BARBARA BECKLEY,

Grievant,

v. **DOCKET NO. 98-HHR-354D**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES and DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING GRIEVANT'S MOTION FOR DEFAULT

This matter came on for hearing before the undersigned Administrative Law Judge on December 8, 1998, to hear argument on Grievant's motion for default in the above-referenced grievance. Grievant appeared pro se, and Respondent Department of Health and Human Resources was represented by B. Allen Campbell, Assistant Attorney General. The Division of Personnel did not appear.

I find, by a preponderance of the evidence, the following facts.

1. A level three grievance hearing was held in this matter on September 2, 1998.

2. The level three decision was issued on September 10, 1998.

2. Grievant had not received the decision by September 11, 1998, more than five (5) days following the hearing.

3. Grievant filed her motion for default on September 11, 1998.

4. Grievant received the level three decision on September 12, 1998.

5. The Certificate of Service indicates the decision was mailed on September 11, 1998.

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.[1] 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 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:

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[1] 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).

> 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.
>
> 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.[2] In this case, the burden is upon Grievant to demonstrate that the Level III decision was not issued on or before September 10, 1998. "The preponderance standard generally requires proof that a reasonable person would accept 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

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[2] 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).

> 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., 163 W. Va. 464, 256 S.E.2d 758 (1979).

A preponderance of the evidence establishes that a default under W. Va. Code § 29-6A-3(a)(2)(1998) has not occurred. While the level three certificate of service is dated September 11, 1998, which is six (6) working days following the level three hearing, HHR presented the testimony of Barbara Wheeler, Level Three Grievance Evaluator Supervisor, to explain that date. Ms. Wheeler testified that the level three grievance evaluator who heard the level three hearing issued the decision on September 10, 1998, and it was placed in HHR's inter-office mail by Judy Mullins, Ms. Wheeler's secretary on that date. When Ms. Mullins came into the office on September 11, 1998, the level three decision was still sitting in the inter-office mail box. Ms. Wheeler instructed Ms. Mullins to change the Certificate of Service to accurately reflect that the decision was mailed on September 11, 1998, and the decision was sent via the U.S. Postal Service on September 11, 1998. Grievant received the decision on September 12, 1998.

There is no reason to dispute Ms. Wheeler's veracity in this matter. She acted appropriately when instructing her secretary to change the Certificate of Service to

accurately reflect the date the decision was actually mailed, which serves to strengthen the credibility of her testimony in this matter.

Accordingly, Grievant's motion for default is **DENIED** and this matter will be scheduled for a level four hearing on the merits before the Grievance Board.

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MARY JO SWARTZ
Administrative Law Judge

Dated: December 17, 1998