CYNTHIA STANLEY, et al., (See footnote 1)

Grievants,

v v.

DOCKET NO. 99-T&R-155D

WEST VIRGINIA DEPARTMENT OF

TAX & REVENUE and DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING GRIEVANTS' MOTION FOR DEFAULT

Comes now the West Virginia Department of Tax & Revenue, on its level four appeal of Grievants' motion for default, to establish that a default did not occur, pursuant to W. Va. Code § 29-6A-3(a). A level four hearing on the issue of default was held in this Grievance Board's Charleston, West Virginia, office on May 13, 1999. Grievants were represented by Tony Tatano, Esq., Steve Hunter Associates, L.C., and the Agency was represented by its counsel, Robert A. Hoffman, Esq. Personnel did not participate.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts. 1. Grievants are employed as Tax Unit Supervisors I by the West Virginia Department of Tax & Revenue ("Agency"). They filed this grievance on January 20, 1999, requesting reassignment from Pay Grade 13 to Pay Grade 16. G. Ex. 1.

2. A level one response was issued by James E. Dixon, Director, Compliance Division, on January 29, 1999. G. Ex. 2. Grievants also filed their grievance directly at level four on January 22, 1999, contrary to the steps provided in the grievance statute for state employees, W. Va. Code § 29-

6A-1, et seq, and the grievance was remanded for processing at levels two and three. G. Ex. 3.

3. On February 1, 1999, Grievants appealed to level two, requesting a waiver of the level two hearing, as well as level three, contending that the Grievance Evaluators at those levels were unable to grant the relief requested. G. Ex. 4. Subsequently, on February 17, 1999, Grievants withdrew their request to waive levels two and three, and requested that a level two hearing be scheduled. G. Ex. 5.

4. A level two hearing was conducted via phone conference on February 24, 1999, and a decision denying the grievance was rendered on February 26, 1999, by Ronald C. Stone, Assistant Tax Commissioner. G. Ex. 7.

5. Grievants appealed that decision to level three on March 2, 1999. G. Ex. 8. A level three hearing was scheduled for March 16, 1999, but was continued at Grievants' request, made to Mark Morton, level three Grievance Evaluator, by memorandum dated March 11,1999. Neither the Agency nor the Division of Personnel were copied on this request for continuance. G. Ex. 9.

6. The continuance was granted and hearing set for April 16, 1999. G. Ex.

10. 7. Subsequently, the Agency requested a continuance of the April 16, 1999 hearing, and asked that this grievance be held in abeyance, based on its belief that it was substantially similar to another grievance which was scheduled to be heard at level four on April 21, 1999, styled Bonnett v. W. Va. Dept. of Tax & Revenue, Docket No. 99-T&R-118 ("Bonnett"). Grievants were copied on this request for continuance. G. Ex. 11.

8. On April 7, 1999, the request for continuance was granted by level three grievance evaluator, Mark Morton, and the instant case was postponed indefinitely pending the decision in Bonnett. G. Ex. 12.

9. On April 8, 1999, Grievants requested that the Agency's request for continuance be denied, because they disagreed that their grievance was similar to Bonnett. G. Ex. 13. Grievants' request crossed in the mail with Mr. Morton's order granting the continuance, and Mr. Morton so advised them by letter of April 8, 1998, reiterating his belief that their grievance was similar to Bonnett, and would be held in abeyance pending that decision. G. Ex. 15.

10. On April 9, 1999, Grievants responded to Mr. Morton's letter, notifying him that they prevailed by default due to the Agency's failure to schedule a level three hearing in their grievance. G. Ex. 17.

11. On April 14, 1999, Grievants again wrote Mr. Morton, reasserting default, as Mr. Morton

had not responded to their earlier correspondence. G. Ex. 18.

12. Mr. Morton replied by letter dated April 15, 1999, denying, among other things, Grievants' allegations of default. G. Ex. 19. 13. The Agency requested a level four hearing on Grievants' allegations of default on April 15, 1999, claiming the relief requested was contrary to law, and also asked the Grievance Board to consolidate the instant grievance with the Bonnett grievance. G. Ex. 20.

14. The default hearing was conducted at level four on May 13, 1999. G. Ex. 21.

DISCUSSION

Grievants allege the Agency is in default, because it unilaterally continued the level three hearing scheduled in this case, placing it in abeyance pending the Bonnett decision, without Grievants' consent. The Agency argues that the motion for default should be denied, first, because a default simply did not occur; second, if it did, Grievants also were at fault in notifying the Agency of a request for continuance; and third, the relief sought by Grievants is contrary to law. The Agency argues further that judicial economy dictates that this grievance be consolidated and heard at level four with the Bonnett grievance.

The issue of default in a grievance filed by a state employee has only recently come within the jurisdiction of the Grievance Board. 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 defaultif 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."

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

> The chief administrator or his or her designee shall hold a hearing on accordance with section six of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.
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> 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.

This Grievance Board has found that the burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Galloway v. Div. of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt todemonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). It is appropriate that this same principle apply to an assertion of default by a grievant, so that the burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. If the respondent is the party appealing to Level IV, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no default occurred, due to the presumption set forth in W. Va. Code § 29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998). Therefore, in this case, the burden is upon Respondents to demonstrate that no default occurred, or alternatively, that the remedy sought by Grievants is contrary to law or clearly wrong. “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

W. Va. Code §29-6A-6 provides, in pertinent part:

> The chief administrator or his designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural substantive due process.
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> . . .
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> The chief administrator or his designee or the hearing examiner shall have the power to (1) administer oaths and affirmations, (2) subpoena witnesses, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues, (5) exclude immaterial, irrelevant or repetitious evidence, (6) sequester witnesses, (7) restrict the number of advocates, and take any other action not inconsistent with the rules and regulations of the board or the provisions of this article.

There is no dispute that no level three hearing was conducted in this grievance. There is also no argument that Grievants are entitled to be accorded all procedural substantive due process bestowed by the grievance statute, including the right to a hearing on the merits of their grievance. The action of Mr. Morton in placing Grievants' claim in abeyance falls under the power to regulate the course of the hearing. The issue is whether Mr. Morton's actions are contrary to the mandate that all parties be given all procedural substantive due process anticipated by the grievance statute. Further, does his action place the Agency in default, or does it merely create an appealable order which Grievants are entitled to bring to level four for adjudication?

I believe in this instance, it is the latter. Mr. Morton was simply responding to a request from the Agency which he believed, in good faith, to be legitimate: to continue the Grievants' hearing pending the result of what it considers to be a similar grievance already at level four. At no time has the Agency indicated it intends to ignore the Grievants or not afford them their due process rights. It merely wished to wait for the outcome of the Bonnett grievance, believing that outcome would dictate the course to take with the Grievants. Clearly, Grievants do not agree that Bonnett is similar. That is an issue which they can appeal to level four for adjudication, which they have. In this case, I consider Mr. Morton's order of continuance and abeyance, and Grievants' appeal, simply a step in theentire grievance procedure. The default provision contemplates a situation where the grievance process has been aborted due to the inaction of the employer and/or its grievance evaluator. That is not the case here. See, Hattman v. Darnton, 201 W. Va. 371, 497 S.E.2d 348 (1997). Finally, W. Va. Code §

29-6A-3(e) provides that "[g]rievances may be consolidated at any level by agreement of the parties." In this instance, Grievants do not agree to consolidate their grievance with Bonnett.

WHEREFORE, this grievance is remanded to level three and the level three grievance evaluator is ordered to schedule a hearing in this matter as soon as practicable, notwithstanding the status of the Bonnett grievance.

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MARY JO SWARTZ

Administrative Law Judge

DATED: June 10, 1999

Footnote: 1

The named Grievants are Cynthia R. Stanley, Lexie H. Redden, Jerry L. Payne, David E. Kinder, William L. Annon, George W. Cremeans, and Mary Sue Catlett.

Footnote: 2

This provision is applicable only to grievances filed after July 1, 1998. Jenkins- Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 22, 1998).