**STEVEN PASTERNAK,**

**Grievant,**

**v. Docket No. 00-HE-357D**

**HIGHER EDUCATION INTERIM GOVERNING**

**BOARD/MARSHALL UNIVERSITY,**

**Respondent.**

## ORDER DENYING DEFAULT

**Grievant, Steven Pasternak, alleges Marshall University ("MU") is in default because it did not hold a Level II hearing in a timely manner.**

**This grievance was denied at Levels I and II. This case and the issue of default was appealed to Level IV on September 25, 2000. (See footnote 1) A Level IV default hearing was held on December 20, 2000, and this issue became mature for decision on January 17, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)**

**After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

### Findings of Fact

**1. On October 12, 2000, Mr. David Harris, Director of Equity Programs and the Associate Director of Human Resources, sent Grievant a request by e-mail to agree to an extension of the timelines for scheduling the Level II hearing. 2. This e-mail stated, "Please allow for the timelines to be extended on your grievance dated October 5, 2000. One week from today (Oct 20) will allow sufficient time to secure a campus evaluator, a place and time for each of the parties to schedule without difficulties."**

**3. Grievant responded on October 12, 2000 stating, "O.K. Are you planning the grievance hearing for OCT (sic) 20th or are you asking until the 20th to set the thing up?" This written agreement required notice of the hearing date by October 20, 2000.**

**4. Mr. Harris responded on October 12, 2000. He replied, "The hearing will be held on or before Oct 20th, depending on scheduling, etc."**

**5. MU has a list of Hearing Examiners, and they serve on a rotating basis. Mr. Jonathan Brown was next on the list and was assigned to hear Grievant's case.**

**6. The hearing was scheduled for October 20, 2000, a Friday.**

**7. On October 19, 2000, Mr. Brown called Mr. Harris and explained he had an unexpected conflict and would be unable to hear the grievance on October 20, 2000, but could conduct the grievance on the following Monday, October 23, 2000.**

**8. There is no indication Mr. Brown was unable to conduct the hearing because of sickness.**

**9. As soon as Mr. Harris found out about Mr. Brown's scheduling difficulty, he called Grievant and informed him of the need to delay the date of the hearing by one working day.**

**10. Grievant did not feel Mr. Brown would be impartial, and told Mr. Harris he did not want him as the Hearing Examiner. Grievant gave Mr. Harris no specific reasons whyhe thought Mr. Brown would be prejudiced.** (See footnote 3) **He stated he would be willing to change the date of the hearing, if MU would change the Hearing Examiner. Mr. Harris said he would check on the Hearing Examiner issue.**

**11. Grievant did not inform Mr. Harris he believed MU would be in default if the hearing was not held until October 23, 2000, or that he would allege default if the hearing was not held on October 20, 2000.**

**12. Mr. Harris discussed the issue with his supervisor, and they concluded Grievant did not have the right to select the Hearing Examiner who would hear his grievance.**

**13. Mr. Harris called Grievant back and informed him of the decision not to replace the Hearing Examiner. Grievant's response was the "hearing would then be very interesting."**

**14. Mr. James Stephens, Director of Human Resources, sent Grievant a letter dated October 19, 2000, informing him of the date and time of the hearing, and that Mr. Brown would be the Hearing Examiner.**

**15. At the beginning of the hearing on October 23, 2000, Grievant informed Respondent there was no need to hold the hearing as MU was in default.**

**16. The hearing was held.**

**17. On October 26, 2000, Grievant wrote Mr. Harris informing him that MU was in default. 18. Mr. Harris responded on October 27, 2000, stating:**

> **It is unfortunate you have chosen to take the position that the Level II grievance is untimely. My memo to you clearly pointed out that the hearing would be held on October 20th contingent upon all the parties[’] schedules. When we talked on October 19th and [I] shared with you the plans for holding the grievance on October 23d, as this was the earliest date that would accommodate everyone's schedule. You expressed your concern about the grievance evaluator. Later that day I informed you of the university's intent to use Jonathan Brown as the evaluator. You gave no specific reason why Mr. Brown should be excluded as the evaluator in this matter. More important, it is not the university's practice to allow the grievant to select the level II evaluator. As you will recall, your only comments were, "It should get interesting- see you [M]onday."**

## Issues and Arguments

**Respondent maintains Grievant agreed to hold the hearing on October 23, 2000, and the only concern he discussed with Mr. Harris was who was to be the Hearing Examiner. Respondent contends Grievant set a default trap through his actions and did not inform MU that he would consider them in default if they did not hold the hearing on October 20, 2000.** (See footnote 4)

**Grievant argues he made a "counter offer" to MU; he would agree to holding the hearing on October 23, 2000, only if MU changed the Hearing Examiner. As he stated in his proposals, "by not agreeing to the additional time extension Mr. Pasternak forced the respondents to either default on the October 12th agreement or replace Mr. Brown as the hearing officer." Additionally, Grievant argues any extension of the time frame must be in writing, and as this was not done, MU must be in default.**

## Discussion

**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).**

**Effective July 1, 1998, the West Virginia Legislature gave the Grievance Board authority to administer Levels II and III of the grievance procedure for education employees. W. Va. Code § 18-29-5 (1998) provides that "[t]he Board shall administer the grievance procedure . . . as provided for in section four of this article." Based upon this change in the statute, the Grievance Board, in Jackson v. Hancock County Board of Education, Docket No. 99-15-081D (May 5, 1999), ruled it now had jurisdiction to hear and decide a grievant's lower level default. A default claim is based on the employer's alleged procedural violation of failing to respond to the grievance within the time limits contained in W. Va. Code § 18-29-4. Jackson, supra.**

**The default provision applicable to school personnel grievances, enacted in 1992, is contained in W. Va. Code § 18-29-3(a), and states in pertinent part:**

> **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 or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for thepurpose 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 so as to comply with the law and to make the grievant whole.**

**W. Va. Code § 18-29-4(b) provides the following directions regarding when Respondent must act at Level II:**

> **Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with section six [§ 18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. Such decision may affirm, modify or reverse the decision appealed from.**

**It should be noted that this Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and**

**Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure. See W. Va. Code § 29-6A-1. Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable. The first order of business is to look at the initial agreement between the parties for the extension of the time lines. Mr. Harris asked Grievant for an extension until October 20, 2000. By his original response, "O.K.", Grievant agreed unconditionally to this extension even though he was unclear whether the date of October 20, 2000, was to be the date of the hearing, or the date by which he would receive notice of the hearing. Inherent in Grievant's initial written agreement would be included the date on which the hearing was held, October 23, 2000, as it was the next working day. Accordingly, Grievant agreed at the start of the waiver process to the actual date of the hearing.**

**Mr. Harris notified Grievant of the October 20, 2000 hearing, and then after Mr. Brown was unable to attend on that date, Mr. Harris notified Grievant of the new date. Apparently, after Grievant learned who the Hearing Examiner would be, he attempted to use Mr. Brown's inability to hold the hearing on the originally scheduled date as a means of removing a Hearing Examiner he did not want.**

**Grievant states he made a counter-offer and an ultimatum: change the Hearing Examiner or no further waivers. Mr. Harris is just as adamant. Grievant's only complaint was he did not want Mr. Brown as the Hearing Examiner, not that he would consider MU in default if the hearing was held on October 23, 2000, or that he would not agree to the new date. Mr. Harris was also clear that if he knew Grievant did not agree to hold the hearing on the following work day he would have gotten someone else to conduct the hearing.**

**In this situation the admonition from Spahr is clear, and it applies. "[T]he grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'proceduralquagmire.'" Harmon, supra. Grievant initially agreed to a waiver, and that agreement included the day the hearing was held. This agreement was in writing. Additionally,**

**Grievant did not raise an objection when Mr. Harris called him back to inform him the Hearing Examiner would not be changed.**

**Accordingly, the undersigned Administrative Law Judge finds no default occurred, as the change in the hearing date to October 23, 2000, was covered by the original agreement, and this agreement was in writing.**

**The above-discussion will be supplemented by the following Conclusions of Law.**

## Conclusions of Law

**1. When a grievant claims 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).**

**2. "[T]he grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999).**

**3. Grievant agreed to a written waiver of the timelines in his October 12, 2000 e-mail to Mr. Harris, and this waiver included the date of the hearing.**

**4. Grievant has failed to meet his burden of proof and demonstrate default occurred in this set of circumstances. Accordingly, Grievant's Motion for Default is DENIED. These matters will remain on the docket for further adjudication at Level IV, and the parties are directed to submit four mutually agreed upon dates for a hearing on the merits.**

**_____ JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: February 6, 2001**

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***Footnote: 1***

***The underlying grievance deals with "comp" time and annual leave.***

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***Footnote: 2***

***Grievant, an attorney, represented himself, and Respondent was represented Assistant Attorney General Beth Ann Rauer.***

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***Footnote: 3***

***Mr. Brown had heard Grievant's prior grievance.***

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***Footnote: 4***

***It is noted that Grievant is an attorney, and the individuals he was dealing with in the Human Resources Office were administrators.***