HARRY LEE POLING,

Grievant,

v. DOCKET NO. 96-47-476

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Harry Lee Poling, Grievant, filed this grievance against the Tucker County Board of Education, Respondent, on September 20, 1996, alleging favoritism. Grievant was denied relief at Levels I and II, on September 30, 1996, and October 18, 1996, respectively. Pursuant to W. Va. Code § 18-29-4(c), Respondent voted to waive holding a Level III hearing in this matter. Therefore, Grievant appealed the Level II decision directly to Level IV.

At Level IV, an evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on February 4, 1997. The case became mature on March 24, 1997, upon receipt of Grievant's reply post-hearing submission.

FINDINGS OF FACT

1. Grievant was awarded a full-time position in the Fall of 1993. The job posting specified that the bus, for the route Grievant was awarded, would be stored at the Department of Highways garage in Thomas, W. Va.

2. Prior to Grievant's successful bid on the above position,he had been employed by Respondent as a substitute bus operator for six years.

3. Grievant was familiar with all of the bus routes, and had driven every bus route, including Mr. Doyle Carr's and Mr. Keith Knotts', except one.

4. Mr. Carr's and Mr. Knotts' bus routes were posted prior to August, 1993. Mr. Carr's position was posted on September 3, 1992, and Mr. Knotts' position was posted on August 19, 1992.

5. Mr. Carr's route includes the Cannon Settlement and Davis areas of Tucker County. Each morning, Mr. Carr begins his day at the bus garage, drives his bus up Route 219, approximately 14 miles to Thomas, W. Va., and then travels to Cannon Settlement where he picks up his first students. He ends his morning run at the Tucker County High School. From there he rides a school bus, with other bus drivers, south, down Route 219 to the bus garage.

At approximately 2:00 p.m., he returns to the bus garage, rides a school bus back up Route 219 to the High School, and picks up his bus to complete his afternoon run. Upon dropping off his last student in the Cannon Settlement area, he drives his bus back to the bus garage.

6. Mr. Knotts drives his bus from his home in Leadmine, up the Leadmine Road 9.6 miles to intersect Route 219, then he travels north to the Aurora School in Preston County to pick up his first students.

7. Grievant resides in the Parsons area of Tucker County. His morning bus run begins by picking up students at Carr's Camp,Flanagan Hill, and in the Canaan Valley area. He ends his run at the Tucker County High School on Route 219. From there, he rides a school bus, with other bus drivers, south, down Route 219 to the bus garage.

At approximately 2:00 p.m., he returns to the bus garage, rides a school bus back up Route 219 to the High School, and picks up his bus to complete his afternoon run. Upon dropping off his last student in the Carr's Camp area, he returns his bus to the Thomas State Road Garage.

8. Grievant is not allowed to store his bus at the bus garage and travel Route 72 each morning to the beginning of his bus route at Carr's Camp because part of that road is too narrow and curvy.

9. In determining where buses are stored overnight, Respondent tries to minimize “dead heading miles,” and considers security of the bus. The bus operators' storage preference is also considered, but is not an over-riding factor.

DISCUSSION

Grievant alleges that Mr. Carr and Mr. Knotts, bus operators, have been shown favoritism by Respondent because their buses are stored at locations which are allegedly favorable to them. Mr. Carr's bus is stored at the bus garage. Mr. Knotts' bus is stored at his house. Grievant's claim concerned where his bus was stored over-night, and not that he maintains two separate vehicles to perform his run. Off the record, Grievant indicated that he was not interested in Respondent transporting him back to the High School (where his bus route begins in the morning), because this

option increases the mileage on his personal vehicles.

Respondent asserted that this grievance should be denied because it was not filed timely. Timeliness is an affirmative defense and must be proven by a preponderance of the evidence by the party asserting the defense. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). W. Va. Code §18-29-4(a)(1) provides, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the
> grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

However, W. Va. Code §18-29-3, provides:

> Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.

The record fails to contain any evidence that Respondent asserted a timeliness defense at or before the Level II hearing. Therefore, Respondent's defense is precluded by statute, and fails. Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39- 413 (May 8, 1996).

Grievant alleges favoritism. W. Va. Code §18-29-3(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." To prove favoritism a grievant must establish aprima facie case which consists of demonstrating:

> (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 other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a

grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Rice v. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-180 (Aug. 29, 1997); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant cannot satisfy the first and third prongs of the favoritism prima facie test. First, Grievant is not similarly situated to Mr. Carr or Mr. Knotts in time. (See footnote 1) Grievant's position was posted a year after those of Mr. Carr and Mr. Knotts.

Second, Grievant failed to show that the differences between him, Mr. Carr, and Mr. Knotts were unrelated to actual job responsibilities. Grievant's dilemma results because of safety reasons. Respondent prefers to not to have one of its buses travel a portion of Route 72 because it is too narrow and curvy.

Third, Grievant agreed in writing to accept the position. Before accepting his current bus route he was familiar with it, and had driven it as a substitute.

Grievant failed to establish a prima facie case of favoritism. Therefore, his grievance must be denied.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. W. Va. Code §18-29-3(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

3. To prove favoritism a grievant must establish a prima facie case which consists of demonstrating:

> (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,
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> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

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4. Grievant failed to prove by a preponderance of the evidence that Respondent favored other employees over him.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Tucker 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.

DATED 9/24/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

See Ritchie v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997).