REBECCA HUGHART,

Grievant,

v.

DOCKET NO. 00-DOH-351D

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER GRANTING DEFAULT

Grievant, Rebecca Hughart, filed a notice of default against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), and a hearing on the issue of default was held in the Grievance Board's Charleston, West Virginia, office on February 16, 2001. Grievant was represented by Mr. Joseph Hill, AFSCME, and DOH was represented by Jennifer E. Francis, Esq.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following material facts of record :

1. Grievant filed a grievance against DOH on June 23, 2000.
2. A level one conference was held on June 26, 2000, and a level one grievance decision was issued that same day by Virgil D. DiTrapano.
3. Grievant appealed that decision to level two on June 26, 2000.
4. On June 30, 2000, AFSCME representative Marilyn Kendall wrote to the level two grievance evaluator, Jesse Haynes, and requested the time frames be extended due to Grievant's being off work on medical leave due to the serious illness of her mother.
5. Grievant returned to work on July 11, 2000, and informed Mr. Haynes that day that she was

back to work and wanted to continue with her grievance. 6. On July 24, 2000, having heard nothing from Mr. Haynes, Grievant notified DOH she was claiming she prevailed on her grievance due to default.

7. On July 25, 2000, Grievant notified Mr. Haynes in writing that she considered him in default on her grievance.

8. Thereafter, on July 28, 2000, Grievant's supervisor, Mr. DiTrapano informed her she was to accompany him to a meeting in Charleston. Grievant asked what the meeting was about, and Mr. DiTrapano refused to tell her. Grievant asked her AFSCME representative, Joe Hill, to go with them, and he did.

9. In Charleston, they met with Jesse Haynes, and Mr. Haynes asked Grievant what she wanted from her grievance. Mr. Hill responded she wanted the pay raise requested in her grievance statement, and Mr. Haynes became angry at Grievant, telling her she was not worth the salary she was already making, and that she could appeal to level three.

10. At that point, Mr. Hill asked Mr. Haynes if that had been the level two conference, and Mr. Haynes replied, you can appeal to level three. That was the first Mr.Hill or Grievant knew that the July 28, 2000 meeting was considered her level two conference. Mr. Hill informed Mr. Haynes at that point that they were still claiming default.

11. Grievant received a level two decision from Mr. Haynes on July 31, 2000, denying the grievance. No discussion of Grievant's default claim was included in the decision.

12. Grievant appealed the level two decision on August 1, 2000, the date she received the level two decision.

13. At level three, Grievance Evaluator Brenda Craig Ellis, stayed the proceedings at that level and forwarded the grievance documents to level four for resolution of Grievant's default claim.

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature 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, it 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."

Grievant alleges she should be awarded the subject pay raise, and has prevailed by default at level two, because DOH failed to comply with level two time lines. DOH argues that Grievant waived her default claim when she appeared for the level two conference, and appealed the level two decision to level three.

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

> 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 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.

If a default has occurred, the grievant is presumed to have prevailed on the merits of the grievance, and DOH may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, the grievance may be remanded to the appropriate level of the grievance procedure. Because Grievant claims she prevailed by default under the terms of the statute, she bears the burden of establishing such default by a preponderance of the evidence. Patteson v. Dep't of Health and Human Resources, Docket No. 98-HHR-326 (Oct. 6. 1998).

The facts in this matter are undisputed. Grievant appealed her grievance to level two on June 26, 2000, requested and received an extension of time due to illness, andreturned to work on July 11, 2000, on which date she immediately notified Mr. Haynes she wished to resume her grievance. Mr. Haynes did not set a level two conference within five working days of that date, nor did Grievant agree to waive the time lines, either orally or in writing. Grievant notified Mr. Haynes he was in default by letter dated July 25, 2000. Grievant received no notice of a level two conference, but was

called to a meeting with Mr. Haynes on July 28, 2000, in which she was vilified by Mr. Haynes and dismissed. Before leaving, Grievant again notified Mr. Haynes that she considered him in default.

It becomes DOH's burden to demonstrate, by a preponderance of the evidence, that it was prevented from holding a conference at level two in compliance with W. Va. Code § 29-6A-4(b) "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud" as provided by W. Va. Code § 29-6A-3(a)(2). DOH raises none of these reasons in its defense, but asserts Grievant waived her claim of default when she appealed Mr. Haynes' level two decision to level three. DOH's claim is without merit. There is nothing in the statute which supports DOH's contention, and it was clearly within Grievant's best interests to continue to comply with the grievance procedure directives in processing her grievance, lest she should find herself defending a claim of untimeliness.

DOH has not established a reasonable basis for noncompliance with the time frame specified by the Code. Mr. Haynes was completely aware of Grievant's level two appeal at all times, as well as her claim of default. He simply failed to hold a conference in a timely manner.

Accordingly, Grievant's request for a finding of default at level two under W. Va. Code § 29-6A-3(a)(2) is **GRANTED**, and DOH may proceed to show that the remedysought by Grievant is contrary to law or clearly wrong. DOH may request a Level IV hearing, within five days of the receipt of this written order granting default, to present evidence and/or argument on this issue. In the event DOH does not request a hearing within five days of receipt of this order, an order will be entered granting the relief requested.