REBECCA K. LOHR,

Grievant,

v. **Docket No. 99-CORR-157D**

DIVISION OF CORRECTIONS

and DIVISION OF PERSONNEL,

Respondents.

DECISION ON DEFAULT

Grievant, Rebecca K. Lohr, employed by the Division of Corrections (Respondent) as a Correctional Counselor I at the Northern Correction Center, filed an appeal to level four on April 20, 1999, alleging that she was entitled to prevail by default because her employer had failed to timely respond at level three of the grievance procedure. A hearing was conducted on May 21, 1999 for the purpose of determining whether a default had occurred, pursuant to the provisions of W. Va. Code §29-6A-3. Subsequent to that hearing, an "Order Granting Default" was issued on July 22, 1999, finding that a default had occurred at level three, and ordering that the matter remain on the Grievance Board docket for further proceedings to determine whether the remedy sought by Grievant was contrary to law or clearly wrong.

A hearing on the default remedy was conducted in the Grievance Board's Wheeling office on September 1, 1999. Grievant was represented by Rick Lohr, her spouse and co- worker, the Division of Corrections was represented by Charles Houdyschell, Jr., Esq., and the Division of Personnel did not appear or otherwise participate in the proceedings. The matter became mature for decision at the conclusion of the hearing after both parties declined the opportunity to submit post-hearing proposed findings of fact and conclusions of law. The facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Effective February 1, 1995, Grievant was promoted to the position of Correctional Counselor I at the Northern Regional Jail and Correctional Facility.

2. Prior to the promotion, Grievant had previously been classified as an Office Assistant II, pay grade 4, with an annual salary of $13,500.00.

3. Upon promotion to the Correctional Counselor I position, Grievant's salary was elevated to pay grade 9, with a base pay of $17, 256.00.

4. At the same time another female employee was promoted from Office Assistant II to Correctional Counselor I, with salary revisions identical to Grievant's.

___5. Two male employees were promoted in February 1995. All were previously classified as Correctional Officer II, pay grade 9, with an annual base salary of $18,828.00, to Correctional Counselor I, pay grade 9, with an annual base salary of $19,404.00. (See footnote 1)

Discussion

The default provision contained in W. Va. Code § 29-6A-3(a)(2), provides, in pertinent part: 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 hearingexaminer 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.

Once a grievant has proven a default, the hearing examiner must presume that the grievant prevailed upon the merits of the case. Respondent then has the burden of establishing by a preponderance of the evidence that the remedy requested is contrary to law or clearly wrong. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W.Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993).

Two issues must be addressed in the resolution of this matter. First, whether an employer may overcome the presumption that the grievant prevailed on the merits of the case. Second, if rebuttable, what degree of proof is required to overcome the presumption.

As previously noted, when an employee establishes that a default has occurred, W. Va. Code §18-29-3(a) creates a presumption that the employee prevailed upon the merits of the grievance. Presumptions may generally be defined as procedural rules which govern the production of evidence,

according to which a fact finder may assume certain facts in the absence of preponderating evidence to the contrary. State v. Dodds, 54 W. Va. 289, 46 S.E. 228 (1903). Presumptions are classified as conclusive, or irrebuttable, or rebuttable. In his treatise on evidence, Handbook on Evidence for West Virginia Lawyers (1978), Franklin D. Cleckley commented that the term irrebuttable presumption is "intrinsically inconsistent" in that the definition of presumption precludes it from being irrebuttable. He defined irrebuttable presumption as one which "cannot be overcome by any evidence except evidence that the basic facts underlying the asserted presumptions are not true." He defines a rebuttable presumption as that which "may be disproved by contradictory evidence", with the burden of producing evidence that the fact does not exist shifting to the adverse party. Although the presumption in W. Va. Code §29-6A-3 is not labeled, the unambiguous language used by the legislature allows the Respondent to overcome the presumption by showing that the requested relief is contrary to law or clearly wrong.

The next issue to be addressed is the degree of proof the employer must meet in showing that the requested relief is clearly wrong or contrary to law. In general, the party bearing the burden of proof in a grievance must prove his or her case by a preponderance of the evidence. This is the least demanding degree of proof, and requires only a showing that an argument is more likely than not true. Occasionally, a party must meet a greater burden, and present clear and convincing evidence of the claim. Clear and convincing evidence requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Because the purpose of the default provision in W. Va. Code §29-6A-3 is to encourage employers to timely rule upon pending grievances, and provides a potentially severe penalty for the failure to do so, but also includes language whichallows the respondent to show the requested relief is "clearly wrong", it appears that the higher standard was intended to be applied in these matters. (See footnote 2)

In the instant case, Grievant is requesting a salary increase of $2,148.00, the same amount awarded to two male Correctional Counselors, and back pay in that amount for each year beginning in 1995. Respondent contends that the salaries of all the Correctional Counselors were determined pursuant to Division of Personnel Policy.

In her original grievance, Grievant asserted that she is entitled to "equal pay for equal work", and complained that her lower salary was attributable to discrimination on the basis of gender, as

prohibited by federal legislation. Following the statutory language, it must be presumed that Grievant prevailed on the merits of her claim, and Respondent must prove that, notwithstanding this presumption, awarding her the requested remedy would be contrary to law or clearly wrong.

At level four, NCC Human Resources Director Greg Yahnke testified that when Grievant transferred from the position of Office Assistant II to Correctional Counselor, her salary was increased from pay grade four to pay grade nine, to the entry level of her current position. By comparison, two male employees who transferred to Correctional Counselor positions had previously been classified as Correctional Officers II, and compensated at pay grade nine. Their change in assignment had been a lateral transfer, that is, they retained their salary in pay grade nine, and were given a three percent merit raise. Mr. Yahnke stated this outcome was in compliance with Division of PersonnelPolicy, “Pay Plan Implementation”. The Policy provides in pertinent part:

C. When an employee is promoted, his/her pay shall be adjusted as follows:

2. Salaries within the range of the current classification shall be increased by one 5% increment per pay grade range advanced to a maximum of 3 pay grade ranges or to the minimum rate of the higher pay grade, whichever is greater.

Because the change in Grievant's classification spanned five pay grades, she was awarded the maximum salary increase allowed by policy, which was in her case, the minimum rate of the higher pay grade. This amount was greater than the fifteen percent she would have received if given the five percent increase for the maximum three pay grades. The males cited by Grievant were already earning much more than Grievant, and received no salary increase based upon the change in classification, but were awarded a merit increase.

Respondent established that there was no discriminatory motive when it set the salaries of Grievant's fellow employees at a level which exceeded her salary. Instead, the higher salary awarded to Grievant's male coworkers was the result of the paygrade they were previously assigned as Correctional Officers. Prior classification is clearly a factor other than gender since it applies equally to males and females, and constitutes a reasonable basis for the pay differences identified here. See Brutto v. W. Va. Dept. of Health and Human Resources, Docket No. 96- HHR-076 (July 24, 1996).

Respondent additionally argued that the grievance had not been timely filed.

W. Va. Code §29-6A-4(a) provides:

Within ten days following the occurrence of the eventupon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant . . . .

Although the facts establish that the events upon which the complaint is based occurred in 1995, Grievant claims that she was not aware of the salary discrepancy until shortly before the grievance was filed. W. Va. Code §29-6A-3(a)(2) requires that "[a]ny 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." Respondent did not raise the timeliness issue at or before level two, and may not rely upon the claim to prevail at level four.

Consistent with the foregoing findings of fact and discussion, the following Conclusions of Law are appropriately made in this matter.

Conclusions of Law

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a level four hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code §29-6A-3(a)(2); Parsons v. Div. of Corrections, Docket No. 99-CORR-056D2 (July 19, 1999).

2. The language of W. Va. Code §29-6A-3(a)(2) creates a presumption that thegrievant prevailed on the merits of the case when the employer did not timely respond to the complaint, resulting in a default.

3. To rebut the presumption created in W. Va. Code §29-6A-3(a)(2), a respondent must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true.

4. W. Va. Code §29-6A-3(a)(2) requires that "[a]ny 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."

5. Respondent did not raise the timeliness issue at or before the level two hearing.

6. Respondent established that the difference in starting salaries was the result of the prior classifications held by the employees in question, and was not gender-related, thereby proving that the remedy requested by Grievant is clearly wrong.

Accordingly, the requested remedy is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: November 15, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

A third male was cited, but his actual salary was not confirmed in the record.

Footnote: 2

This interpretation would also be consistent with the language of W. Va. Code §29- 6A-7(4), which provides that a level four decision may be appealed if it "[i]s clearly wrong in view of the reliable, probative and substantial evidence on the whole record . . . ."