SYDNEY GOFF,

Grievant,

v. **DOCKET NO. 02-DOH-245D**

W. Va. DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Sydney Goff filed this grievance against his employer, W. Va. Department of Transportation/Division of Highways on June 26, 2002. On August 9, 2002, he filed a notice with the Grievance Board that Respondent defaulted at Level II. Respondent thereafter requested a Level IV hearing on Grievant's default claim.

A Level IV hearing to determine whether a default occurred was held at the Grievance Board's Charleston office on September 6, 2002, with Grievant appearing *pro se* and Respondent represented by Barbara Baxter, Esq. The matter became mature for decision at the close of the hearing.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant filed a grievance at Level I on or about June 26, 2002, stating, “The problem happened on June 18, 2002 at 7:38 a.m. Dennis Clark used verbal language real harsh towards myself. I also think my reputation is being put on the line. My employee rights have been damaged by this problem.” As relief, he sought, “To have a writtenreprimand in Dennis Clark's personnel files. I Sydney A. Goff to be moved into another section, not another squad.”

2. A Level I conference was held by Jeff Williams, supervisor of Grievant's section, and a Level I decision was issued by Mr. Williams on June 28, 2002. The Level I decision stated Mr. Clark had been counseled and been given a verbal reprimand, but did not address Grievant's request for a transfer.

3. Grievant appealed to Level II, and met for the Level II conference with James Sothen, Director of the Engineering Division, on July 10, 2002.

4. Mr. Sothen listened to Grievant's position, and explained what action had been taken, and that he felt that was the appropriate action. He told Grievant that he hoped their conference and the action already taken would resolve the matter. After the meeting, he prepared a written memorandum to his administrative file summarizing the conference.

5. Mr. Sothen verbally told Grievant his decision. Grievant recalls that Mr. Sothen stated he would issue a written decision in two to four days, but Mr. Sothen does not recall making that promise, as he is certain he would have done so had he said he would, and at the time he considered the matter resolved.

6. Grievant told Mr. Sothen he would talk to Drema Smith, an employee in Respondent's Human Resources Department who assists employees with grievance matters, to see what he should do next. 7. Grievant and Mr. Sothen did not speak again until the Level IV default hearing. After waiting a month for Mr. Sothen's decision, Grievant went to Ms. Smith, who advised him he could proceed to Level III or file a default claim at Level IV. She also advised him to speak to Respondent's mediator, who said he would contact Mr. Sothen. 8. After waiting another week, Grievant went back to Ms. Smith, who assisted him with filing his claim for default.

9. Mr. Sothen has not issued a written Level II decision.

DISCUSSION

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. “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.” W. Va. Code § 29-6A-3(a).

The procedure and time limits for Level II of the grievance procedure are specified in W. Va. Code § 29-6A-4(b), which states: “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 decisionupon the appeal within five days of the conference." Under this statute, the Level II Grievance Evaluator, in this case, Mr. Sothen, was required to issue a written decision within five days of the Level II conference. Mr. Sothen did not do so, so Grievant has proven that Respondent defaulted at Level II.

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). Board, et al. v. WVDHHR/Lakin Hosp., Docket No. 99-HHR-329D (Sep. 24, 1999).

___Respondent asserts that its default at Level II was the result of excusable neglect. It argues that Mr. Sothen did not issue a written Level II decision because he felt the matter was resolved, and Grievant did not explicitly state he was dissatisfied with the resolution even though Mr. Sothen verbally told Grievant at the Level II conference what his decision was. Unfortunately, W. Va. Code § 29-6A-4(b) does not contain an exception to the written decision requirement for cases where the parties feel the Level II conference resolved the issue to everyone's satisfaction. Grievant did not indicate he was satisfied with Mr. Sothens' decision. Absent a written settlement agreed to by a grievant, a written decision is required when the grievance is granted just as it is when the grievance is denied and Respondent knows the grievant remains dissatisfied. This procedural requirement is intended to avoid exactly the type of confusion that occurred here. There is no doubt that Mr. Sothen acted in good faith in a very laudable attempt to resolve this grievance at the lowest level possible, within the spirit of the grievance procedure. There is also no doubt that Respondent's human resources department correctly advised Grievant of his rights under the grievance procedure, and he was justified in following the procedure as it was written. This was Grievant's first grievance, and he represented himself, so it is understandable that he would rely on the very person Respondent has designated to assist its employees in these matters. Grievant assumed correctly that because Mr. Sothen was a member of management, he would be familiar with the grievance procedure and would know how to comply with it. Mr. Sothen assumed, incorrectly, that the issue had been resolved, and as Grievant knew what the decision was, no written decision was necessary. Although both parties were acting with the best intentions, a miscommunication occurred, resulting in an unintended procedural default.

The 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). "The grievance process is for 'resolving problems at the lowest possible administrative level,'" and the Supreme Court of Appeals of West Virginia has advised that the merits of the case are not to be forgotten. Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990). In the absence of bad faith, substantial compliance is deemed acceptable. Duruttya, *supra*. In Thomas v. Clay County Health Department, Docket No. 01-CCHD-422D (Sep. 26, 2001), the Grievance Board held that this type of good-faith effort to resolve the grievance, although it results in a technical default, may be considered substantial compliance. In that case, the Administrative Law Judge found that the lower-level Grievance Evaluator "believed the situation had been resolved through the discussion, and resolution at the lowest possible level is the goal of the grievance procedure. It is clear [the Grievance Evaluator] took the complaint seriously and met with Grievant . . . to resolve the matter. [She] believed this [grievance] was resolved, and no further action was needed." In such cases, the Judge found, to find a default because the Grievance Evaluator failed to fully comply with the procedural requirements would raise form over substance in contravention of the intent of the grievance procedure. In this case, I find that because Mr. Sothen made a good faith effort to resolve the grievance at his level, verbally informed Grievant of his decision, and indeed believed the issue had been resolved and no written decision was necessary, he was substantially in compliance with the procedure and his procedural failure to issue a written decision within the time limits was excusable neglect.

The following Conclusions of Law support this finding:

CONCLUSIONS OF LAW

1. 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.

2. "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." W. Va. Code § 29-6A-3(a).

3. "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." W. Va. Code § 29-6A-4(b).

4. Grievant has proven that Respondent did not issue a written decision within five days of the Level II conference, and therefore defaulted at that level.

5. 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). Board, et al. v. WVDHHR/Lakin Hosp., Docket No. 99-HHR-329D (Sep. 24, 1999). 6. The 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).

7. As stated in Duruttya, *supra*, "the grievance process is for 'resolving problems at the lowest possible administrative level.'" 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. Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). *See also* Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

8. A good-faith effort to resolve the grievance, although it results in a technical default, may be considered substantial compliance. Thomas v. Clay County Health Dep't, Docket No. 01-CCHD-422D (Sep. 26, 2001).

9. Due to Respondent's good faith effort to resolve this grievance at the lowest possible level and its substantial compliance with the grievance procedure, its procedural error in failing to issue a written Level II decision within the specified time limits was excusable neglect. For the foregoing reasons, this default is **DENIED.**

Since Grievant has indicated his understanding of and dissatisfaction with the Level II decision, the matter is remanded to Level III for a timely hearing on the merits.

Date: September 10, 2002 _____

M. Paul Marteney

Administrative Law Judge