DARRIN SHEPPARD,

Grievant,

v.

DOCKET NO. 01-HHR-598D

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

ORDER GRANTING DEFAULT

Grievant, Darrin Sheppard, filed a grievance at level four on December 5, 2001, protesting his dismissal from his employer, the West Virginia Department of Health and Human Resources/Bureau for Children and Families ("DHHR"). Subsequently, Grievant informed the Grievance Board that he had prevailed by default in an earlier grievance filed over a suspension on or about July 8, 2001, and asserted the favorable resolution of that grievance would impact on his dismissal grievance. Upon receiving this information, the undersigned Administrative Law Judge set a hearing on Grievant's default claim, over Grievant's objection. A hearing was held on March 26, 2002, on the default issue in the suspension grievance, and that matter became mature for decision on April 16, 2002. (See footnote 1) Grievant was represented by Kevin Church, AFSCME, and Respondent Department ofHealth and Human Resources ("DHHR") was represented by Jon Blevins, Assistant Attorney General.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. At all times relevant herein, Grievant was employed as a Child Protective Service Worker in DHHR's Mingo County office.

2. On June 25, 2001, Grievant received a letter from Thomas P. Gunnoe, Regional Director, suspending him from his employment for twenty (20) days without pay. R. Ex. 3.

3. On July 8, 2001, Grievant mailed in a grievance form to his immediate supervisor, Miranda "Jeannie" Curry, protesting the 20-day suspension. R. Ex. 4.

4. Ms. Curry received the July 8, 2001 grievance form on July 12, 2001. R. Exs. 4, 6.

5 As Grievant was serving his 20-day suspension at that time, Ms. Curry telephoned him at home on July 12, 2001, and set up a level one conference for the next day, July 13, 2001. R. Ex. 9.

6. In the meantime, Ms. Curry discussed the matter with her supervisor, Marilyn Ferrell and Mike McCabe, Personnel Director. Mr. McCabe advised them not to schedule the level one conference until Grievant had returned from suspension.

7. It has been the policy and practice of DHHR not to schedule grievance conferences for employees who are on a period of unpaid suspension on the basis that thistime does not constitute working days for the purpose of compliance with W. Va. Code § 29-6A-1, et seq.

8. Ms. Curry called Grievant back and left a message on his answering machine canceling the July 13, 2001 conference. R. Ex. 9. She did not tell him why she had to reschedule, nor did she give him another date for the conference.

9. Grievant returned Ms. Curry's call at 3:43 p.m. on July 12, 2001, and left a message that it was alright to cancel the July 12, 2001, meeting. R. Ex. 9.

10. That same day, July 12, 2001, Ms. Curry wrote Grievant a letter indicating she was scheduling his level one conference for July 31, 2001, the day he would return from his suspension. R. Ex. 6.

11. On July 14, 2001, Grievant mailed in a second grievance to Ms. Curry alleging a default on his July 8, 2001 grievance.

12. Ms. Curry received the second grievance on July 19, 2001. R. Ex. 8.

13. Ms. Curry did not respond to the second grievance, because she had already set Grievant's level one conference for July 31, 2001.

14. On July 31, 2001, Ms. Curry and Grievant had a level one conference, and Ms. Curry issued her responses to both the July 8 and July 14, 2001 grievances. R. Exs. 7, 8.

15.

Grievant did not appeal either of the level one decisions.

16. On October 4, 2001, Grievant filed another grievance directly at level four protesting his dismissal from employment, and informing the Grievance Board that he hadprevailed in his earlier suspension grievance, and the resolution of that grievance would affect his termination grievance. (See footnote 2)

17. The Grievance Board set a default hearing for February 14, 2002, later continued to March 26, 2002, which Grievant objected to on the grounds that DHHR had failed to timely request a default hearing on the suspension grievance.

DISCUSSION

The issue of default in grievances filed by state employees is within the jurisdiction of the Grievance Board. W. Va. Code § 29-6A-3(a) states the following:

> (1) A grievance shall be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.
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> (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, orclearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

In a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dept. of Health and 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). Where the

evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

A default claim arises from an allegation of an employer's violation of the procedural rules relating to the time to respond within the time limits contained in W. Va. Code § 29- 6A-4. If a default occurs, the grievant is presumed to have prevailed. 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. Dept. of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if the employer can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A-3(a), or the remedy requested is either contrary to law or clearly wrong, the grievant will not receive the requested relief. Carter, supra; Williamson, supra. If there is no default, the grievant may proceed to the next level of the grievance procedure. This Grievance Board has clarified in its procedural rules the method by which parties may seek default and subsequent relief with the Board at 156 C.S.R. 1.5.1.

> 5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether the relief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

Grievant alleges he prevailed by default at level one, because DHHR failed to comply with level one time lines, following his grievance filings of July 8 and July 14, 2001. Grievant argues the relief sought, removal of the 20-day suspension, should be ordered without further consideration, as DHHR did not request a level four default hearing, and is precluded from now asserting a defense to that claim.

This same argument was raised and resolved in a previous default claim, Thomas v. Clay County Health Department, Docket No. 01-CCHD-422D (Sept. 26, 2001), where the Administrative Law Judge ("ALJ") held that, [o]nce a default is filed, the Grievance Board is required to follow its rules and regulations in resolving the issue." Id. In Thomas, the ALJ explained:

> When default is claimed, the Grievance Board is required to follow its own procedural rules, just like any other agency, in dealing with the issue. The Grievance Board has stated in its rules that either party may file adefault at Level IV, and once this occurs the first order of business is to assess whether a default occurred. This first step takes place no matter which party has filed at Level IV. If it is determined a default did occur, the second step is to assess whether the employer was prevented from responding "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." If Respondent cannot offer an acceptable excuse, then the third step is to assess whether "the relief sought is contrary to law or clearly wrong."
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> The rule states once a grievant files a default claim, this is the procedure that is to be followed. This procedure is consistent with a long line of cases of permitting employees to bring such matters to the Grievance board for resolution rather than being compelled to go to circuit court. Further, there is no language in W. Va. Code § 29-6A-3(a) mandating an employer must request a hearing or lose the entire grievance as a matter of law.

Thomas, supra.

Given this precedent, it was not contrary to law or statute to allow a level four hearing on Grievant's default claim, and the issue to be decided now is whether a default occurred at level one.

W. Va. Code § 29-6A-4(a) provides when an employer must act at level one:

> At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

DHHR concedes a level one conference was not held within three days of receipt of the grievance, nor was a level one decision issued within six days of receipt of the grievance. However, it denies a default occurred because: (1) "working days" do not include days an employee is on unpaid suspension; and (2) Grievant agreed to reschedule the level one hearing originally scheduled for July 13, 2001. In the alternative, DHHR asserts the delay was due to unavoidable cause or excusable neglect. Grievant was serving a 20-day suspension at the time DHHR's level one response would ordinarily have been due under W. Va. Code § 29-6A-4a. Ms. Curry and Ms. Ferrell both testified they relied upon advice from their Personnel Director, Mike McCabe, who told them it was DHHR's practice not to schedule grievance conferences or hearings while an employee was serving a disciplinary suspension. As a result of that advice, Ms. Curry rescheduled Grievant's level one conference for the day he returned to work after his suspension.

W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday,

Sunday or official holidays. DHHR bases its practice of excluding days an employee is off work due to a disciplinary suspension when counting days for responding to a grievance on the fact that the employee is not “working”. The undersigned is not persuaded by DHHR's argument. Rather, it is the legislature's own words in crafting the grievance procedure statute for state employees, which should be used in interpreting “working days.” For instance, Code § 29-6A-3(o) states:

> Grievances shall be processed during regular working hours. Attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the employer.

Code § 29-6A-3(p) states:

> The grievant ... shall be granted necessary time off during working hours for the grievance procedure without loss of pay and without charge to annual or compensatory leave credits. In addition to actual time spent in grievance conferences and hearings, the grievant ... shall be granted time off during working hours ... for the preparation of such grievance without loss of pay and without charge to annual or compensatory leave credits.

The undersigned finds that the term “working days” refers not to days when an employee is actually working, or performing the duties and responsibilities of his or her job, but rather refers to a work week comprised of “regular working hours,” defined by the employer, which in the instance of most West Virginia state government agencies, would be 8:30 to 4:30, Monday through Friday.

Further, there is nothing in the grievance procedure statute which supports DHHR's contention that the time an employee is off work due to a disciplinary suspension should serve to toll the time limits prescribed by the statute. In fact, it appears the reverse is true, as noted in Code § 29-6A-3(g), which provides that:

> If a grievance is filed which cannot be resolved within the time limits set forth in section four of this article prior to the end of the employment term, the time limit set forth in said section shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time.

In addition, Code § 29-6A-4(e) provides for an expedited grievance process, wherein the aggrieved employee protesting a dismissal, demotion, or suspension exceeding twenty days may appeal directly to level four.

Thus, the legislature has expressed its desire that grievances proceed as quickly as possible,

especially when dealing with substantial disciplinary penalties, and DHHR's argument that a 20-day suspension tolls the time lines does not comport with that intent.

Finally, the undersigned is not aware that the Grievance Board has ever allowed an employee's suspension time to toll the time required for him or her to *file* a grievance, and it makes no sense to find that it would toll the time required for the employer to *respond*. DHHR's second argument of defense is that Grievant agreed to the extension of the time line for responding at level one. Grievant denies he agreed to waive the level one time line. Grievant's testimony on this matter conflicts with the testimony of Ms. Curry and Ms. Ferrell, requiring a determination as to which testimony is truthful. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id., Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

On July 12, 2001, Ms. Curry wrote on her July 2001 telephone log that she called Grievant to let him know she had scheduled his level one conference for the next day, July 13, 2001. Later that day, Ms. Curry wrote that she called Grievant back and left a message on his answering machine telling him the July 13 appointment was canceled, and to call back if it was okay. She then noted that Grievant called her and left a voice mail saying it was “O.K. to change.” R. Ex. 9. Ms. Curry had not told Grievant why she had to cancel the July 12 meeting, and had not given Grievant another date for the conference. Ms. Curry testified she asked her supervisor, Ms. Ferrell, to listen to Grievant's voice mail to verify he had called and okayed the cancellation of the level one conference.

Ms. Ferrell testified Ms. Curry asked her listen to Grievant's voice mail, and that he said it was okay to change the date of the level one conference. It is not unusual for Ms. Ferrell to monitor messages that come into the office from time to time.

Grievant testified he spoke with Ms. Curry about scheduling the level one conference on July 13,

2001. She called later saying she could not have the conference the next day and had to reschedule it. Grievant testified he did not recall having a “second conversation” with Ms. Curry telling her it was okay to continue the conference, nor did he remember leaving a message on her voice mail to that effect. Grievant contends Ms. Curry's telephone log was fabricated.

The undersigned had the opportunity to observe the witnesses as they testified. Ms. Curry and Ms. Ferrell were unequivocal about the voice mail Grievant left saying it was okay to cancel the July 12 level one hearing. Grievant, on the other hand, wavered a bit in his testimony on this manner, first saying he didn't recall one way or the other whether he left the voice mail, and later, denying he made such a call. Clearly, Grievant has a significant interest in denying he agreed to a continuance of the level one conference, as that would defeat his default claim. The undersigned is unable to conclude that Ms. Curry and Ms. Ferrell fabricated Ms. Curry's telephone log. There is no indication on the log that the notation about the voice mail was “squeezed” into the log space, or otherwise added later. However, even if Grievant agreed that Ms. Curry could cancel the July 13, 2001, conference, that does not amount to a knowing, willful, and unequivocal waiver of the time lines. For all Grievant knew, Ms. Curry still had two additional days to schedule the conference and still comply with the time lines. Thus, the undersigned concludes that Grievant did not waive the level one time lines.

Finally, DHHR argues that it should be excused from default because of unavoidable cause or excusable neglect for its belief that the level one conference could not be held while Grievant was serving his 20-day suspension. It is a common axiom that “ignorance of the law is no excuse.” As noted above, there is nothing in the statutory language which supports DHHR's theory, and while it was undoubtedly acted on a good faith belief, that is not enough to prevent a finding that it was in default in failing to hold a level one conference or issue a level one decision within the statutory time lines.

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. Dept. of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000). 2. When a grievant files a claim at Level IV and 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 the evidence. 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. Dept. of Health and 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).

3. This Grievance Board has clarified in its procedural rules the method by which parties may seek default and subsequent relief with the Board at 156 C.S.R. 1 5.1.

> 5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether the relief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

4. Once a default is filed, the Grievance Board is required to follow its rules and regulations in resolving the issue. Thomas v. Clay County Health Dept., Docket No. 01- CCHD-422D (Sept. 26, 2001). 5. W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays.

6. "Working days" means refers not to days when an employee is actually working, or performing the duties and responsibilities of his or her job, but rather refers to a work week comprised of "regular working hours," defined by the employer, which in the instance of most West Virginia state government agencies, would be 8:30 a.m. to 4:30 p.m., Monday through Friday.

7. There is nothing in the grievance procedure statute which provides that an employee's time off work due to a disciplinary suspension serves to toll the time limits prescribed for either the filing of

a grievance, or the response to that grievance.

8. Grievant has proven by a preponderance of the evidence that DHHR defaulted on his grievance at level one.

9. DHHR has failed to prove by a preponderance of the evidence that Grievant waived the time lines at level one, or that it should be excused from the default as a result of unavoidable cause or excusable neglect.

Accordingly, Grievant's request for a finding of default at level one under W. Va. Code § 29-6A-3(a)(2) is **GRANTED**, and DHHR may proceed to show that the remedy sought by Grievant is contrary to law or clearly wrong. DHHR 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 DHHR does not request a hearing within five days of receipt of this order, an order will be entered granting the relief requested.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 9, 2002

Footnote: 1

Although late, DHHR's brief was received and accepted on April 19, 2002.

Footnote: 2

The record does not reflect the date of Grievant's termination.