BOYD LILLY,

Grievant,

v. **Docket No. 98-PEDTA-489**

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

DECISION

Boyd Lilly (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., (See footnote 1) on May 19, 1998, alleging that Respondent West Virginia Parkways Economic Development and Tourism Authority (Parkways) failed to make an impartial Level I decision. This grievance arises from the events described in Lilly v. West Virginia Parkways Economic Development and Tourism Authority, Docket No. 98-PEDTA-358 (June 18, 1999). (See footnote 2) On June 10, 1998, this grievance, styled 98-14 by Parkways, was denied at Level I by Immediate Supervisor Rick Deeds (Deeds). Deeds' Level I decision is the subject of this grievance. On June 25, 1998, it was denied at Level II by Administrator William K. Forrest (Forrest). It was denied at Level III by Grievance Evaluator D. L. Lake on November 25, 1998. A Level IV hearing was held before the undersigned administrative law judge at the Grievance Board's Beckley, West Virginia office on May 20, 1999. At that hearing, Parkways was represented by A. David Abrams, Jr., Esq., and Grievant represented himself. The parties were given until June 29, 1999, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision on that date.

The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by Parkways as a Security Officer at its Beckley South facility (Beckley South).

2. Grievant posted a cartoon, ridiculing another Parkways employee, Lynne Roaché (Roaché), for his use of state vehicles for private purposes, on union bulletin boards at Beckley South. Someone also placed a copy of this cartoon in an interdepartmental mail envelope addressed to Roaché, and slipped it under the door of his office. Roaché was upset by the cartoon.

3. At approximately 5:30 p.m. on April 27, 1998, Grievant was standing beside the car of Cheryl Porterfield (Porterfield), speaking to her through the driver's window. Porterfield was parked in a narrow, congested area of Beckley South's parking lot. Roaché, who was leaving work, accelerated his pickup truck as he approached Grievant and Porterfield, because he did not want to speak to Grievant, due to the cartoon described above, and because he feared aggravating his heart condition. Roaché passed Grievant at a distance of approximately five feet, but did not swerve toward him, or otherwise attempt to hit him. 4. Grievant, Roaché, Porterfield, James Simmons (Simmons) and Gary Wykle (Wykle) were the only eyewitnesses to this incident.

5. Later on April 27, 1998, Grievant twice called his immediate supervisor, Rick Deeds (Deeds), at home and told him of the parking lot incident.

6. The next day, Deeds reported the incident to his supervisor, Forrest. That day, Forrest took a written statement from Porterfield and a verbal statement from Roaché. Deeds later took statements from Simmons and Wykle.

7. Grievant filed two grievances over the parking lot incident: one claiming that Parkways maintained an unsafe workplace, and the other that Parkways failed to adequately investigate the parking lot incident. Parkways consolidated these two grievances, and the consolidated grievance (parking lot incident grievance) has since been denied at Level IV. Id.

8. On May 11, 1998, Grievant and others met with Deeds in a Level I informal conference on the parking lot incident grievance.

9. At that informal conference, Grievant asked whether Deeds had reached a conclusion regarding the parking lot incident. Deeds replied that, based on information supplied by Grievant and other eyewitnesses, he had reached a conclusion, unless Grievant had more information to provide.

10. Grievant provided no more information.

___11. Deeds denied this grievance at Level I on June 10, 1998.

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DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant claims that Parkways failed to make an impartial Level I decision in the parking lot incident grievance, because Deeds told Grievant, at the Level I informal conference on that grievance, that he had reached a conclusion, unless Grievant had more information to provide. Grievant claims that an impartial Level I decision is required by W. Va. Code §§ 29-6A-1, et seq..

Grievant argues that Deeds' decision made a mockery of the grievance system, and violated his rights as a state employee. As relief, he seeks to be made whole in every way, and that someone other than Deeds be appointed to conduct the Level I informal conference in the parking lot incident grievance. Parkways responds that Deeds was not required to be ignorant of the facts of the parking lot incident to conduct the Level I informal conference, and that any prejudice to Grievant's claim was cured by subsequent proceedings at Levels II, III, and IV.

W. Va. Code § 29-6A-6, entitled Hearings Generally, provides that "[t]he chief administrator or his designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartial manner. . . ." However, a Level I informal conference is held with a grievant's "immediate supervisor." W. Va. Code § 29-6A-4(a). Terms such as "immediate supervisor" and "grievance evaluator," "chief administrator," and "designee acting as a grievance evaluator," are not interchangeable, but help determine what procedure is to be followed at each level of the grievance procedure. See W. Va. Dep't of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993). (See footnote 3) Accordingly, the statute imposes a duty of impartiality only on chief

administrators, their designees acting as grievance evaluators, and hearing examiners, and not on immediate supervisors. (See footnote 4) Although this technical interpretation of the statute, standing alone, would support a denial of this grievance, the undersigned also relies upon a common- sense approach to the overall purpose and structure of the grievance process.

The purpose of the grievance procedure for state employees is to "provide a procedure for the equitable and consistent resolution of employment grievances. . . ." W. Va. Code § 29-6A-1. In the multi-step process created by this statute, a grievance progresses from an informal conference with a grievant's immediate supervisor through a series of appeals to ever-higher levels of authority, where decision makers are less likely to be familiar with the circumstances surrounding the grievance, but have ever-greater authority to resolve it. The degree of impartiality increases as the levels ascend, with a grievance being heard by a non-agency employee for the first time at Level IV. Thisapproach encourages the parties to resolve their differences at the lowest possible level, and promotes finality. See Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, 376 S.E.2d 639 (1988); Adams v. Cabell County Bd. of Educ., Docket No. 94-06-520 (May 15, 1995).

The grievance process allows the immediate supervisor, who is closest to the situation, and thus likely to have the best knowledge of the facts and their surrounding circumstances, to resolve a grievance at its earliest stage. So it was with this grievance. Deeds is Grievant's immediate supervisor. Deeds and Forrest quickly investigated the parking lot incident, taking statements from Grievant, Roaché, Porterfield, Simmons and Wykle. (See footnote 5) W. Va. Code § 29-6A-4(a) required that Deeds, upon a request by Grievant, hold an informal conference. At that conference, Deeds told Grievant that, based on information supplied by Grievant and other eyewitnesses, he had reached a conclusion, unless Grievant had more information to provide. Grievant had no more information to provide.

Deeds had to make a decision, and the best time to do that is after all of the facts have been gathered. After receiving the statements of the five eyewitnesses, none of whom stated that Roaché did anything more than drive at excessive speed through a congested area of the parking lot, Deeds reasonably formed the tentative conclusion that the grievance before him was baseless. He gave Grievant an opportunity to provide him with more information, but Grievant had no more to give. The fact that Deeds ruled againstGrievant does not mean that he was not impartial, and Grievant has failed to establish a lack of impartiality on Grievant's part.

Parkways is correct in arguing that Deeds was not required to be ignorant of the facts of the parking lot incident to conduct the Level I informal conference, and that any prejudice, that might have affected Grievant's claim at Level I, was cured by subsequent proceedings at Levels II, III, and IV. Deeds, who, as noted above, had no statutory duty of impartiality, fulfilled his duty under the statute. Grievant presented no evidence, and called no witnesses, either at Level III or Level IV, to prove otherwise.

Accordingly, Grievant failed to establish, by a preponderance of the evidence, that his immediate supervisor had a statutory duty to conduct a Level I informal conference in an impartial manner, and that his immediate supervisor exhibited a lack of impartiality at Level I. Therefore, this grievance must be denied.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving his 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).

2. W. Va. Code §§ 29-6A-1, et seq., imposes a duty of impartiality only on chief administrators, their designees acting as grievance evaluators, and hearing examiners, and not on immediate supervisors. 3. Any prejudice, that might have affected Grievant's claim at Level I, was cured by subsequent proceedings at Levels II, III, and IV.

4. Grievant failed to establish, by a preponderance of the evidence, that his immediate supervisor exhibited a lack of impartiality at Level I.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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. However, the

appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated July 6, 1999

Footnote: 1

1 This statute was amended, effective July 1, 1998. The amendments do not affect the outcome of this grievance.

Footnote: 2

2 The instant grievance was filed 15 days after the two grievances that resulted in the cited Decision. The instant grievance was further delayed by a misunderstanding over whether this grievance could be submitted for a decision at Level IV on the record developed at the lower levels, and by the continuance of a Level IV hearing scheduled for March 4, 1999.

Footnote: 3

3 It is noted that W. Va. Code § 29-6A-3(t) provides that "[a]ny grievance evaluator may be excused from participation in the grievance process for reasonable cause, including, but not limited to, conflict of interest. . . .," but that, as noted above, this provision does not apply to immediate supervisors.

Footnote: 4

4 It is noted that, in many grievances, the immediate supervisor made the decision being grieved, and could not reasonably be expected to be fully impartial.

Footnote: 5

5 Grievant alleged at Level III that Deeds improperly altered the statement he took from Wykle. It was proven at Level IV that Deeds twice altered Wykle's statement, but at Wykle's request.