RANDALL NIERMAN, et al.,

_____ Grievant,

v. Docket No. 98-PEDTA-442D

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

ORDER DENYING DEFAULT

Randall Nierman and 41 fellow employees (See footnote 1) (Grievants) are employed by the West Virginia Parkways Economic Development and Tourism Authority (Parkways), as toll workers. This grievance is a consolidation by Parkways of four grievances, all arising from the same circumstances, alleging ”disparity and unfair treatment” in Parkways' allocation of service pay. These grievances were filed between August 13, 1998, and August 18, 1998. These grievances were denied at Level I, between August 17, 1998, and August 19, 1998, by various supervisors, and at Level II, on August 20, 1998, by James V. Kelley. They were appealed to Level III between August 21, 1998, and August 25, 1998. On August 31, 1998, Grievants received a notice from Parkways that a Level III hearing hadbeen scheduled for December 11, 1998, a Friday. On September 3, 1998, Grievants claimed that they had prevailed by default, and Parkways subsequently appealed this default claim to Level IV. A Level IV default hearing was held before the undersigned administrative law judge, at the Grievance Board's Beckley office, on May 12, 1999. At that hearing, Grievants were represented by Joan Hill, Esq., and Parkways was represented by A. David Abrams, Jr., Esq. The parties were given until June 11, 1999, to submit proposed findings of fact and conclusions of law, and this default claim became mature for decision on that date.

The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants appealed their adverse Level II decisions to Level III between August 21, 1998, and August 25, 1998.

2. Although a Parkways grievant may occasionally represent himself/herself at Levels I, II, and/or III, Grievants' representative at Level III, Boyd Lilly (Lilly), is the only grievance representative at Parkways who represents grievants at Level III hearings. He is the President of Local 3229 of the AFSCME/West Virginia State Employees Union.

3. Lilly routinely requests that grievance hearings be scheduled on Thursdays and Fridays, to accommodate his work schedule.

4. Relying upon Lilly's requests, Parkways' standard practice is to schedule grievance hearings on Thursdays and Fridays.

5. The fact that Level III hearings are only scheduled on Thursdays and Fridayshas created a backlog of grievances at Parkways.

6. Parkways scheduled Grievants' Level III hearing for December 11, 1998, the first available Friday.

DISCUSSION

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. (See footnote 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 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 falls 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): "the 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 Parkways must act at Level III:

> **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 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.**

If a default has occurred, then Grievants are presumed to have prevailed on the merits of the grievance and Parkways may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, then Grievants may proceed to the next level of the grievance procedure. Parkways argues that no default occurred under the terms of the statute. The Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340, (Feb. 26, 1993). Because Parkways disputes Grievant's claim that they prevailed by default under the terms of the statute, Parkways bears the burden of establishing that a default did not occur by a preponderance of the evidence. Ehle, supra.

A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidencewhich as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No.

92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The facts in this matter are undisputed. Grievants filed their appeals to Level III between August 21, 1998, and August 25, 1998. By notice dated August 31, 1998, (See footnote 3) Parkways scheduled a Level III hearing for December 11, 1998, a Friday. Accordingly, Parkways did not schedule a Level III hearing in this grievance until several months after it was appealed to Level III.

Thus, it becomes Parkways' responsibility to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level III, in compliance with W. Va. Code § 29-6A-4(c), "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

Parkways argues that it was prevented from providing a timely hearing by its accommodation of Lilly's request that such hearings only be scheduled on Thursdays and Fridays, and that this accommodation constituted excusable neglect on its part. Parkways is correct.

The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon its interpretation under the Federal Rules of Civil Procedure. "Excusable neglect seems to require a demonstration of good faith on the part of the partyseeking an enlargement and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied." Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997), quoting Bailey v. Workman's Comp. Comm'r, 170 W. Va. 771, 296 S.E.2d 901 (1982), quoting 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (1969).

Parkways presented the credible testimony of D. L. Lake (Lake), its Level III hearing examiner, to the effect that Lilly, who works the night shift on Mondays, Tuesdays, and Wednesdays, routinely requests that Level III hearings be held only on Thursdays and Fridays.

Lilly's testimony at Level IV on this issue was evasive. During his testimony, Lilly reluctantly agreed that it was "a possibility" that a majority of Level III grievance hearings were scheduled, at his request, on Thursdays and Fridays. Documentary evidence presented

by Parkways also supports this. By letter of July 15, 1996, Lilly requested that Lake schedule a hearing "for a Thursday or Friday of your choosing." By letter of March 11, 1997, Lilly requested that Lake schedule a hearing "for a Thursday of your choice." By another letter of March 11, 1997, Lilly requested that Lake schedule a hearing "on a Thursday afternoon." By letter of March 31, 1997, Lilly requested that Lake schedule a hearing "on the Thursday of your choice." The hearing that was the subject of Lilly's letters of March 11, 1997, and March 31, 1997, was scheduled by Lake for August 6, 1997, a Thursday. By letter of October 9, 1997, Lilly requested that Lake schedule a hearing on "a Friday after 11-1-97." By letter of October 21, 1997, Lilly requested that Lake schedule a hearing "for a Friday at your convenience." By letter of May 26, 1998, Lilly requested thatLake schedule a hearing "on a Friday in July of your choosing." By letter of July 13, 1998, Lilly requested that Lake schedule a hearing "on a Friday that is convenient for you." By letter of November 30, 1998, Lilly requested that Lake schedule a hearing "on a Thursday of your choice." The undersigned concludes that a majority of Level III grievance hearings were scheduled, due to Lilly's many requests, on Thursdays and Fridays.

Lake testified that Parkways reasonably relied upon Lilly's requests, and accommodated them. Under these circumstances, Parkways has shown both good faith and a reasonable basis for noncompliance with the time frame specified in W. Va. Code § 29-6A-4(c), and Grievants are estopped from using Parkways' reasonable accommodation of their representative's requests to raise a claim of default against Parkways. Therefore, Parkways has demonstrated, by a preponderance of the evidence, that it was prevented from providing a timely hearing at Level III as a result of excusable neglect.

Accordingly, it is determined that Parkways is not in default in this grievance. This grievance is remanded for a Level III hearing.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1 1.

If a grievance evaluator required to respond to a grievance at any level fails

to make a required response in the time limits required by W. Va. Code §29-6A-4, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud, the grievant shall prevail by default. W. Va. Code §29-6A-3(a)(2).

2. At Level III, the administrator or his or her designee shall hold a hearing within seven days of the receipt of the appeal. W. Va. Code § 29-6A-4(c).

3. Because Parkways disputes Grievants' claim that they prevailed by default under the terms of the statute, Parkways bears the burden of establishing that a default did not occur by a preponderance of the evidence. Ehle v. Bd. of Directors, Docket No. 97- BOD-483 (May 14, 1998).

4. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

5. Parkways established, by a preponderance of the evidence, that it was not in default in this grievance.

6. Parkways was prevented, as a direct result of excusable neglect, from providing a required response in a timely manner. See W. Va. Code § 29-6A-3(a)(2).

Accordingly, Grievants' request for a finding of default at Level III under W. Va. Code § 29-6A-3(a)(2) is DENIED. (See footnote 4) **This grievance is remanded for a Level III hearing.**

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated June 24, 1999

Footnote: 1

The additional grievants are Stephen M. Smith, Roberta Harper, Clara Riddle, Rebecca Coon, Mary Samples, Marian Edwards, James L. Thomas, Larry D. Farley, Hal Myers, Steven A. Fortner, Alisa G. Blankenship, Terry W. Griffith, Melissa Smith, Faye Codle, Shirley Bonham, Jean Via, Troy Harvey, Wanda Cook, Edwin Bailey, Phyllis Wyatt, Louie C. Constantino, Robin Weddle, Retha Greer, Jasper Smith, George Epperly, II, Thomas Covey, Kimberly Worrell, Bonnie Hall, Alicia Burdette, James Deck, Robert Taylor, Shirley Martin, Nora Greene, John

Romage, Billie Dunlap, Patricia Rose, Carol Tigart, Ruth Brunty, Jim Vandal, Jr., Jacqueline Robinson, and Frederick M. Elmore, Jr.

Footnote: 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).

Footnote: 3 ***Grievants do not contend that this response placed Parkways in default.***

Footnote: 4 ***This Order Denying Default is not considered a final, appealable, order.***