SHAWN FARLEY,

Grievant,

v. **Docket No. 00-DOH-062D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

On or about September 27, 1999, Grievant Shawn Farley filed a grievance against his employer, Respondent Department of Transportation, Division of Highways ("DOH"), alleging that his supervisor, Dave Green, had assigned him to work locations so that Mr. Green could pursue a relationship with Grievant's wife. The grievance proceeded to Level III, and a hearing was scheduled for December 10, 1999. At that time, the parties agreed to continue the hearing for 60 days in order to allow Respondent to investigate the allegations, and to allow the parties to engage in settlement negotiations. The Level III hearing was rescheduled for February 15, 2000.

On February 10, 2000, the Level III grievance evaluator continued the hearing set for the 15th, on her own motion, stating as the reason that “[t]he Auditing Division's heavy workload precluded it from conducting the investigation and the Human Resources Division has taken responsibility for ensuring that a thorough investigation is conducted. Therefore, to provide the Human Resources Division sufficient time, this hearing is continued.” Grievant notified Respondent it was in default, and filed his default claim at Level IV on February 14, 2000.

This grievance was placed in abeyance for a period of time to allow the parties to attempt to reach a settlement of this grievance. As they were unable to do so, a Level IV hearing was scheduled for May 17, 2000, solely for the purpose of taking evidence on the issue of whether a default had occurred at Level III. Grievant was represented by Jerry A. Wright, Esquire, and Respondent was represented by Timbera Wilcox, Esquire. Neither DOH nor Mr. Wright appeared for the scheduled

hearing. The parties then agreed that this default claim could be submitted for decision without a hearing. This matter became mature for decision upon receipt of the last of the parties' written arguments, on June 7, 2000.

As there was no hearing and no written testimony was submitted by the parties, there is no evidence to be considered. However, inasmuch as Respondent does not dispute that a default occurred, there is sufficient information in the procedural history to address the initial issue of whether a default has occurred. Further, the parties have agreed in their separate written arguments that DOH has taken certain actions against Mr. Green, which will be considered a stipulation of fact, so that there is sufficient information to address the issue of relief as well.

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

Grievant's claim of default is based upon the failure to timely hold a Level IIIhearing, as he did not agree to the second continuance, or an extension of time of more than 60 days. W. Va. Code § 29-6A-4(c) provides as follows regarding when Respondent must act at Level III:

> (c) Level three.
>
> Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.
>
> The chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.

> The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

W. Va. Code § 29-6A-3(g) provides that the parties may waive these timelines. (See footnote 1) In this case the parties waived the timelines, but only for 60 days. That 60 day period expired on February 8, 2000, (See footnote 2) and the hearing had been scheduled for seven days from this date. The grievance evaluator could not exceed these agreed to timelines without further agreement of the parties. She failed to obtain Grievant's agreement, and a default occurred. As previously noted, Respondent did not dispute the default claim. Respondent, in its written argument simply proposed that it had done all it could do in this matter by investigating the allegations made by Grievant, removing Mr. Green as Grievant's supervisor by transferring him to another location, and demoting Mr. Green. Grievant agreed in his written argument that Respondent had taken these actions.

Grievant, however, also asked that he be awarded monetary damages for the mental anguish and emotional distress he has suffered, and suggested that a 15% increase in pay, retroactive to the date he filed his grievance, and prejudgement interest at 10%, should cover it. Respondent did not address the propriety of such relief.

This Grievance Board has made it clear that the relief requested by Grievant is not available from this body both because it is not the purpose of the grievance procedure to award such damages, and because such relief is speculative. Walls v. Kanawha County Bd. of Educ., Docket No. 98-20-325 (Dec. 30, 1998); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997).

> As for the "pain and suffering" damages Grievant seeks, an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". W. Va. Code § 18-29-5(b). This Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case. Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 225, 227 n.11 (1995).

Snodgrass, supra.

Grievant suggests that this issue be revisited. The undersigned declines to do so. The purpose of

the grievance procedure is to provide a forum for the resolution of employment problems, with the goal that the employer and employee will be able to work out a solution. In this case, the problem was Grievant's supervisor was not acting appropriately. DOH acted in a responsible manner to investigate the allegations, and tookaction to remove Mr. Green as Grievant's supervisor. It need not do more in the context of the grievance procedure. It would be contrary to law to award damages for pain and suffering to Grievant in this matter.

The following findings of fact are derived from the procedural record and the stipulation of fact.

Findings of Fact

1. This grievance was filed on or about September 27, 1999, by Grievant, and proceeded to Level III. On December 10, 1999, the parties agreed to a 60 day extension of the statutory timelines, and the hearing was set for February 15, 2000.

2. On February 10, 2000, the Level III grievance evaluator continued the hearing indefinitely without the consent of the parties.

3. DOH investigated Grievant's allegations, removed Dave Green as Grievant's supervisor, transferred him to another location, and demoted him.

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. Once a grievance progresses to Level III, a Level III hearing must be held by the chief administrator or his designee within seven working days of the receipt of the appeal, and a written decision must be issued and transmitted to the grievant within five working days of the Level III hearing W. Va. Code § 29-6A-4(c).

3. The parties may agree to extend the statutory timelines for processing a grievance, and did so in this grievance. However, the Level III grievance evaluator exceeded the agreed to timelines without agreement of the parties, and a default occurred. 4. “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).

5. This Grievance Board does not award tort like damages. Walls v. Kanawha County Bd. of Educ., Docket No. 98-20-325 (Dec. 30, 1998); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997). To award Grievant money for pain and suffering would be contrary to law.

Accordingly, inasmuch as Grievant has already received all the relief to which he is entitled, Grievant's request for damages for pain and suffering is **DENIED**, as is this grievance .

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: July 18, 2000

Footnote: 1

The statute provides that this agreement is to be reduced to writing. However, this Grievance Board has ruled that it is not necessary to reduce the agreement to writing in instances where it is clear that the parties have agreed to the waiver; for example, when the waiver is placed on the record. Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000). In this case, there is no dispute that the parties agreed to waive the timelines for 60 days, and the agreement is considered to be a valid waiver.

Footnote: 2

While "days" means working days when applying the statutory scheme (W. Va. Code § 29-6A-2(c)), the undersigned finds that, given that Grievant claimed a default and Respondent did not dispute this, the parties had agreed to a 60 calendar day extension of time.