WARREN SHIRKEY,

Grievant,

v. **Docket No. 04-DOH-153D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

On October 10, 2001, and on October 15, 2001, Grievant, Warren Shirkey, filed grievances against his employer, the Division of Highway ("DOH"). His first Statement of Grievance reads, "Fread [sic] Hanshaw was the acting forman [sic] went to Chuck Smith over tarping trucking and refused to pick up tarp at the Distrit [sic]." The Relief Sought Section of the grievance form was not completed.

The second Statement of Grievance reads, "for continued harassment[,] called into office twice in a week over something I had no control over[:] Late 1) Tarp 2)." For relief sought Grievant stated, "Want harassment accured [sic] 10/12/01 [stopped]."

On April 21, 2004, Grievant filed a motion for default with this Grievance Board, stating his employer had defaulted on two grievances when it failed to issue Level III decisions within the required time frames. (See footnote 1) A Level IV default hearing was held June 22, 2004, and default was granted by order dated July 30, 2004. A hearing on whether the relief requested was contrary to law or clearly wrong was held on September 30, 2004, and this issue became mature for decision on that day, as the parties elected not to submitproposals. (See footnote 2)

Issues and Arguments

Because the prior Level IV hearing had only been on the issue of default, there was no copy of the Statements of Grievance in the file. It was unknown at that time what relief Grievant sought. Grievant indicated he had asked for two supervisors to be terminated. DOH then asked for and

received copies of Grievant's Statements of Grievance from the Level III Hearing Examiner, and Respondent's attorney saw for the first time what Grievant had originally requested as relief. The relief sought is identified on page one of this Decision, and there is no request for the termination of any supervisors.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Transportation Worker 2, with the North Charleston Headquarters.
2. On October 10 & 15, 2001, Grievant filed two grievances alleging harassment.
3. On December 7, 2001, Assistant District Engineer Dennis King met with Grievant to discuss both grievances. When asked what relief he was seeking for the grievance dated October 10, 2001, Grievant stated "he did not know." Mr. King talked with both Chuck Smith, Kanawha County Administrator, and Fred Hanshaw, Equipment Operator 3, and he found there was no mistreatment or harassment. He issued a LevelII Decision stating same on December 10, 2001.
4. On December 7, 2001, Mr. King also discussed the October 15, 2001 grievance with Grievant. After this discussion, Mr. King talked to Mr. Smith about Grievant's complaints. Mr. King found Grievant's failure to tarp his truck and late arrival to work were discussed with Grievant, Grievant was not "written up," and there was no evidence of harassment. Because Mr. King believed Grievant felt he was being harassed, he offered Grievant a transfer to the St. Albans Headquarters. Grievant refused this offer. (See footnote 3)
5. Grievant then appealed to Level III where the default occurred.
6. The parties agree any harassment of Grievant should cease immediately.

Discussion

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. W. Va. Code § 29- 6A-3. The burden of proof is on a respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent 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).

Consistent with this statutory presumption that Grievant prevailed on the merits, the undersigned must presume Grievant established harassment. W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy andprofession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

At the Level IV remedy hearing, Respondent, after noting Grievant's relief sought, agreed Grievant should not be harassed by his employer, and if Grievant had been harassed, this behavior should cease. Accordingly, Respondent agreed with the relief sought in this default grievance, given Grievant was presumed to have proven harassment.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3(a)(2). The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong.

2. The Grievance Board has determined a respondent's standard of proof that the relief sought is clearly wrong or contrary to law, once a default claim is proven, is by clear and convincing evidence. Lohr v. Div. of Corrections/Div. of Personnel, Docket No. 99-CORR-157D (Nov. 15, 1999). See W. Va. Code § 29-6A-3.

3. Harassment is defined as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law,policy and profession." W. Va. Code § 29-6A-2(l).

4. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). See Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

5. Respondent, of course, did not prove, or attempt to prove, by clear and convincing evidence, that any potential or actual harassment of Grievant should continue.

Accordingly, this grievance is **GRANTED**, Respondent is directed to cease any harassment of Grievant.

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 StateEmployees 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 15, 2004

Footnote: 1

At the default remedy hearing, the parties agreed there were three grievances. This decision will deal with the two described above.

Footnote: 2

Grievant represented himself, and Respondent DOH was represented by Barbara Baxter, Esq.

Footnote: 3

Grievant indicated in his testimony that he was not offered a transfer, but was told he was being transferred. Grievant

did not clearly explain why he was not transferred if this were the case. Grievant remains at the North Charleston Headquarters to this day.