JAMES GRATE,

Grievant,

v. **Docket Nos. 99-DOT-045D &**
99-DOT-048D

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF MOTOR VEHICLES,

Respondent.

ORDER

On January 28, 1999, James R. Grate (Grievant) appealed to Level IV of the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., alleging he was entitled to prevail by default in a grievance he filed against his employer, Respondent West Virginia Department of Transportation, Division of Motor Vehicles (WVDMV). Following an extended continuance requested by Grievant, a Level IV default hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on September 27, 1999. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, andthis matter became mature for decision on October 11, 1999, upon expiration of the agreed time limit for submitting a written post-hearing argument. (See footnote 2)

The following Findings of Fact pertinent to resolution of this issue have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV default hearing.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Department of Transportation, Division of Motor Vehicles (WVDMV), as Manager of the Governor's Highway Safety Program.

2. David Bolyard is employed by WVDMV as Director of Driver Services.

3. The unit which Grievant manages was placed under the WVDMV by Executive Order of the Governor in February 1998. At that time, Grievant began reporting directly to Mr. Bolyard as his immediate supervisor.

4. R. Douglas Thompson is employed by WVDMV as Manager of Driver Licensing.

5. On or about December 15, 1998, Mr. Bolyard assigned Grievant to work under the supervision of Mr. Thompson.

6. On December 23, 1998, Grievant submitted a grievance to Mr. Bolyard which stated the following:

> At your meeting on December 15, 1998, attended by Mr. Doug Thompson and myself, held in your office between 1:30 p.m. and 3:30 p.m., you assigned Mr. Thompson to be my direct Supervisor. This changes the lineof supervision which had been in place since my transfer to DMV on February 1, 1998, from yourself as Director of Driver Services. You also stated in the course of the meeting that you had become dissatisfied with my supervision of the Highway Safety Program since Ms. Martha Hinchman had filed a grievance approximately three months ago and further that you had insufficient time to allow for proper supervision of myself and/or the Highway Safety Program.
>
> Since grounds to support Martha's grievance could not be demonstrated and the grievance was subsequently not upheld and ultimately withdrawn by Martha, and since the DMV Table of Organization presented to me upon transferring to DMV in February indicates that Mr. Thompson & I are peers, and since this action now places in me in a subservient position to Mr. Thompson, my perception, and perhaps that of others of this action is in effect a demotion.

J Ex 1. (See footnote 3)

7. As relief sought in the grievance described in Finding of Fact Number 6, above, Grievant requested the following:

> To resolve this Grievance, I request the following: 1) Since this action was taken in part or whole from information in or generated by the Grievance filed by Martha Hinchman, that a true copy of this document be presented to me, 2) Evidence be presented to substantiate the fact that the constraints on your time has (sic) materially changed for my supervision from the period prior to Martha's Grievance to the period after Martha's Grievance, and 3a) that you rescind your decision regarding Doug Thompson becoming my supervisor and replace [it] with a detailed list or understanding of needed improvements that I and/or the other staff of the Highway Safety Program need to accomplish, or 3b) that the supervision of the Highway Safety Program be transferred to an Assistant Commissioner within DMV which may have more available time.

J Ex 1.

8. On December 23, 1998, Grievant submitted a second, separate grievance to Mr. Bolyard which stated the following:

> At your meeting on December 15, 1998, attended by Mr. Doug Thompson and myself, held in your office between 1:30 p.m. and 3:30 p.m., you made the observation that Commissioner Miller was deeply disappointed by the lack of media coverage at the recent summer Buckle-Up campaign award ceremony. You also made it quite clear that this situation was directly attributable to me and/or one or more members of the Highway Safety Program staff.
>
> As you may not recall, the date for the awards presentation was tentatively set prior to the April 1998 “Kick-Off’ luncheon held at the Charleston Civic Center. Further, at each survey, participants were reminded the ceremony would take place in early November.
>
> And, as I'm sure as you will recall, prior to Ms. Martha Hinchman initiating her grievance, I made a point to visit with you in your office at least once every week. And as you may have noted, I would refer to a list to insure that all items that required your assistance would be covered. During the majority of these visits, I would ask the following four things regarding the summer Buckle-Up program:
>
> 1) That an invitation would be extended to the Governor to attend & make the presentations,
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> 2) That an invitation would be extended to Commissioner Miller to attend & to make the presentations should the Governor be unable to attend.
>
> 3) That in consideration of the first two items, to clarify that the date of November 9, 1998, was acceptable, and
>
> 4) That adequate and appropriate media coverage would be provided as it was at the initial “kick-off’ luncheon.
>
> As noted during the December meeting, in each of our meetings that the above four items were brought to your attention, you indicated you would take care of notifying the appropriate individuals. Not until just prior to the awards ceremony was the Highway Safety staff asked to provide a Press Release to Ms. Mary Jane Lopez.
>
> And, as we all agree, media coverage at the Awards Ceremony was inadequate. But

> as you noted during the meeting, the coverage which was arranged by the Highway Safety staff for the April “Kick-Off” luncheon wasadequate because of the three TV stations, several radio stations, and the printed news sources that were notified were present to cover both the luncheon and to do personal interviews. However, when I and the staff were told the media for the November meeting would be taken care of, we of course did nothing until asked for the Press Release.
>
> I feel it is very unfair to now state, or leave the Commissioner and/or others with the impression that we are at fault for the lack of coverage. Accordingly, this grievance is filed to provide a written record of my and the Highway Safety program staff's view of this matter.

J Ex 2. (See footnote 4)

9. As relief for the grievance described in Finding of Fact Number 8, above, Grievant requested the following:

> 1) A memo be prepared and presented to Commissioner (sic) informing him of the complete facts of this case, and 2) that in the future, a written itemized schedule for each necessary task involved in future campaigns be developed to included the party(s) responsible for each task’s completion.

J Ex 2.

10. Mr. Thompson attempted to meet with Grievant to discuss his grievances on December 30, 1998, but Grievant declined to meet with him because he did not believe Mr. Thompson had authority to resolve the grievances on their merits.

11. On January 7, 1999, Grievant submitted identical appeals for each of the grievances to WVDMV Commissioner Joe E. Miller which stated the following:

> The attached grievance that I filed on December 23, 1998, with Mr. Dave Bolyard is hereby appealed to you for resolution.
>
> I would like you to be aware that this grievance was filed at Level I with Mr. Bolyard because:
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> 1) His comments on December 14, 1998 directly perpetrated the grievable event, and
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> 2) I believe that Mr. Bolyard is vested with the authority to grant the requested relief, and
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> 3) Mr. Bolyard was my direct Supervisor on December 14, 1998.

> Additionally, my understanding of the correct Grievance Procedure as provided to me by the West Virginia Division of Personnel requires:
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> 1) that within 3 working days an informal conference with the supervisor is to be held, and
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> 2) that within 6 working days a written decision is to be provided.
>
> It is also my understanding that the above time frames could have been extended by mutual written agreement of the parties.
>
> Since I have had no communication with Mr. Bolyard regarding this matter, since the above time frames have expired, since I have received no written request for an extension, and since I have been led to believe that you are Mr. Bolyard's direct supervisor, I therefore feel I must appeal this matter to you for a Level II resolution.
>
> I look forward to discussing this matter with you at your earliest convenience.

J Ex 1.

12. On January 8, 1999, Mr. Thompson issued written responses to the two grievances via certified mail, indicating that the matter could not be resolved, further advising Grievant he could appeal to Mr. Bolyard at Level II within five working days. G Ex A; J Exs 1 & 2.

13. On January 8, 1999, following receipt of Mr. Thompson's responses, Grievant replied to Mr. Thompson in identical memos which stated the following:

> The purpose of this memo is to acknowledge receipt of your responses to the two grievances I recently filed. However, because you are neither
>
> 1) the individual who perpetrated either grievable event, nor
>
> 2) are you empowered to grant the requested relief, nor
>
> 3) were you my direct supervisor at the time either event occurred,

> the grievances are returned for you to return to the appropriate individual, which I believe to be Dave Bolyard.

J Exs 1 & 2.

14. Commissioner Miller forwarded the appeals to Mr. Bolyard within five days, and Mr. Bolyard advised Grievant in a telephone conversation that his Level II grievance needed to be directed to him, and not to Commissioner Miller, who is at Level III. Grievant disagreed and told Mr. Bolyard that he would not resubmit the grievance to him at Level II, rather than the Commissioner.

15. Mr. Bolyard thereafter consulted with legal counsel within WVDMV, and confirmed that he was the proper supervisor for Grievant to appeal to at Level II, but did not follow up by issuing any written response to Grievant.

16. On January 28, 1999, Grievant appealed to this Grievance Board alleging that WVDMV was in default at Level II in regard to both grievances.

DISCUSSION

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board last year. 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 5) 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."

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless Respondent is able to demonstrate that the remedy requested is either contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there was no default, Grievant may proceed to the next level of the grievance procedure. Respondent contends no default occurred in this matter, as contemplated under the terms of the statute.

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. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Because Grievant is claiming he prevailed by default under the statute, he 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).

Initially, Grievant complains a default occurred because six working days elapsed from the time he delivered his grievance to Mr. Bolyard at Level I on December 23, 1998, and Mr. Thompson's issuance of a response on January 8, 1999. Although WVDMV arguably failed to issue a written response to Grievant within the six-day time limit in W. Va. Code § 29-6A-4(a), Grievant elected to pursue his grievance by proceeding to Level II on the merits. Grievant's correspondence to Commissioner Miller dated January 7, 1999, is entitled “Grievance Appeal,” and Grievant states therein, “I feel I must appeal this matter to you for a Level II resolution.” Further, in his appeal to Level IV, Grievant described his action on January 7, 1999, in the following terms: “Having received no response to the Grievance, but still wishing to resolve this matter within DMV, I appealed to Mr. Bolyard's supervisor, Commissioner Joe E. Miller for a Level II decision.” By proceeding in this

manner, Grievant failed to pursue a default at Level I, and is estoppedfrom now raising this default claim at Level IV. See Wagoner v. W. Va. Div. of Corrections, Docket No. 98-CORR-365 (Jan. 4, 1999). See generally, Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).

Nonetheless, at the time Grievant appealed to Level IV requesting a determination that WVDMV was in default, he had not received a written response to his Level II appeal on the merits from Commissioner Miller, Mr. Bolyard, or anyone else. However, Grievant was verbally advised by Mr. Bolyard that he needed to submit his Level II appeal to him if he wanted to receive a response. Grievant was similarly advised in Mr. Thompson's written Level I response that Mr. Bolyard was the proper person to appeal to at Level II.

Because the merits of Grievant's claims involve the issue of his proper place in the chain of supervision within WVDMV, Grievant apparently refused to concede that he was required to proceed to Mr. Bolyard at Level II. However, absent a ruling on the merits of his grievance, Grievant has not established that his grievance was submitted to the proper authority at Level II. Therefore, the time limits for WVDMV to respond had not yet begun to run when Grievant declared his employer in default. In these unusual and unique circumstances, Grievant is not entitled to a finding that WVDMV is in default.

Inasmuch as the parties have had to resort to Level IV to resolve their standoff at Level II, it would not serve the purposes of the statute to remand this grievance to Level II for further processing. Accordingly, Grievant's request for a determination that WVDMV is in default at Level II is **DENIED**. If Grievant wishes to pursue either of his grievances on the merits, he may appeal to WVDMV Commissioner Joe E. Miller at Level III within five days of receipt of this Order. Consistent with the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. “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." W. Va. Code § 29-6A-3(a).

2. When a grievant asserts that his 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. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. See W. Va. Code § 29- 6A-3(a)(2).

3. By appealing to Level II for resolution of his grievance on the merits, Grievant waived any claim he may have had to declare his employer in default at Level I. See Wagoner v. W. Va. Div. of Corrections, Docket No. 98-CORR-365 (Jan. 4, 1999). See generally, Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). 4. Where the grievant fails to establish that his grievance was properly submitted to the appropriate agency administrator for resolution at Level II, he cannot obtain a determination of default by refusing to comply with the agency's directions regarding the proper procedure for proceeding to the next level for a decision on the merits of his grievance.

Accordingly, this request for a determination of default under W. Va. Code § 29-6A- 3(a)(2), is **DENIED**. This matter is hereby **REMANDED** for further processing in accordance with guidance previously set forth in this Order.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 30, 1999

Footnote: 1

Grievant appeared pro se. Respondent WVDMV was represented by Senior Assistant Attorney General Jacquelyn I. Custer.

Footnote: 2

Grievant did not elect to make a written submission.

Footnote: 3

This matter has been assigned Docket Number 99-DOT-045D.

Footnote: 4

This matter has been assigned Docket Number 99-DOT-048D.

Footnote: 5

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). As this grievance was initiated on June 9, 1999, it falls under the new statute.