MAMIE K. SPENCER,

Grievant,

v. Docket No. 99-HHR-113D

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WELCH EMERGENCY HOSPITAL,

Respondent.

ORDER GRANTING DEFAULT

Mamie K. Spencer (Grievant) is employed by Welch Emergency Hospital (WEH) in its cardiopulmonary department. She filed this grievance on February 1, 1999, alleging that she was the victim of discrimination with regard to her salary. This grievance was denied at Level I, on February 2, 1999, by Immediate Supervisor Jeffrey Mays (Mays).

Grievant appealed to Level II on February 2, 1999. Grievant received no response at Level II until February 25, 1999, when she received a memo. This memo scheduled a Level II conference for this grievance on March 1, 1999, and requested a time frame extension from Grievant. By letter of February 26, 1999, Grievant denied WEH's request for a time frame extension, and claimed to have prevailed by default, inasmuch as WEH had failed to hold a conference on her grievance within five days of its receipt of her appeal to Level II. By letter of March 3, 1999, Grievant appealed her claim of default to Level IV.

A Level IV default hearing was held on April 26, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by Sandra Parker, and WEH was represented by Assistant Attorney GeneralDennise Smith. The parties were given until May 26, 1999, to submit proposed findings of fact and conclusions of law and this grievance became mature for decision on that date.

The following Findings of Fact pertinent to resolution of this matter have been determined

based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant appealed her adverse Level I decision to Level II on February 2, 1999. She gave her appeal to Mays, who put it in the mailbox of Cathy Addair (Addair), who represents WEH in grievance proceedings.

2. On February 25, 1999, Grievant received a memo from Level II grievance evaluator Scott Burford (Burford). This memo scheduled a Level II conference for her grievance on March 1, 1999, and requested a retroactive time frame extension from Grievant.

3. By letter of February 26, 1999, Grievant denied WEH's request for a retroactive time frame extension, and claimed to have prevailed by default.

4. On March 3, 1999, Burford issued a Level II decision to Grievant, denying her grievance based on her failure to attend the Level II conference.

5. Grievant sent a letter to this Grievance Board, dated March 3, 1999, claiming that she had prevailed by default, inasmuch as WEH had failed to hold a conference on her grievance within five days of its receipt of her appeal to Level II.

6. Addair was absent from WEH due to illness until February 16, 1999. In her absence, James Young (Young) was designated to replace her.

7. Level II grievance evaluator Burford was present at WEH during thependency of this grievance.

8. WEH instituted a policy, by memo dated September 29, 1998, requiring that a grievant hand deliver, in an envelope marked "DATED MATERIAL INSIDE," her original grievance statement to the Human Resources Director of WEH. This procedure is also required of a grievant appealing to Level II.

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 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 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(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.**

If a default has occurred, then a grievant is presumed to have prevailed on the merits of the grievance and WEH 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 the grievant may proceed to the next level of the grievance procedure. WEH 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 Grievant claims she prevailed by default under the terms of the statute, she bears the burden of establishing such default by a

preponderance of the evidence. Patteson v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998). 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). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The facts in this matter are undisputed. Grievant filed her appeal to Level II on February 2, 1999. WEH first responded to her appeal on February 25, 1999, in a memo requesting a retroactive time frame extension and scheduling a conference on March 1, 1999. In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. In computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E. 362 (1911). See also W. Va. R. Civ. P. 6(a). Therefore, February 2, 1999, is excluded.

Also excluded are Saturdays, February 6, 13, 20, and 27; and Sundays, February 7, 14, 21, and 28. February 12, Lincoln's Birthday, and February 15, Presidents' Day, are also excluded. Accordingly, WEH did not respond to Grievant at Level II until 14 working days after she filed her appeal, and did not schedule a Level II conference with her until 18 working days after she filed her appeal to Level II.

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

WEH argues that it was prevented from providing a timely response by the absence from work due to illness of Cathy Addair, who represents WEH in grievance proceedings. Addair was absent from WEH due to illness until February 16, 1999. However, Addair credibly testified at Level IV that in her absence, Young was designated to replace her. Young's credible Level IV testimony confirmed this, as did Burford's memo of March 3, 1999, which

referred to Addair's absence and Grievant's failure to hand deliver her Level II appeal to Addair's "designee." Although the absence of a grievance evaluator from work has been found to constitute unavoidable cause, Patteson, supra, it was also clear from testimony at Level IV that Level II grievance evaluator Burford was present at WEH during the pendency of this grievance. (See footnote 2) The undersigned finds that, by a preponderance of the evidence, Burford was present at WEH to conduct the conference, and Young was present to represent WEH at it. It is also noted that, even under WEH's view of these events, no action was taken on this grievance, after Addair's return to work on February 16, 1999, until Burford's memo to Grievant, dated February 25, 1999. Accordingly, WEH has failed to prove that it was prevented from providing a timely response by Addair's absence.

WEH also argues that Grievant did not follow the requirements of its policy or "protocol," set forth in a memo dated September 29, 1998, which requires that a grievant hand deliver, in an envelope marked "DATED MATERIAL INSIDE," her original grievancestatement to the Human Resources Director of WEH, and do so again when appealing to Level II. WEH relies on 156 CSR 1-3.2 as its authority for issuing this policy. This Procedural Rule provides that employers should establish written procedures relating to employee grievances at Levels I, II, and III. However, this Rule does not permit WEH to add procedural hurdles to the grievance procedure set forth in W. Va. Code §§ 29-6A-1 et seq.. WEH is reminded that the legislature intended a "simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps." Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E. 2d 640 (1997). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1989); Duruttya v. Bd. of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989). Finally, WEH failed to establish that it was harmed in any way by Grievant's alleged failure to jump through the procedural hoops established by WEH's policy.

In these circumstances, WEH has failed to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level II as a result of sickness, injury, excusable neglect, unavoidable cause or fraud.

Accordingly, it is determined that WEH is in default in this grievance, and it may proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2), that the remedy sought by Grievant is contrary to law or clearly wrong. WEH may request a Level IV hearing, within five days of

the receipt of this written notice of default, to present evidence on this issue.

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 II, the administrator or his or her designee shall hold a conference within five days of the receipt of the appeal. W. Va. Code § 29-6A-4(b).

3. When a grievant asserts that her employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Patteson v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 98-HHR-326 (Oct. 6, 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. Grievant established, by a preponderance of the evidence, that a timely response was not provided to her at Level II.

6. WEH was not prevented, as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud, from providing a required response in a timely manner. See W. Va. Code § 29-6A-3(a)(2). Accordingly, Grievant's request for a finding of default at Level II under W. Va. Code § 29-6A-3(a)(2) is GRANTED. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated June 2, 1999

Footnote: 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).

Footnote: 2

Burford, during his testimony at Level IV, displayed an extremely poor memory of the events surrounding Grievant's appeal to Level II.