ANGELA LEWIS,

Grievant,

v. Docket No. 00-BEP-382D

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS/GOVERNOR'S INVESTMENT OFFICE,

Respondent.

ORDER DENYING DEFAULT

Grievant, Angela Lewis, is grieving a three day suspension she received in November 2000, from her supervisor at the Bureau of Employment Programs ("BEP"). This grievance was denied at Levels I and II. On December 6, 2000, Grievant wrote this Grievance Board alleging default at Level II of the grievance procedure.

A Level IV hearing on the issue of default was held on January 5, 2000, and this issue became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 1)

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. **This grievance was filed on November 9, 2000.**
2. **On November 15, 2000, Grievant had a Level II conference with her second level supervisor, Lisa Wells.**
3. **Ms. Wells was on approved sick leave on November 17, 20, 21, and 22, 2000.**
4. **November 23 and 24, 2000 were state holidays.**
5. **Grievant wrote to Commissioner William Vieweg on November 21, 2000, requesting default be declared in this grievance. Resp. Ex. No. 6, at Level IV.**
6. **On November 29, 2000, Ms. Wells issued a Level II Decision. In this Decision she**

noted it was issued in a timely manner because she had been on approved sick leave. (See footnote 2) Resp. Ex. No. 8, at Level IV.

7. On December 6, 2000, Grievant wrote this Grievance Board noting she had received no response from Commissioner Vieweg about her letter of November 21, 2000, and alleging her Level II Decision was not issued in a timely manner. Resp. Ex. No. 7, at Level IV.

Discussion

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board when the West Virginia Legislature passed House Bill 4314 on March 13, 1998. That legislation, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998. More specifically, W. Va. Code § 29-6A-3(a) was amended, 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, unlessprevented 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."

Because Grievant is claiming a default occurred under the statute, she 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).

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless BEP is able to demonstrate that the remedy requested is either contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); 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. BEP denies a default occurred in this matter, as contemplated under the terms of the statute.

In this matter, after this grievance was advanced to a conference at Level II, BEP was required to respond in accordance with W. Va. Code § 29-6A-4(b). W. Va. Code § 29-6A-4(b) provides the following directions regarding when Respondent must act at Level II:

> **b) Level two.**
>
> **Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.**

In counting the time allowed for an action to be accomplished under the state employee 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). Thus, BEP was obligated to issue a Level II decision on this grievance not later than Wednesday November 22, 2000, 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).

This Decision was not issued until November 29, 2000, but BEP demonstrated Ms. Wells was on approved sick leave on November 17, 20, 21, and 22, 2000. BEP further noted November 23 and 24, 2000 were approved holidays, and November 18, 19, 25, and 26 were Saturdays and Sundays. The first day that could be counted was November 16,the second day was November 27, the third day was November 28, and the Decision was issued on the

fourth day, November 29, 2000. Accordingly, this Decision was issued in a timely manner, when the days of approved sick leave are taken into account, and no default occurred.

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). See Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000).

2. In counting the time allowed for an action to be accomplished under the state employee 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).

3. When a grievant asserts 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 theevidence. Once the grievant establishes a default occurred, the employer may show 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); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999).

4. When the employer asserts the remedy that would be received is contrary to law in accordance with W. Va. Code § 29-6A-3(a)(2) because, in fact, no default occurred, the employer must establish such a defense by a preponderance of the evidence. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

5. BEP proved it was prevented from issuing a Decision in a timely manner as a direct result of the approved sick leave of the second level supervisor. This is one of the reasons specified by W. Va. Code § 29-6a-4(b), and establishes no default occurred.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is DENIED. This matter is remanded to Level III for a hearing and Decision on the merits.

_____ JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 19, 2001

Footnote: 1

Grievant represented herself, and Respondent was represented by Patricia Shipman, Supervising Attorney with BEP.

Footnote: 2

Ms. Wells' Decision also stated the time had been tolled due to Grievant's suspension. This issue will not be addressed as Respondent did not put this forth as an argument.