GUY HALE,

Grievant,

v. **Docket No. 01-HHR-104D**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/DONATED FOOD PROGRAM,

Respondent.

DECISION

On March 6, 2001, Grievant, Guy Hale, filed a grievance against his employer, Respondent, Department of Health and Human Resources/Donated Food Program ("HHR"), stating that the:

> letter dated March 1, 2001 of written reprimand lists several false accusations such as sabotage and insubordination. I feel I am being falsely accused of such acts. There are two employees who are responsible for the inventory count and four employees included in the reconciliation of inventory. I have never finished a count of inventory in four hours and to my knowledge it has never been done. Approximately, 70,635 cases of food were to be counted on February 28, 2001. Bob Jack, Accounting Technician, started counting on February 27, 2001 (the day before) and still was counting on February 28, 2001. Reconciliation alone for February inventory took over eight hours with Bob Jack, David Mullins, Darrell Carter and myself.
>
> I was never told by my supervisor, Redman Alston, that I was not to receive loads that came in on February 28, 2001. I have always received loads on inventory day and have never been told that someone else would receive loads on inventory day. Inventory day is considered “party day” for other employees.
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> I feel I am being the only one held responsible for DFP warehouse staff inefficiencies, which is impossible when teamwork is a very important part of my daily operation.

As relief Grievant sought to have the “[l]etter of written reprimand removed and to be treated the same as other employees involved with inventory.”

On March 21, 2001, Grievant filed a default claim at Level IV, stating that a default occurred at

Level I of the grievance procedure.

A Level IV hearing was held on April 17, 2001, solely for the purpose of taking evidence on the issue of whether a default had occurred. Grievant represented himself, and Respondent was represented by Jon R. Blevins, Esquire. Respondent admitted that a default had occurred. The burden of proof then shifted to Respondent to prove the charges against the Grievant by clear and convincing evidence, which requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999). Respondent declined to submit any evidence in support of the charges against Grievant, or to withdraw the written reprimand. This matter became mature for decision at the conclusion of the Level IV hearing.

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which provides, in pertinent part:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, orclearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

The following findings of fact are made based upon the procedural record and the admissions of the parties.

Findings of Fact

1. Grievant received a written reprimand on March 1, 2001.
2. On March 6, 2001, Grievant filed a grievance challenging the written reprimand.
3. A default occurred at Level I of the grievance procedure.

In addition, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. "The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a).

2. A default occurred at Level I of the grievance procedure.

3. "A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2)." Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

4. The burden of proof in this grievance was upon Respondent to prove the charges against the Grievant by clear and convincing evidence. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

5. Respondent, HHR, did not prove the charges against Grievant.

6. The remedy requested is not clearly wrong or contrary to law.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove the written reprimand given to Grievant on March 1, 2001, from any and all files within its control, and to send a letter to the Division of Personnel stating that the written reprimand has been rescinded by this Decision, and requesting that any copies of the letter of written reprimand within the possession of any Division of Personnel employee be destroyed or returned to Respondent. Respondent is further directed to takes steps to ensure that Grievant is treated the same as other employees.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: April 25, 2001