REBECCA K. LOHR,

Grievant,

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

DIVISION OF CORRECTIONS
and DIVISION OF PERSONNEL,

Respondents.

ORDER GRANTING DEFAULT

On April 20, 1999, Rebecca K. Lohr (Grievant) appealed to level four of the grievance procedure, alleging she was entitled to prevail by default in a grievance filed against her employer, Respondent West Virginia Division of Corrections (DOC). On May 21, 1999, a level four hearing was held in the Grievance Board's office in Wheeling, West Virginia. That hearing was limited to the question of whether or not a default had occurred at level three of the grievance procedure. Grievant was represented by Rick Lohr, her husband and coworker, and DOC was represented by counsel, Charles Houdyschell, Jr. Despite notification of the hearing, the Division of Personnel failed to appear. This matter became mature for consideration on June 8, 1999, upon receipt of the parties' written arguments.

The pertinent facts in this matter are essentially undisputed by the parties and are set forth in the following findings of fact.

Findings of Fact

1. Grievant is employed by DOC as a Correctional Counselor I at the Northern Regional Jail and Correctional Facility. 2. On March 24, 1999, Grievant initiated a grievance alleging that she had been subject to discrimination in pay. Her immediate supervisor issued a level one decision, stating he was without authority to grant relief, on March 24, 1999.

3. Grievant appealed to level two on March 25, 1999, and, after a level two meeting, the grievance was denied on March 30, 1999.

4. Grievant appealed to level three, where a hearing was conducted by Lowell McAfee, hearing examiner for DOC, on April 9, 1999.

5. Mr. McAfee prepared a recommended decision for the Commissioner of DOC's approval, which he mailed to the Commissioner's office on April 13, 1999.

6. The recommended decision was received in the Commissioner's office on April 14, 1999.

7. Most of the management-level employees in DOC's central office, including the Commissioner, were at a conference on April 14, 15, and 16, 1999.

8. The most senior management employee present in the central office when the recommended decision arrived was Ms. Swecker, Director of Administration, who had not been given the authority to approve grievance decisions in the Commissioner's absence.

9. Hilda Williams, Director of Human Resources, has been given authority by the Commissioner to decide whether he should approve, disapprove, or modify recommended level three decisions. After making this decision, she forwards the recommended decision to the Commissioner for final action.

10. Ms. Williams attended the conference on April 14, 15, and 16. Upon herreturn to the office on Monday, April 19, 1999, she reviewed the decision and immediately took it to the Commissioner for approval.

11. The final level three decision, approved by the Commissioner, was issued on April 19, 1999, and faxed to Grievant on that date. It was also placed in the U.S. mail, certified, on the same day.

12. April 19, 1999, was the sixth working day after the level three hearing held on April 9, 1999.

Discussion

The issue of default in a grievance filed by a state employee came within the jurisdiction of the Grievance Board last year. A default provision was added to the state employees grievance procedure, effective July 1, 1998, (See footnote 1) amending 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 ofthe 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, the following language has been added 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, the grievant wins and Respondent may request a ruling at level four regarding whether the relief requested is 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, the grievant may proceed to the next level 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. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Because Grievant is claiming she prevailed by default under the terms of the statute, Grievant 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).

W. Va. Code § 29-6A-4(c) provides that, upon appeal to level three, the “chief administrator or his or her designee shall hold a hearing” and “issue a written decision . . . within five days of the hearing.” In counting the time allowed for an action to be accomplished under the state employees' grievance procedure, W. Va. Code § 29-6A-2(c)provides that “days” means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). Grievant contends that, quite simply, the level three decision was not issued until, at the earliest, April 19, 1999, six working days after the hearing. Pursuant to the statutory provisions set forth above, DOC was obligated to issue a level three decision not later than

April 16, 1999, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

DOC has made two alternative arguments. First, it contends that the decision was actually "issued" on April 13, 1999, by Mr. McAfee, when he placed it in the mail for the Commissioner's approval. W. Va. Code § 29-6A-3(i) provides that the decision is to be "transmitted to the grievant and any representative named in the grievance within the time prescribed." DOC is correct in its assertion that the date of actual receipt by the grievant is not relevant. This Grievance Board has consistently held that the controlling event is when the decision is effectively transmitted to, not received by, the grievant. Wensell v. W. Va. Regional Jail & Correctional Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998) (emphasis added).

Mr. McAfee testified at the hearing in this matter that he does not have authority to issue final decisions without the Commissioner's approval. The only person Mr. McAfee sent the decision to on April 13 was the Commissioner. As noted in Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999), when the Commissioner had signed and placed the final decision in the mail to the grievant, all actions necessary for"transmission" of the decision had been completed. Accordingly, the undersigned finds that the level three decision was not issued to Grievant until April 16, 1999, six working days after the hearing. Accordingly, DOC has defaulted at level three, unless it was prevented from issuing the decision on time due to one of the causes set forth in the statute.

DOC's second argument is that, due to the conference attended by all central office employees with authority to approve grievance decisions, it was prevented from issuing the decision within five days due to "excusable neglect" and "unavoidable cause." "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied." Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997) (citations omitted). Unavoidable cause has been found in at least one instance to encompass unforeseen events, such as the unexpected resignation of the hearing examiner, which prohibit the employer from responding to a grievance in a timely manner. Patteson v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-326D (Oct. 6, 1998).

This Grievance Board has found that a default was not excused due to an employer's legal

counsel's medical leave of absence, when the default occurred because no other employee of the legal counsel's staff was allowed to open and process mail in his absence. Allison v. W. Va. Dep't of Transp., Docket No. 98-DOH-415D (Dec. 30, 1998). Likewise, when the Commissioner of the Department of Health and Human Resources took a planned vacation, and no other employee was authorized to sign the level threedecision, the resulting default was not excused. In Brown v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-027 (June 2, 1999), the administrative law judge observed:

> There is no evidence that Commissioner Frazier's vacation time off came as a surprise, and the statute specifically authorizes the Commissioner to appoint a designee to act in his behalf. In this case, [the level three grievance evaluator] actually presided over the level three hearing, and there is nothing which would have prevented HHR from instituting alternative procedures to make sure grievance decisions were timely handled while the Commissioner was off on vacation.

In the instant case, the undersigned finds that DOC has not established excusable neglect or unavoidable cause. As in the cases cited above, there is no evidence that the conference attended by the central office employees came as a surprise, and there is no reason why alternative temporary arrangements for dealing with grievances during that time frame could not have been made. As noted in Brown, supra, DOC's Commissioner is authorized by statute to appoint a designee, such as the actual level three hearing examiner, to sign final decisions in his absence. DOC has failed to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at level three as a result of any of the recognized reasons set forth in W. Va. Code § 29-6A-3(a)(2).

Accordingly, it is determined that DOC is in default with regard to this grievance, and 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. DOC may request a level four hearing within five days of receipt of this Order to present evidence on this issue.

In accordance with the foregoing findings and discussion, the following conclusionsof law are appropriate.

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. At level three, the “chief administrator or his or her designee shall hold a hearing” and “issue a written decision . . . within five days of the hearing.” W. Va. Code § 29-6A-4(c).

4. Grievant established, by a preponderance of the evidence, that a level three decision was not issued within five days of the level three hearing.

5. Respondent failed to establish that it was prevented from issuing a timely level three decision due to sickness, injury, excusable neglect, unavoidable cause, orfraud.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is **GRANTED**. This matter will remain on the docket for further adjudication at Level IV. **If Respondent wishes to request a hearing regarding the default remedy, it must do so within five days of receipt of this Order, and provide three potential hearing dates which are mutually agreeable to the parties.** The Grievance Board does not consider this Order to be a final order or decision which is appealable to circuit court under the provisions of W. Va. Code §§ 29-6A-7 or 29A-5-4.

Date: July 22, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

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).