KAREN MORRISON,

Grievant,

v. **Docket No. 99-LABOR-146D**

DIVISION OF LABOR,

Respondent.

ORDER DENYING DEFAULT

Grievant, Karen Morrison, filed a motion for default judgment, with her employer, Division of Labor ("DOL") in the above-styled grievance on April 2, 1999, 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 May 12, 1999, and became mature for decision at that time. Grievant was represented by Larry Walker, and the Division of Labor was represented by Kelli Talbott, Senior Assistant Attorney General.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact pertinent to this matter.

Findings of Fact

1. This grievance was filed directly at Level II on or about January 26, 1999.

2. On January 27, 1999, Deputy Commissioner Bob Miller sent a notice to Grievant informing her that the Level II Conference would be held on February 2, 1999. Deputy Commissioner Miller did not inform Grievant's representative, Larry Walker, of this conference. Grievant never contacted Mr. Walker about the conference or asked him when they would prepare for it. The notice Grievant received indicates that no one else was notified.

3. On the morning of February 2, 1999, Deputy Commissioner Miller saw Mr. Walker in the office and indicated he would see him at the conference in the afternoon. Mr. Walker then informed Deputy Commissioner Miller he was unaware of any Level II conference.

4. Later that same morning, Grievant saw Mr. Walker and asked him about the Level II

conference.

5. The Level II conference was held on February 2, 1999, as scheduled. Although the fact that Mr. Walker was not notified was discussed, neither Grievant or her representative asked for a continuance. After this conference, Grievant was given additional time to submit any further documentation she wished Deputy Commissioner Miller to consider.

6. Deputy Commissioner Miller received these additional written materials on February 8, 1999.

7. February 12 and 15, 1999, were state holidays.

8. On February 16, 1999, one day before the deadline, a Level II decision denying the grievance was issued. This decision discussed the facts of the case, and the rationale for upholding the suspension, but did not contain an appeal paragraph. Grievant received this decision of February 17, 1999.

9. When Deputy Commissioner Miller discovered this error, he sent a second letter with the appeal information on February 18, 1999. Grievant received this additional letter on that same date.

10. Deputy Commissioner Miller did not return Grievant's original grievance form to Grievant, and although Grievant has complained about this failure, she has never asked for the return of the original form. 11. On February 22, 1999, Grievant appealed her grievance to Level III.

12. On February 26, 1999, a Level III pre-hearing conference was held with the parties in attendance.

13. Grievant's Level III hearing was held on March 3, 1999, by agreement of the parties. The deadline for the submission of proposed findings of fact and conclusions of law was set for April 8, 1999, by the agreement of the parties.

14. On April 12, 1999, without the knowledge of her representative, Grievant sent a letter to Deputy Commissioner Miller requesting a default judgement at Level II based on his failure to timely issue the Level II decision and on other alleged procedural difficulties. (See footnote 1)

15. On April 16, 1999, Deputy Commissioner Miller issued a letter denying the default request.

16. On April 21, 1999, the Level III decision was issued denying the grievance on the merits, as the issue of default was not before the Level III Hearing Examiner.

17. On April 27, 1999, Grievant appealed the Level III decision to Level IV.

Discussion

The issue of default in a grievance filed by a state employee came within the jurisdiction of the Grievance Board last year. On March 13, 1998, the West VirginiaLegislature 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 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."

This 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. ofTrustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Because Grievant is claiming she prevailed by default under the statute, she bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

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

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

W. Va. Code § 29-6A-3(i) states:

> Decisions rendered at all levels of the grievance procedure shall be dated, in writing setting forth the decision or decisions and the reasons for the decision, and transmitted to the grievant and any representative named in the grievance within the time prescribed. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

Grievant's testimony focused on the fact she did not receive the appeal paragraph until February 18, 1999, and this was one day late. She acknowledges she received thedecision in a timely manner. However, the default provisions are triggered by the failure of the Grievance Evaluator to respond and to "issue a written decision upon the appeal within five days of the conference." W. Va. Code § 29-6A-4(b) (emphasis added). See Gillum v. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-387D (Dec. 2, 1998). The question presented here is whether the failure to include the appeal paragraph resulted in the decision not being "a decision", and whether Respondent substantially complied with the statutory requirements.

This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya, supra, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable. Thus, given this set of facts, the undersigned Administrative Law Judge finds Respondent substantially complied with the statutory requirements.

It should be noted that by Respondent's actions, the date from which Grievant could file her grievance to Level III was increased, and the time for filing did not begin to run until February 18, 1999, the date she received the appeal paragraph. Additionally, althoughGrievant did not receive the appeal information until a day later, she still knew in a timely manner that her grievance was denied at Level II, and that if she wished to contest that decision she must appeal to Level III. (See footnote 3) It is noted that Grievant filed her appeal to Level III three days after she received the decision, and two days after she received the appeal paragraph.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Failure to include the appeal paragraph with the decision, when this error was due to oversight and was corrected within one day will not result in a finding of default. 2. Respondent substantially complied with the statutory provisions.

Accordingly, Grievant's request that a default be entered is **DENIED**, and this grievance will be set for a Level IV hearing on the merits of the case. The parties, based on a June 1, 1999 letter, in which Grievant changed her decision to submit her case on the record at Level IV, are directed to submit five agreed upon dates for a Level IV hearing.

_____ **JANIS I. REYNOLDS**

Administrative Law Judge

Dated: June 18, 1999.

Footnote: 1

Grievant alleged Respondent was also in default because it did not return her original grievance form, her representative was not informed of the Level II conference in advance, and she was not provided with requested documentation at Level II. These issues will not be addressed in this default order as the issue of default relates only to the issue of whether the Level II decision was issued in a timely manner pursuant to statute.

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

The parties pointed out to the undersigned Administrative Law Judge that Grievant had filed a grievance on her prior written reprimand and had taken this grievance to Level IV.