SCOTT PARSONS,

Grievant,

v. **Docket No. 99-CORR-056D**

DIVISION OF CORRECTIONS/
NORTHERN REGIONAL JAIL
& CORRECTIONAL FACILITY,
and DIVISION OF PERSONNEL,

Respondents.

ORDER GRANTING DEFAULT

On February 11, 1999, Scott Parsons (Grievant) submitted this matter to the Grievance Board at level four, alleging that a default had occurred at level one of the grievance procedure, entitling him to relief pursuant to the provisions of W. Va. Code § 29- 6A-3(2). On March 26, 1999, a level four hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Wheeling, West Virginia. Grievant was represented by David Young, a coworker, and Respondent was represented by counsel, Charles Houdyshell. The parties agreed that the undersigned would address the sole issue of whether Respondent Division of Corrections (DOC) is in default, reserving the question of whether the remedy sought by Grievant is contrary to law or clearly wrong. The parties presented oral arguments, waiving written arguments, and this matter became mature for decision at the conclusion of the hearing.

The following findings of fact are made based upon a preponderance of the credible testimonial and documentary evidence presented during the level four hearing.

Findings of Fact

1. In October of 1998, Grievant initiated a grievance alleging he was entitled tocompensation for time periods when he filled in for a supervisor. Grievant is employed as a correctional officer.

2. Following a level one conference, on October 23, 1998, Leonard Wellman, Unit Manager, issued a written decision granting the grievance and awarding Grievant compensation for the periods he worked as a supervisor.

3. After the level one decision was issued, officials of the Northern Regional Jail & Correctional Facility (NRJ) instructed Mr. Wellman to amend it, because he did not have the authority to grant the monetary relief requested by Grievant.

4. In January of 1999, Grievant heard "through the grapevine" that Mr. Wellman was going to amend his level one decision and deny the grievance.

5. On February 1, 1999, Grievant submitted a notification of default, alleging that the amended level one response was untimely, because the grievance had been submitted for decision in October of 1998.

6. On February 3, 1999, Grievant received an amended level one decision from Mr. Wellman, rescinding the original decision and denying the grievance at level one.

7. A level two conference was held and a level two decision issued on February 8, 1999.

Discussion

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 provisionto 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 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, the grievant wins and Respondent may request a ruling at Level IV regarding whether the relief requested should be granted. If there was no default, the grievant may proceed to the next level of the grievance procedure. Respondent contends no default occurred under the terms of the statute. This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statutecovering 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 terms of the statute, Grievant bears the burden of establishing such default by a preponderance of the evidence.

The instant case presents an unusual factual situation. It is not often that a grievance decision is rescinded and amended. W. Va. Code § 29-6A-4(a) provides that a written level one decision must be issued within six days of receipt of the grievance. There is no dispute between the parties that the original decision issued on October 23, 1998, was timely. Rather, Grievant alleges that, because that decision was later amended, the amended decision was untimely, because it was not issued within six days of the original filing of the grievance.

The issue of amending lower level grievance decisions was addressed in Franz v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-228 (Nov. 30, 1998). In that case, it was deemed appropriate for a level two decision granting a monetary award to not be considered final until approved by administrative officials of the employing agency and other agencies, such as the Division of Personnel and the Attorney General's office. The reasoning for this conclusion was based upon directives by the Division of Personnel to the effect that back pay awards at the lower levels of the grievance process can only be awarded by proper administrative authorities or pursuant to properly executed settlementagreements.

Applying the logic from Franz, supra, to the instant situation leads to the conclusion that it was appropriate and proper for NRJ to amend the original level one decision. Moreover, because Mr. Wellman did not have the authority to grant such an award, the decision was not officially “final” until

reviewed and approved by NRJ administrators and, at the very least, the Division of Personnel, which was apparently not included in the grievance at level one.

Therefore, because a final, binding level one decision was not issued within six days of the filing of the grievance, Grievant has proven by a preponderance of the evidence that a default has occurred. However, Respondent may be excused from its untimeliness due to the causes stated in the statute, such as “sickness, injury, excusable neglect, unavoidable cause or fraud.” The only excuse provided by Respondent is that the level one evaluator did not have the authority to grant the grievance, but it has not explained why it took approximately three months for NRJ officials to direct Mr. Wellman to change the decision. Excusable neglect may be found where events arise which are outside the defaulting party's control, and contribute to the failure to act within the specified time limits. See Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). That has not been proven here. The level one grievance evaluator should have been educated regarding the limits of his authority with regard to monetary grievance awards, which is totally within the control of Respondent. Moreover, if the level one decision was to be rescinded and amended, this should have been accomplished shortly after the first decision was issued, not three months later. NRJ's delay in amending the decision isinexcusable; an employee should not have to wait such an extensive period of time to receive a decision which is binding and within the authority of the issuing hearing examiner.

Therefore, it is hereby determined Respondent is in default in regard to this grievance regarding back pay, and Respondent must proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2) that the remedy sought is contrary to law or clearly wrong. Accordingly, a Level IV hearing will be scheduled to provide the parties an opportunity to present evidence on the issue of whether the remedy Grievant has obtained by default is clearly wrong or contrary to law. It is further determined that the Division of Personnel is an indispensable party to this grievance.

In addition to 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 mayshow 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. Grievant established, by a preponderance of the evidence, that Respondent failed to issue a final level one decision within six days of the filing of this grievance. Respondent failed to demonstrate that such failure was a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud which precluded it from scheduling a timely conference at Level II of the grievance procedure for state employees. Id.

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 as previously indicated in this Order. It is further **ORDERED that the Division of Personnel is an indispensable party and is hereby joined as a named party to this grievance.** 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.

The parties are directed to confer with each other and inform this office by May 5,1999, of at least three potential dates upon which they are available for a level four hearing.

Date: April 26, 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).