KELLY R. RICE,

Grievant,

v. **Docket No. 96-DOH-288**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Kelly R. Rice (Grievant) filed this grievance against the West Virginia Department of Transportation, Division of Highways (DOH), on October 10, 1995, alleging that he was improperly denied preparation time regarding six grievances he had previously filed. Grievant sought to be given his time off, and to have the persons responsible "disciplined in accordance with West Virginia Administrative Rule Section 21." The grievance was denied at Levels I and II, and Grievant appealed to Level III on November 13, 1995. A hearing was conducted on April 15, 1996, and a Level III decision issued by Commissioner of Highways Fred VanKirk on June 7, 1996. In that decision, the eight hours of annual leave time which Grievant had used to prepare his grievances were restored, but the request for disciplinary action was denied. Grievant appealed to Level IV on July 3, 1996. Following a series of continuances, each of which was granted for good cause shown, a Level IV evidentiary hearing was scheduled in this Board's office in Charleston, West Virginia, on March 10, 1997. At that hearing the parties agreed to submit this matter for decision on the record developed through Level III. The parties waived further oral or written arguments, and this matter became mature for decision at that time.

As the facts necessary for resolution of this grievance are not in dispute, the following Findings of

Fact are in order:

FINDINGS OF FACT

1. Grievant is employed in DOH District Three, which includes Wirt County.

2. Grievant's immediate supervisor is Alvin Engleke, County Maintenance Supervisor for Wirt County. Grievant's second-level supervisor is Robert Epler, District Engineer for District Three.

3. On September 19, 1995, Grievant submitted six separate grievances at Level I of the grievance procedure for state employees. See G Ex 4.

4. On September 29, 1995, Grievant appealed each of the six grievances to Level II. See G Ex 4.

5. On October 5, 1995, Grievant had an unscheduled, informal meeting with Mr. Epler, in which they discussed the six grievances.

6. On October 5, 1995, Grievant requested approval from Mr. Engleke to use eight hours on October 6, 1995, as preparation time for his six grievances.

7. Mr. Engleke approved Grievant's request. He then contacted Mr. Epler to clarify how to record Grievant's time. Mr. Epler determined that preparation time was unnecessary because he understood from his conversation with grievant that the grievances had already been submitted for his decision at Level II.

8. Mr. Engleke did not advise Grievant that his preparation time request was disapproved, and Grievant took off eight hours on October 6, 1995, to research his six pending grievances.

9. When Grievant returned to work, he was advised by Mr. Engleke that Mr. Epler had denied his requested preparation time, and the preparation time was changed to annual leave.

10. Grievant filed a timely grievance pursuant to W. Va. Code § 29-6A-1, et seq. By the terms of the Level III decision on this grievance, Grievant's eight hours of annual leave were restored.

DISCUSSION

In order to prevail in a grievance of this nature, a Grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

W. Va. Code § 29-6A-3(p) provides:

> The grievant or the employee selected by a grievant to represent him in the processing of a grievance through this procedure, or both, shall be granted necessary time off during work hours for the grievance procedure without loss of pay and without

> charge to annual or compensatory leave credits. In addition to actual time spent in grievance conferences and hearings, the grievant or the employee representative, or both, shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of such grievance without loss of pay and without charge to annual or compensatory leave credits. However, it shall be understood by all parties that the first responsibility of any state employee is the work assigned by the appointing authority to the employee. Grievancepreparation and representation activities shall not seriously affect the overall productivity of the employee.

Grievant notes that Section 22 of the West Virginia Division of Personnel Administrative Rule provides that "[a]n employee hired for permanent employment may file a grievance with the Education and State Employees Grievance Board ...." 143 C.S.R. 1 § 22 (1995). Grievant also cites to Section 21.03 of the Administrative Rule:

> (a) Any person who willfully violates any provision of W. V. Code, §29- 6-1 et seq. or of this rule is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars or more than five hundred dollars, or imprisoned in the county jail for a period not to exceed one year, or both fined and imprisoned. Jurisdiction under this section shall be in a court of record exercising criminal jurisdiction within the county wherein the offense is committed.

143 C.S.R. 1 § 21.03(a) (1995).

Grievant has already obtained relief at Level III by having his annual leave restored. Because he did not request or take more than eight hours' leave to prepare his six grievances, he has no basis to claim that he was entitled to credit for additional preparation time. Accordingly, this issue is moot and will not be further addressed. See W. Va. Educ. & State Employees Grievance Bd. Procedural Rules 156 C.S.R. 1 § 4.20 (1996); Pridemore v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-561 (Sept. 30, 1996); Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93- HHR-265/266/267 (May 19, 1994).

Grievant further requests that the persons "responsible be disciplined in accordance with West Virginia Administrative Rule Section 21." That regulation makes reference to a criminal statute within the jurisdiction of a court of record. This Grievance Board is anadministrative agency, not a criminal court. See W. Va. Code §§ 29-6A-1, et seq. The undersigned has no authority to impose criminal penalties.

This Grievance Board may award relief against the employer based upon conduct of which the employer is aware and, which it in effect, "condones." White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994). However, this Board is without authority, statutory or

otherwise, to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

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

CONCLUSIONS OF LAW

1. In order to prevail, Grievant must prove the allegations in his complaint by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88- 015 (Nov. 2, 1988).

2. This Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against an employee, or to impose criminal penalties. See Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994); Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-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: April 30, 1997