CHERYLL FARLEY,

Grievant,

v.

Docket No. 02-HHR-088D

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

On March 14, 2002, Respondent, Department of Health and Human Resources ("HHR"), forwarded a claim of default made by Grievant, Cheryll Farley, to Level IV, apparently requesting a hearing on the default. A telephonic conference was held on April 17, 2002, at which time HHR's counsel, Jon R. Blevins, stated that HHR would not contest that a default occurred. A Level IV hearing was held on April 24, 2002, to take evidence on whether the relief requested was contrary to law or clearly wrong. Grievant represented herself. This matter became mature for decision upon receipt of the Grievant's written argument on May 3, 2002. Respondent declined to submit written argument.

Grievant filed this grievance on November 9, 2001. The statement of grievance reads:

> My perfor[m]ance appraisal was not given to me in a timely ma[nn]er. I was not interview[ed] or given a chan[c]e to see the changes in my scoring. I was not given priva[cy] to go over or give my input on the changes that w[ere] made. I had a 2.50 it went down to a 2.04.

The stated relief was "I want to be made [w]hole in every way. I disagree with my score." At the Level IV hearing, Grievant was asked to clarify what relief would make her whole. She stated she would be satisfied with a score of between 2.26 and 2.50 on her performance evaluation, and a merit increase of $1,008.

The following Findings of Fact are made based upon the evidence presented at Level IV.

FINDINGS OF FACT

1. Grievant is employed by HHR at Pinecrest Hospital as a Health Service Worker.

2. On September 2, 2001, Grievant's supervisor handed Grievant her performance evaluation for the 12 month period from September 1, 2000, through August 31, 2001, and told her she needed to sign it as she had to turn it in that afternoon. Grievant questioned her evaluation, suggesting she should have received a better evaluation, and her supervisor told her it was a good evaluation. Grievant was not given an opportunity to review her evaluation in any detail, she was not counseled about her evaluation, and she was not given a copy of her evaluation at that time.

3. Grievant received a rating of “meets expectations” in 22 categories on her performance evaluation, and a rating of “exceeds expectations” in 1 category. A rating of “meets expectations” is assigned a value of “2", and a rating of “exceeds expectations” is assigned a value of “3". To determine Grievant's total score on her performance evaluations, 22 was multiplied by 2, equaling 44, and 1 was multiplied by 3, and then these 2 numbers were added to arrive at a total of 47. The total of 47 should have then been divided by the number of categories, 23, to get the final score. Grievant's supervisor wrote a 2.50 on Grievant's evaluation as the final score.

4. Grievant signed her evaluation on September 2, 2001, believing she had received a rating of 2.50 on her performance evaluation.

5. According to a formula developed by HHR, Grievant would have received a merit increase of $1008.00 with a score of 2.50. 6. The correct result when dividing 47 by 23 is 2.04. This error was discovered by Elizabeth Thewes, Director of Administrative Services at Pinecrest Hospital, who was preparing the transmittal sheets to send the evaluations to the main office in Charleston. Grievant's evaluation was changed by Ms. Thewes to reflect the correct score. According to the formula develop by HHR, an employee receiving a score of 2.04 would receive a merit increase of $756.00.

7. Grievant received a copy of her performance evaluation in early November 2001, and this was the first time she was aware that her score was 2.04, not 2.50.

8. One of Grievant's co-workers had also received a rating of 2.50 on her performance evaluation, which was changed after she signed it to a 2.04. This employee grieved the change in her

score, and her grievance was granted at Level II of the grievance procedure, so that the score on her performance evaluation was returned to a 2.50. The original of this employee's evaluation had been lost. This employee claimed she had made comments on the evaluation form which could not be located, and that the document had been altered. A decision was made by HHR that, without the original document to demonstrate what ratings were originally assigned to individual categories, HHR would not be able to support its position during the grievance procedure, so the grievance was granted at Level II.

9. The original of Grievant's performance evaluation was not lost.

DISCUSSION

Because Grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard 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 argued it would be clearly wrong to grant the relief requested, because the change that was made to the final score on Grievant's performance evaluation after she signed it was the result of correcting a mathematical error in the calculation of her final score. Respondent correctly pointed out that the individual scores totaled 47, and when that number was divided by 23, the score was 2.04, not 2.50.

There was some discussion at the Level IV hearing about whether Grievant was challenging the rating she received in individual categories. It appeared that Grievant intended to do so, and Respondent raised a timeliness defense to this, arguing Grievant knew the ratings she had received in each category when she signed the performance evaluation on September 2, 2001, and she had 10 days from that date to challenge these ratings. Grievant, however, did not challenge the rating she received in any category, and the timeliness defense need not be addressed.

Respondent demonstrated by clear and convincing evidence that the change in Grievant's score on her performance evaluation was necessary due to the fact that Grievant's supervisor had not correctly calculated the score. It would be clearly wrong to change Grievant's score on her performance evaluation back to a 2.50.

The statement of grievance also alleges that Grievant was not given her performance evaluation in a timely manner, and that she was never interviewed regarding her performance evaluation. Respondent did not address these issues, and it must be assumed that, since Grievant has prevailed by default, she did not receive her performance evaluation in a timely manner. It is clear from the evidence that her supervisor never sat down with Grievant and explained the ratings to Grievant, or gave her the opportunity to respond to the ratings in any meaningful manner; nor did anyone explain to Grievant why her final score had been changed after she signed the performance evaluation. If a supervisor is not willing to sit down with the employee and take the time to go over the performance evaluation, and discuss the employee's performance, at least on an annualbasis, how is the employee to know whether she is doing a good job and how she can improve? Further, it is inappropriate to hand an evaluation to an employee and tell the employee to hurry up and sign it, without giving the employee time to read the evaluation, ask questions, and make comments. Steps should be taken by HHR to assure that this behavior is not repeated.

However, it would be equally wrong to simply award Grievant a higher rating than she earned to punish HHR for this behavior. It would not be fair to Grievant's fellow employees. While an agency is required to abide by its own lawfully established policies, its actions will not always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that 'a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). See Walker v. Dep't of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998). Grievant had plenty of time to go over her performance evaluation prior to the Level IV hearing, but did not argue she should have been rated higher in any of the 23 categories. The undersigned concludes that Grievant did not earn a rating higher than 2.04 on her performance evaluation, and it would be clearly wrong to give her a higher score.

Grievant pointed out during the Level IV hearing that a fellow employee had been notified, as Grievant had, that the final score on her performance evaluation had been changed from a 2.50 to a 2.04. When that employee filed a grievance, HHR had granted the relief requested, returning her score to a 2.50. She did not understand why HHR was willing to change this employee's score back

to 2.50, and would not do the same for her, and believed this was favoritism. This will be treated as an attempt to rebut Respondent's argument that it would be clearly wrong to grant the relief requested. Respondent admitted that the fellow employee's score had been returned to a 2.50, from a 2.04. However, Thomas McGraw, CEO at Pinecrest Hospital, explained that the original of this employee's evaluation had been lost. When the grievance was filed, and the grievant claimed she had made comments on the evaluation form which could not be located, and that the document had been altered, a decision was made that, without the original document to demonstrate what ratings were assigned to individual categories, HHR would not be able to support its position during the grievance procedure, so the grievance was granted at Level II.

The original of Grievant's performance evaluation has not been lost, nor has Grievant alleged that the document has been altered, except for the change in the final score. Although Grievant asserted that her ratings were the same as her co-worker's on the performance evaluation, without the original of the co-worker's performance evaluation, HHR did not believe this could be proven. Grievant is not in the same situation as her co- worker, and HHR's decision to concede on the co-worker's grievance, due to its inability to produce the original document, cannot be faulted.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. Respondent defaulted at Level III of the grievance procedure when a hearing was not held within the statutory time period. W. Va. Code § 29-6A-3.

2. In determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3.

3. The burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard 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 matterbeyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

4. Respondent demonstrated that the relief requested would be clearly wrong, as the final score on Grievant's performance evaluation is simply a mathematical calculation. This mathematical calculation results in a final score of 2.04, not 2.50.

5. When the respondent does not follow its own policies, this does not invalidate an action, unless “the error was harmful, in that 'a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). See Walker v. Dep't of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998).

6. As Grievant did not suffer any harm from Respondent's failure to give her her performance evaluation in a timely manner, or from Respondent's failure to counsel her regarding her performance evaluation, it would be clearly wrong to grant the relief requested as punishment for these procedural violations.

Accordingly, this grievance is **DENIED**.

Any party 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 8, 2002