TERRY HICKS,

Grievant,

v. **Docket No. 02-DOH-114D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On or about March 20, 2002, Grievant, Terry Hicks, filed a grievance against his employer, Respondent, the Department of Transportation/Division of Highways ("DOH"), when he was not selected for a position for which he had applied. On April 19, 2002, Grievant notified DOH that he was claiming a default at Level II. DOH forwarded Grievant's notice of default to the Grievance Board, and on April 25, 2002, DOH requested a hearing at Level IV on the default claim.

A Level IV hearing was held on May 31, 2002, solely for the purpose of determining whether a default had occurred at Level II. Grievant represented himself, and Respondent was represented by Barbara L. Baxter, Esquire. The parties did not wish to submit written argument, and the issue of whether a default occurred became mature for decision at the conclusion of the hearing, on May 31, 2002.

The following findings of fact are made based upon the evidence submitted at the Level IV hearing.

Findings of Fact

1. Grievant filed this grievance on or about March 20, 2002. Grievant's supervisor responded to the grievance the next day, stating he had no authority to grant the relief requested.
2. Grievant appealed the Level I response to Level II on March 21, 2002.
3. John W. Dawson, District One Engineer, timely responded to the grievance on March 25,

2002, stating he had no authority to grant the relief sought.

4. Grievant appealed the Level II response to Level III on March 25, 2002.

5. On March 27, 2002, Grievant signed a document entitled “Time Frame Waiver,” and initialed that he was agreeing to waive the procedural time frames at Level III. The waiver states it is Grievant's understanding that the grievance will be processed no later than April 30, 2002.

6. By Order dated April 1, 2002, hearing examiner Brenda Craig Ellis remanded this grievance to Level II, finding the matter was not ripe for review at Level III, as the Level II conference was not held by the appropriate party, nor did the appropriate party issue a Level II decision. Ms. Ellis ordered that the Acting Director of the Materials Control, Soils & Testing Division, Barney Stinnett, would be the Level II evaluator, and ordered that the five-day time frame for Mr. Stinnett to hold the Level II conference would begin to run the first work day following his receipt of the order. The reason given in the Order for this action was that “Mr. Hicks applied for a position in the Materials Control, Soils & Testing Division, Organization 0077, under the acting directorship of Barney Stinnett. Mr. Hicks' grievance relates to his non-selection of that position.”

7. Mr. Stinnett is not the administrator of Grievant's work location, nor was he the administrator's designee. 8. Mr. Stinnett received Ms. Ellis' Order on Tuesday, April 2, 2002. He called Grievant on Friday, April 5, 2002, to set up a conference. Mr. Stinnett met with Grievant on Monday, April 8, 2002.

9. Mr. Stinnett signed a letter on Friday, April 12, 2002, in which he explained why Grievant had not been selected for the position for which he had applied, and denied the grievance.

10. Mr. Stinnett put the letter in the interdepartmental mail on Monday, April 15, 2002, and it was taken to the central mail office in the Highways Building at 2:00 p.m. that day to be post-marked and placed in the U. S. mail. Mr. Stinnett believed the letter would be post-marked that day.

11. Mr. Stinnett later discovered that the procedure at the DOH central mail office had been changed, and any interdepartmental mail received in the central mail office after 2:00 p.m. is not post-marked and placed in the U.S. mail until the next day. Thus, Mr. Stinnett's letter was not placed in the U.S. mail until April 16, 2002, and it was received by Grievant the next day.

Discussion

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

(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. Grievant claims a default occurred at Level II of the grievance procedure, when Mr. Stinnett did not issue a Level II decision within five days of the date he met with Grievant. W. Va. Code § 29-6A-4 sets forth the time periods for a response 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.

Respondent made two arguments. It argued first, that John Dawson was the administrator of Grievant's work location, and, as such, was the person who was to issue a Level II decision, not Barney Stinnett, and Mr. Dawson met with Grievant and issued the Level II decision in a timely manner. Second, as Mr. Stinnett believed he had met with Grievant on April 9, rather than April 8, 2002, Respondent argued that, even if Mr. Stinnett were required to issue a Level II response, he had done so in a timely manner. Upon questioning from Grievant, Mr. Stinnett acknowledged that the meeting could have been on April 8, 2002, and Grievant's evidence supported a finding that this was, in fact, the date of the meeting.

Respondent has demonstrated that the person required by statute to respond at Level II of the grievance procedure did so in a timely manner. The statute designates the administrator of the grievant's work location, or his or her designee, as the Level II grievance evaluator. The statute further states that a default may result from a grievance evaluator's failure to respond with the statutory time periods. Grievant did not dispute that it was Mr. Dawson who was the administrator of his work location, and it appears from the evidence that he was, although the evidence is not

conclusive on this subject. It can be concluded that it is more likely than not that Mr. Dawson was the administrator ofGrievant's work location, and Mr. Stinnett was not the administrator of Grievant's work location.

The undersigned is not aware of any statute which transfers the authority of the administrator of the grievant's work location to appoint a designee, to the Level III hearing examiner or grievance evaluator. Ms. Ellis had no authority to designate Mr. Stinnett as the Level II grievance evaluator in place of the administrator of Grievant's work location. Mr. Stinnett was not the Level II grievance evaluator, nor was he the designee of the administrator of Grievant's work location. It was Mr. Dawson who was required to respond to the grievance within the statutory time periods, and he did so. Respondent did not default at Level II.

Ms. Ellis did require Mr. Stinnett to act within a certain time period, and he did not do so. This, however, is a procedural matter, the validity of which is appealable to Level IV, not a matter about which a default may be claimed. Stanley v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-155D (June 10, 1999). “The default provision contemplates a situation where the grievance process has been aborted due to the inaction of the employer and/or its grievance evaluator.” Id. (See footnote 1)

The following conclusions of law support the decision reached.

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 inthis 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)(2).

2. The administrator of the grievant's work location, or his or her designee, must hold a Level II conference within five working days of the receipt of a grievant's appeal to Level II, and he or she must issue a written decision within five working days of the Level II conference. W. Va. Code §§ 29-6A-4(b) and 29-6A-3(i).

3. As Barney Stinnett was not the administrator of Grievant's work location, or the administrator's designee, he was not a grievance evaluator who was required by statute to respond to the grievance within the statutory time limits.

4. The administrator of Grievant's work location responded to the grievance at Level II within the statutory time periods.

Accordingly, the default claim is **DENIED**. This matter is **ORDERED REMANDED TO LEVEL III** of the grievance procedure for state employees for proper adjudication. This matter is **ORDERED DISMISSED AND STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 14, 2002

Footnote: 1

Were the undersigned to address whether Mr. Stinnett's letter was issued and transmitted to Grievant in a timely manner, no default would be found. Mr. Stinnett believed he was doing what he was required to do to get the letter out within five working days of the conference. He was unaware that the letter would not be post-marked until the sixth day. This constitutes excusable neglect. Wood County Comm'n v. Hanson, 187 W. Va. 61, 415 S.E.2d 607 (1992); Parsons v. McCoy, 157 W. Va. 183, 101 S.E.2d 632 (1973); Beckley v. Dep't of Health and Human Resources, Docket No. 98-HHR-354D (Dec. 17, 1998).