DONNIE KIMBLE,

Grievant,

v. **Docket No. 98-DOH-405D**

DIVISION OF HIGHWAYS,

Respondent.

DECISION ON DEFAULT

On October 8, 1998, Donnie Kimble (Grievant) submitted an appeal to level four of the grievance procedure, requesting relief by default, pursuant to the provisions of W. Va. Code § 29-6A-3. Grievant alleged a default had occurred at level three in this grievance in which he alleges he was improperly suspended and demoted because of an alleged physical altercation between Grievant and a coworker, Thomas Ravoira. This matter was held in abeyance, pursuant to the joint request of the parties, for an extensive period of time for settlement negotiations. After settlement negotiations failed, the Division of Highways (DOH) conceded that a default had occurred at level three, and requested a level four hearing regarding whether the remedy requested by Grievant was contrary to law or clearly wrong. A hearing regarding the default remedy was conducted in this Grievance Board's office in Wheeling, West Virginia, on June 30, 1999. Grievant was represented by Samuel DeCapio, a coworker, and DOH was represented by counsel, Timbera Wilcox. Grievant seeks to have his demotion and suspension reversed, restoration of back pay and benefits for the thirty-day suspension period, and reinstatement to his previous position. This matter became mature for consideration on July 15, 1999, upon receipt of Grievant's post-hearing brief. DOH declined to submit a written brief. The following findings of fact are made from a preponderance of the evidence submitted at the level four hearing.

Findings of Fact

1. Prior to the discipline which is the subject of this grievance, Grievant was employed as a

Transportation Crew Chief.

2. On an unspecified date in October of 1997, Grievant and coworker Thomas Ravoira engaged in “horseplay” in the lunchroom, during which Grievant sat on Mr. Ravoira's legs and pretended to unzip his (Grievant's) pants.

3. Approximately six months later, in March of 1998, Mr. Ravoira filed a complaint against Grievant, alleging that Grievant had removed his own penis from his pants and “shook” it approximately 6 to 12 inches from Mr. Ravoira's face. Mr. Ravoira claimed that this conduct constituted harassment.

4. Larry Conrad, another DOH worker, was present in the lunchroom when the incident between Grievant and Mr. Ravoira occurred.

5. Mr. Conrad only saw Grievant and Mr. Ravoira “horsing around,” and he did not see Grievant engage in the conduct alleged by Mr. Ravoira.

6. As a result of Mr. Ravoira's complaint, Grievant was suspended for thirty dayswithout pay and demoted to Transportation Worker III.

Discussion

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. This default provision is contained in W. Va. Code §29-6A-3(a)(2), which provides, in pertinent part:

> 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, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

Respondent contends that awarding the requested remedy of reversing the discipline, restoring Grievant's pay and benefits, and reinstating him to his prior position, would be clearly wrong because the discipline was proper for Grievant's alleged misconduct. In a default matter, Respondent has the

burden of establishing its defense by a preponderance of the evidence. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. ofHealth & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Respondent contends that, in order to determine whether the remedy requested is clearly wrong, it is necessary to determine whether or not Grievant did, in fact, engage in the misconduct for which he was disciplined. Over Grievant's objection (See footnote 1) DOH was allowed to submit evidence regarding the underlying grievance and Grievant's alleged misconduct. However, the evidence offered simply does not prove by a preponderance of the evidence that the requested remedy, reversal of the discipline in this case, was contrary to law or clearly wrong.

As has occurred in past grievances in which Mr. Ravoira has alleged harassment on the part of his coworkers, (See footnote 2) he refused to comply with a subpoena to appear and testify at the hearing in this grievance. DOH did not request enforcement of that subpoena, and the undersigned refused a continuance, based upon Mr. Ravoira's past pattern of refusing to testify at these grievance hearings. Accordingly, the only evidence offered by DOH of the alleged misconduct was an unsigned, unsworn recorded statement given by Mr. Ravoira and the testimony of Mr. Conrad. The statement given by Mr. Ravoira is hearsay,which is not entitled to much weight under these circumstances, where Mr. Ravoira is apparently the only person who actually believes that this incident occurred and can explain how he felt harassed by it, and yet he refused to appear and testify against his alleged attacker. Moreover, Mr. Conrad, an eyewitness to the incident, did not see the incident as related by Mr. Ravoira in his statement. Although Grievant did not testify at the grievance hearing, his own recorded statement confirms only that Grievant and Mr. Ravoira were “horseplaying” and that he “pretended” to unzip his pants.

The evidence of record simply does not establish by a preponderance of the evidence that Grievant should be denied his requested remedy. There is insufficient evidence to support the conclusion that Grievant engaged in the conduct alleged, or that any act which he did commit warranted a suspension and demotion. The evidence does not show that Grievant committed sexual

harassment or harassment of any kind. Accordingly, because Respondent has failed to prove that the remedy is clearly wrong or contrary to law, Grievant is entitled to the requested relief.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. 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 timely requests a Level IV hearing, and 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). 2. Respondent Division of Highways failed to prove by a preponderance of the evidence that the remedy requested by Grievant, reinstatement to his position and back pay, is contrary to law or clearly wrong.

Accordingly, Grievant's request for default relief is **GRANTED**, and Respondent is ORDERED to reinstate him to his prior position and restore all lost wages, seniority and benefits during Grievant's thirty-day suspension period.

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, and 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.

Date: August 6, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant argued that, pursuant to the provisions of the default statute, he was entitled to the presumption that he had prevailed on the merits of the grievance; therefore, it would be improper to allow DOH to present any evidence regarding

the merits of the underlying grievance. Due to the outcome reached in this Decision, it is not necessary here to make a definitive ruling on this issue.

Footnote: 2

See Devore/Cline v. W. Va. Div. of Highways, Docket Nos. 98-DOH-277/278 (June 9, 1999). Mr Ravoira was also subpoenaed and refused to appear to testify at the level four hearing in DeCapio v. Div. of Highways, Docket No. 98-DOH-279 (Feb. 18, 1999).