HUSSEIN SHARIFPOUR,
Grievant,
v.

DOCKET NO. 98-DOH-265

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISON OF HIGHWAYS,
Respondent.

ORDER

This matter came on for hearing on August 27, 1998, pursuant to Grievant's request that he be deemed to have won this grievance by default, as provided for in the recently amended grievance statute for state employees, W. Va. Code § 29-6A-3(a)(2). Accordingly, upon agreement of the parties in a prehearing telephonic conference on August 17, 1998, a hearing was conducted solely to determine whether a default had occurred at level two. That hearing was held in the Grievance Board's office in Morgantown, West Virginia, at which time Grievant appeared pro se, and Respondent was represented by counsel, Timbera Wilcox. The evidence submitted at the hearing indicated the following sequence of events:

1. On May 28, 1998, Grievant filed a level one grievance with his immediate supervisor, alleging that his relocation/transfer, effective June 1, 1998, was the result of favoritism, discrimination and retaliation. A level one conference was held on June 9, 1998.
2. Grievant's immediate supervisor notified Grievant that he was without authority to grant relief at level one, which was stated in a memorandum to Grievant dated June 11, 1998.
3. Grievant appealed to William Wilshire, Director of Traffic Engineering, on June 12, 1998. A level two conference was conducted with Grievant and Mr. Wilshire in attendance on July 1, 1998.
4. Mr. Wilshire's written level two decision, denying the grievance, was mailed to Grievant on July 10, 1998, and it was received by Grievant on July 11, 1998.
5. On July 21, 1998, Grievant appealed to level four, alleging he had won the case by default, due to Mr. Wilshire's untimely response at level two.
6. Over Grievant's protests, a level three hearing was scheduled and conducted on July 21, 1998. Grievant participated in that hearing and attempted to assert his claims of default at level two. The hearing evaluator refused to hear Grievant's default claim, and the hearing proceeded on the merits of the case.
7. At the conclusion of the July 21 hearing, the level three evaluator held the record open pending further evidence to be offered by Respondent.[(1)] The level three hearing was to be scheduled to continue at a later date, if the evidence did not support the arguments made by Respondent.
8. To date, it is unknown whether the level three hearing evaluator has ruled on Respondent's evidence or whether the level three hearing will be scheduled to continue.

Effective July 1, 1998, Code §29-6A-3(a)(2) provides that "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. . . ." Because the level two decision was not sent until the sixth working day after the level two conference, Grievant argues that Respondent has not responded "in the time limits required," which would have been five days, pursuant to Code §29-6A-4(b).

At the level four hearing, Respondent moved to dismiss this matter on two alternative bases. In support of this motion, Respondent argued that, because this grievance was already pending

when the statute took effect on July 1, 1998, Grievant's claims are precluded. Alternatively, it contended that the default provision provides no mechanism for Grievant to request a default judgment at level four.[(2)]

It is a well-settled principle of statutory construction in this state that statutes operate only prospectively, unless retroactive applicability is clearly expressed or necessarily implied from the statute's language. Syl. Pt. 3, Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980). However, statutes which are merely procedural, rather than substantive, in nature may be applied retroactively. As recently held in Syl. Pt. 2, Public Citizen, Inc. v. First Nat'l Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996), "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application." See generally State ex rel. Blankenship v. Richardson, 196 W. Va. 726, 474 S.E.2d 906 (1996). Accordingly, an initial determination must be made as to whether the statute in question affects procedural or substantive rights.

Black's Law Dictionary, 6th Ed., at page 997, defines "substantive law" as:

> That part of law which creates, defines, and regulates rights and duties of parties, as opposed to 'adjective, procedural, or remedial law,' which prescribes method of enforcing the rights or obtaining redress for their invasion. The basic law of rights and duties . . . as opposed to procedural law. . . .

In the instant case, the default provision affects substantive rights and "augments substantive liabilities," in that the Grievant "prevails by default." In other words, the employee wins his grievance, and the employer is required to grant him the relief requested. Although the employer has the right to request a level four hearing to show that "the remedy received . . . is contrary to law or clearly wrong," the administrative law judge is to presume that "the employee prevailed on the merits of the grievance." Code §29-6A-3(a)(2) (1998). This is not a procedural matter, because the default provision creates a "substantive liability" on the part of the defaulting employer, imposing upon it the "duty" of providing grievant what he has requested.

As determined in Public Citizen, supra, statutes effecting substantive changes are not applicable to pending cases. Clearly, Grievant's case was already filed and in the grievance process on July 1, 1998, when the new statute took effect. Accordingly, the default provisions of Code §29-6A-3(a)(2) are not applicable to his grievance, and he is not entitled to relief.

Because the proceedings at level three in this grievance were not completed, this grievance will be remanded to that level, so that it may continue through the grievance procedure on the merits.

Accordingly, it is hereby **ORDERED** that Respondent's motion to dismiss is hereby **GRANTED**, and this matter is **REMANDED** to level three for further proceedings in accordance with this Order.

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V. DENISE MANNING
Administrative Law Judge
Date: September 9, 1998

1. This evidence included a transcript of proceedings in a federal court case, to which Grievant and Respondent were both parties, which Respondent alleged involved identical issues and had been settled by agreement. Due to the outcome of the proceedings in this grievance, this issue does not need to be addressed in any further detail at this time.
2. Because of the determinations reached regarding Respondent's former argument, the latter need not be addressed.