MARY BETH PATTESON,

Grievant,

v. **DOCKET NO. 98-HHR-326D**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING GRIEVANT'S MOTION FOR DEFAULT JUDGMENT

The Grievant, Mary Beth Patteson, filed a motion for default judgment in the above-styled grievance on August 25, 1998, in accordance with W. Va. Code § 29-6A-3(a)(2) (1998). A hearing on this matter was held in this Board's Charleston, West Virginia, office on September 21, 1998. Grievant appeared pro se, Respondent Department of Health and Human Resources ("HHR") was represented by B. Allen Campbell, Esq., and Respondent Division of Personnel ("DOP") was represented by Joe E. Smith.[1]

The issue of default in a grievance filed by a state employee has only recently come within the jurisdiction of the Grievance Board. On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998.[2] That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> (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

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[1] The Division of Personnel was joined as an indispensable party to this grievance at Level IV.

[2] This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

> 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.

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A-5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

W. Va. Code § 29-6A-4(c) provides as follows regarding when Respondent must act at Level III:

> 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 of his or her designee shall hold a hearing in accordance with section six 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.
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> 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. (Emphasis added).

Respondents did not challenge whether Grievant could pursue her allegation of default at Level IV. If a default has occurred, then the grievant wins and Respondents may request a ruling at Level IV regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure. Thus, a grievant may come to Level IV asking for guidance on the lower level procedural issue of whether a default has occurred, requesting that a notice of default be issued, and in order to know how to proceed with his grievance.

This Grievance Board has found that the burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Galloway v. Div. of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). It is appropriate that this same principle apply to an assertion of default by a grievant, so that the burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence.[3] In this case, the burden is upon Grievant to demonstrate that the Level III decision was not issued on or before August 14, 1998. "The preponderance standard generally requires proof that a reasonable person would accept

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[3] If the respondent is the party appealing to Level IV, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no default occurred, due to the presumption set forth in W. Va. Code § 29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors/W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

In evaluating whether a default has occurred, it must also be kept in mind that "default judgements are not favored by the law." Thompson v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-117 (Apr. 30, 1998). Rule 55 of the West Virginia Rules of Civil Procedure allows a plaintiff to obtain a judgment by default when a defendant fails to timely "plead or otherwise defend." However, "[t]he principle is well founded that courts look with disfavor on judgments obtained by default." Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, ___ (1970). Rule 60 provides excuses which may be asserted to set aside a default.

> If any doubt exists as to whether relief should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits. McDaniel v. Romano, 155 W. Va. 875, 878, 190 S.E.2d 8, 11 (1972). The law strongly favors an opportunity for the defendant to make a case to an action against him. Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, 456 (1970).

Graley v. Graley, 174 W. Va. 396, ___, 327 S.E.2d 158, 160 (1985). In determining whether a default judgment should be entered in the face of a Rule 6(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party. Syl. Pt. 3, Parsons v. Consolidated Gas Supply Corp., 256 S.E.2d 758 (W. Va. 1979).

The undisputed evidence submitted by the Grievant established that she had a level three hearing on her grievance on August 7, 1998, but the level three decision was not issued until August 21, 1998, which is beyond the five working day response time limit required by W. Va. Code § 29-6A-4(c). Therefore, Grievant has met her burden of showing that default occurred.

Respondents raise two alternative defenses in support of their argument that the motion for default should be denied. First, Respondent HHR argues the delay was a result of unavoidable cause. Second, Respondent DOP argues that it is an indispensable party to this grievance, but was not joined at level three; therefore, a default judgment should not be upheld against it as it had no opportunity to appear at level three.

Barbara Wheeler, HHR's level three grievance evaluator, testified that HHR has recently hired several new grievance evaluators in response to the enactment of Code § 29-6A-3(a)(2). Grievant's level three grievance was assigned to Roy Cunningham, a new level three grievance evaluator on 90-day probationary status. Mr. Cunningham heard the grievance at level three on August 8, 1998. During that time, Ms. Wheeler, the supervisor of the new grievance evaluators, was off work on National Guard duty. Ms. Wheeler returned to work on August 13, 1998, and Mr. Cunningham resigned his position with HHR that same day. Mr. Cunningham's cases were distributed among the remaining grievance evaluators, and Ms. Wheeler took Grievant's case. After listening to the testimony and reviewing the evidence presented at level three, Ms. Wheeler issued her decision. It is HHR's practice and procedure that all level three decisions are submitted to Michael McCabe for review and approval, then submitted to the Commissioner for final approval, and returned to the grievance evaluator for issuance. Grievant's level three decision was

processed in the normal fashion and returned to Ms. Wheeler for issuance on August 21, 1998, the date on the certificate of service.

HHR argues that this series of events constitutes unavoidable cause, in that it was unforeseen that the grievance evaluator assigned to Grievant's case would resign before issuing a decision in her grievance. To further complicate matters, Ms. Wheeler, the supervisor of the unit, was on military leave at the time Mr. Cunningham was presumably deciding to resign. Once Ms. Wheeler returned and assumed responsibility for Grievant's case, she issued a decision as quickly as possible under the circumstances.

DOP's argument that a default judgment should not issue against it as it is an indispensable party to this grievance, but was not joined at level three, is more accurately a challenge to whether any relief granted to Grievant as a result of a default judgment would be contrary to law. DOP's absence at level three had no bearing on the timely issuance of the level three decision, and is not relevant to the discussion of whether a default has occurred.

Applying the analysis outlined in Parsons, supra, to the facts in this grievance, as well as the statutory exceptions for timely issuance of decision set forth in Code § 29-6A-3(a)(2), I find, for the reasons stated below, that Respondent HHR has proven, by a preponderance of the evidence, that its delay in issuing Grievant's level three decision was due to unavoidable cause. The merits of the grievance involve back pay for a day Grievant took off work due to a bomb scare at the Capital Complex. Clearly, her interests have not been prejudiced by HHR's delay, by seven days, in issuing its level three decision. Indeed,

Grievant did not file her motion for default until after she received the level three decision.[4] In addition, no intransigence on the part of HHR can be found in Ms. Wheeler's recitation of the facts leading up to this motion, and both parties will be well served to have the issue in question resolved on the merits.

WHEREFORE, Grievant's motion for default judgment is hereby DENIED. The parties are further instructed to provide mutually agreed upon dates to the Grievance Board for the level four hearing on the merits of this grievance.

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MARY JO SWARTZ
Administrative Law Judge

DATED: October 6, 1998

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[4] Grievants cannot wait to receive their level three decision to see what the outcome of their level three hearing was, and then decide to file a motion for default. Grievants must notify the employer that it is in default when the default occurred. See Harmon/Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 25, 1997), aff'd Circuit Court of Fayette County, Civil Action No. 97-C-332 (Jan. 27, 1998).