anderson v. General Dynamics Corvair, etc., 589 F.2d 397 (9th Cir. 1978); and Redmond v. GAF Corporation, 574 F.2d 897 (7th Cir. 1978). In the instant case a prima facie case by

complainant would consist of her proving that she had a religious belief which prevented her from accepting work on her Sabbath; that she informed the respondent of her need for accommodation; and that she suffered an adverse consequence as a result of the respondent failing to accommodate her religious beliefs. The Commission has proven these elements and the complainant has therefore established a prima facie case of failure to accommodate her religion.

Once the complainant has established a prima facie case, the burden then shifts to the respondent to produce evidence that it "made a good faith effort to accommodate religious beliefs, that the efforts were unsuccessful and that they were reasonably unable to accommodate those beliefs without undue hardship." Burns v. Southern Pacific Transportation Company, 589 F.2d 403, 405 (9th Cir. 1978). See also, Proctor v. Consolidated Freightways Corporation, 795 F.2d 1472 (9th Cir. 1986); Dorr v. First Kentucky National Corporation, 796 F.2d 179 (6th Cir. 1986); and Turpin v. Missouri-Kansas-Texas Railway Company, 736 F.2d 1022 (5th Cir. 1984). The "burden to undertake initial steps toward accommodation rests upon the [respondent], not the [complainant]." Proctor, 795 F.2d at 1475. See also American Postal Workers Union v. Postmaster General, 781 F.2d 722 (9th Cir. 1986). Moreover, such initial steps by the respondent must be made in "good faith", Anderson, 589 F.2d at 401, be "more than a negligible effort," Burns, supra, 589 F.2d at 406, consist of "some steps in negotiating with [complainant] to reach a reasonable accommodation," Id. at 406, be "affirmative" in nature, EEOC v. Caribe Hilton International, 597 F.Supp. 1007, 1011 (D.P.R. 1984), and be designed to "effectively eliminate...the

religious conflict faced by [the] particular [complainant]." Even if its initial efforts at accommodation are in good faith, but still fail "to eliminate the [complainant's] religious conflict, the burden remains upon the [respondent] to establish that it is unable to reasonably accommodate those beliefs without undue hardship." Postal Workers Union, 781 F.2d at 776. To establish undue hardship the employer need only show that the only avenues of accommodation that would eliminate the religious conflict will: (1) hinder the rights of other persons, or; (2) involve more than de minimus costs. Brown, 601 F.2d at 962; Caribe, 597 F.Supp. at 1011. A defense of undue hardship "must be based on reality" and the respondent may not "speculate on the future impact of accommodating" a complainant. "Speculation is clearly not sufficient to discharge GM's burden of proving undue hardship", as the Court held in Brown, 601 F.2d at 961. Undue hardship "must mean present undue hardship, as distinguished from anticipated or multiplied hardship." Haring v. Blumenthal, 471 F.Supp. 1172 (D. D.C. 1979). Undue hardship "cannot be proved by assumptions nor by opinions based on hypothetical facts," Anderson, 589 F.2d at 402, and must be "more than proof of some fellow's grumbling or unhappiness." Burns, 589 F.2d at 407.

The duties of respondent with respect to religious accommodation are also set forth in West Virginia Human Rights Commission's Legislative Rules Regarding Religious Discrimination, 6 W.Va. C.S.R. 77 §3.1 et seq. (1992).

No employer shall, on the basis of religion, discriminate against an individual concerning the

terms, conditions or privileges of employment unless it can be shown that the employer cannot reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of its business. 6 C.S.R. 77 §3.1.

One possible means of reasonable accommodation without undue hardship is through voluntary swapping or substitution where a voluntary substitute with substantially similar qualifications is available. The individual seeking accommodation is responsible to facilitate the securing of a voluntary substitute when he or she knows of someone with substantially similar qualifications who is willing to substitute or swap positions. The duty to reasonably accommodate the practices of employees or prospective employees requires that the employer or labor organization facilitate the securing of voluntary substitute with substantially similar qualifications as the individual requiring accommodation. Employers and labor organizations may consider the following means to facilitate the securing of such voluntary substitute:

3.4.1.A. To publish policies regarding accommodations and voluntary substitution;

3.4.1.B. To promote an atmosphere in which substitutions are favorably regarded;

3.4.1.C. To provide a central file, bulletin board or other means for matching voluntary substitutes for positions for which substitutes are needed;

3.4.1.D. The obligation to accommodate requires that the employer take affirmative steps to attempt to secure substitutions or swaps. 6 C.S.R. 77 §3.4.1.

Respondent asserts that it undertook reasonable efforts to accommodate complainant's religious conflict which prevented her from accepting extra duty runs which required her to work on her Sabbath, by its submitting the request for accommodation to the vote of the bus operators; and that it would be an undue hardship to require accommodation in the form of swapping the extra duty runs falling on her Sabbath with the next available run not falling on the Sabbath accepted by the next person on the seniority list, because the bus

operators have already voted no and to allow it would violate the terms of W.Va. Code §18A-4-8b which at the relevant times provided as follows:

Notwithstanding any other provisions of this chapter to the contrary, decisions affecting such personnel with respect to extra duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in selecting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had the opportunity to perform similar assignments. The cycle shall then be repeated: Provided, That an alternative procedure for making extra duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment. For the purpose of this section, extra duty assignments are defined as irregular jobs that occur periodically or occasionally, such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

The undersigned finds as fact that the respondent did not attempt an accommodation of the complainant's religion in good faith. First it must be observed that respondent never attempted to clarify in its agents own minds, what the complainant sought in the way of accommodation. Ms. Harsh was aware that complainant sought only to be offered the next available run not falling on their Sabbath, yet forwarded the Prosecuting Attorney's statement of the vote on the basis of bumping the bus operators from those next available runs on a commensurate number of hours to the run declined on the Sabbath. That proposal was then forwarded to Mr. Larry to take the vote of the bus operators. Mr. Larry represented in effect

that the complainant would simply take their runs without them receiving the opportunity to accept complainant's Sabbath run in exchange, when their turn came and the complainant wanted their run. The vote could not have been handled in a more provocative and unfair manner than that which respondent undertook.

Furthermore, the undersigned is of the opinion that the permission for the complainant to swap runs with that operator who obtains the next available extra duty run during the week, does not conflict with the provisions of W.Va. Code § 18A-4-8b; nor does it require that the furnishing of this accommodation to the complainant require any vote of approval by anyone, since the provision merely requires that the assignments be offered on a rotating seniority basis. The very fact that complainant is required by the tenets of her religion to decline such offers falling on her Sabbath, in effect violates the obvious intent of the Legislature in this section to assure that all receive equal chances to accept this type of assignment.

The only thing that causes the respondent to be unable to both accommodate the complainant and still retain the rotating seniority distribution required pursuant to W.Va. Code § 18A-4-8b, is the respondent's own additional rule that no swapping of the extra duty assignments are allowed. This is the very remedy for religious accommodation that is provided for in the Legislative Rules, 6 C.S.R. 77 §3.4.1. Yet when complainant undertook to obtain voluntary swapping of her extra duty run for that of Mr. Kittle the respondent rejected this solution. For the foregoing reasons the respondent is found to have failed to provide religious accommodation to the

complainant, where providing accommodation in the form of her switching extra duty runs with the operator receiving the next available extra duty run not falling on the Sabbath of complainant does not present an undue hardship upon respondent.

The West Virginia Human Rights Act, W.Va. Code §5-11-9(a)(7)(C), provides that it is unlawful for any person or employer to "[e]ngage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article...." To prove a prima facie case of retaliatory employment discrimination, the complainant must prove by a preponderance of the evidence (1) that the complainant engaged in a protected activity; (2) that the complainant's employer was aware of the protected activity; that the complainant was subsequently discharged (absent other evidence tending to establish retaliatory motivation); and (4) that complainant's discharge followed her protected activities within such a period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W.Va. 53, 365 S.E.2d 251 (1986).

The complainant informed Mr. Larry that the respondent had lost a case regarding religious accommodation in regards to her daughter's participation in a spelling bee in May 1992. This was just prior to the end of the school year. Before leaving that year, complainant had made requests of Mr. Larry for religious accommodation in the assignment of extra duty runs, so that she and her husband would not lose their opportunity to select an extra duty run when that run fell on their Sabbath. It is very likely that complainant made reference

to that case and the accompanying order when discussing her request with Mr. Larry. Upon return from summer break, complainant renewed her requests for religious accommodation, which the cease and desist order issued in her daughter's case, indicated should be granted. The subsequent events and Mr. Larry's own demeanor on the witness stand, make it quite obvious that Mr. Larry resented the complainant's request for accommodation. Although complainant's testimony that Mr. Larry's demeanor toward her changed shortly after Mr. Larry became informed of her daughter's case having been decided in their favor, is subject to other non retaliatory reasons in regard to the confrontations in October regarding the student seating and bus stop change; clearly by the time that exchange occurred, the prior case and the complainant's insistence in pursuing religious accommodation, which that order seemed to require of respondent, motivated Mr. Larry's later decision to make all future assignments of bus operator instructor positions after November 1992 to his two newly certified employees. To the extent that respondent's agents failed to undertake in good faith, the attempt to accommodate complainant's religion in assignment of extra duty runs; such was in direct contempt of the Commission's earlier order requiring the respondent to cease and desist from engaging in religious discrimination. Such contempt of the Commission's prior order could support an inference that the complainant's treatment in regards to the requested accommodation was retaliatory in nature, in response to the earlier decision. Because the undersigned found that the failure to accommodate religion claim was sufficiently raised by the

complaint and amended complaint, however, it is unnecessary to make such a finding.

In addition to make whole remedies available to the complainant, the Commission in its cease and desist order may make provisions which will aid in elimination of future discrimination. The cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the respondent that the Commission's order has been implemented and will continue to be implemented. Whittington v. Monsanto Corporation, ES-2-77 and Pittinger, et al. v. Shepardstown Volunteer Fire Department, PAS-48-77. See also Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). The undersigned concludes that the respondent's failure to accommodate the complainant in this case, is indicative of an ongoing policy of the respondent to assert the provisions of W.Va. Code §18A-4-8b, prevent the modification of extra duty assignment procedures, in such a fashion that prevents those seeking religious accommodation in the assignment of extra duty runs from obtaining reasonable accommodation under the West Virginia Human Rights Act. Therefore, the undersigned does hereby require the respondent to implement a policy that permits its bus operators to obtain religious accommodation in the assignment of extra duty assignments, by exchanging the extra duty run which falls on the Sabbath of the requestor, with the next available extra duty run not falling on a Sabbath, and offering that extra duty run falling on the requestor's Sabbath, to the bus operator whose non Sabbath extra duty run is being exchanged. The respondent shall also permit the voluntary

exchange of extra duty runs to accomplish religious accommodation as well. Respondent shall file an affirmation by the respondent's responsible officer to certify to the Commission that this relief has been complied with, including provision of a copy of any document establishing the policy required herein.

The complainant is entitled to incidental damages. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W.Va. 1, 239 S.E.2d 145 (1977). A cap on awards of incidental damages in cases heard by the West Virginia Human Rights Commission, without a jury, was set at \$2,500.00, which may be increased periodically to conform with the consumer price index. Bishop Coal Company v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989). The complainant has suffered extreme emotional distress as a result of the respondent's failure to accommodate her religion. During the attempt of the complainant to obtain this accommodation she was subjected to cruel and vindictive behavior of not only Mr. Larry, her immediate supervisor, but also, as a direct result of his conduct of the vote in such a fashion to suggest she sought to bump the other drivers from these assignments without their obtaining the Sabbath run in exchange, to the hostility of her coworkers, the other bus operators, as well. For the emotional distress accompanying this outrage, complainant is entitled to an award of incidental damages in the amount of \$3,277.45. It is not clear that the complainant has sustained any additional emotional or other incidental damages associated with respondent's failure to assign her to bus operator instructor positions that became available; or, that this comprises a separate cause of action or separate act of discrimination on behalf

of the respondent; therefore no additional award of incidental damages beyond that of the \$3,277.45 is made.

C.

CONCLUSIONS OF LAW

1. The complainant, Karen S. Conner, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W.Va. Code §5-11-10.

2. The respondent, Barbour County Board of Education, is an employer as defined by W.Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with W.Va. Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W.Va. Code §5-11-9 et seq.

5. Complainant has established a prima facie case of religious discrimination, both on a retaliatory basis and for failure to accommodate.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful religious discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$578.09, plus statutory interest.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of reasonable costs in the aggregate amount of \$1,339.26.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices. In terms of this case this provision requires that the respondent accommodate the request of any employee for accommodation of their religious beliefs in the assignment of extra duty runs by permitting the next extra duty run not falling on the Sabbath to be assigned to the person requiring accommodation and allowing the person whose extra duty run is exchanged to accept the extra duty run falling on the Sabbath, which was declined by the person requesting the accommodation. The respondent is enjoined from disallowing the exchange of runs in such

situations and is hereby directed that the adoption of these accommodation procedures do not conflict with W.Va. Code §18A-4-8b.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant \$578.09.

3. Within 31 days of receipt of this decision, the respondent shall pay to the Commission costs in the amount of \$1,339.26.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 13th day of June, 1997.

WV HUMAN RIGHTS COMMISSION

BY: 

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing
FINAL DECISION by
depositing a true copy thereof in the U.S. Mail, postage prepaid, this
13th day of June, 1997, to the following:

KAREN S CONNER
PO BOX 192
BELINGTON WV 26250

BARBOUR CO BD OF ED
105 S RAILROAD ST
PHILIPPI WV 26416

JOHN MCFERRIN
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
L & S BLDG 5TH FLOOR
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CHARLESTON WV 25301

BETHANN R LLOYD ESQ
F THOMAS RUBENSTEIN ESQ
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ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE