MERRY M. FIBER,

GRIEVANT,

v. **Docket No. 03-HEPC-029D**

HIGHER EDUCATION POLICY COMMISSION/

WEST LIBERTY STATE COLLEGE,

Respondent.

ORDER DENYING DEFAULT

Merry M. Fiber (Grievant), employed by West Liberty State College (WLSC) as a Secretary, filed a level one grievance on September 26, 2002, seeking salary credit for her ten years of service with the State of West Virginia. Grievant's immediate supervisor supported her claim, but lacked authority to implement the salary change. Grievant appealed to level two on October 3, 2002. On that same date, Dr. David T. Javersak, Dean of the School of Liberal Arts, met with Grievant and issued a level two decision in which he also supported her claim, but noted that he could not provide the relief requested. Grievant notified WLSC Director of Human Resources Brian Warmuth by memorandum dated October 16, 2002, that WLSC was in default because a level three hearing had not been scheduled within the statutory time frame pursuant to W. Va. Code § 29-6A-3. Pursuant to Respondent's request, a level four hearing was conducted on the default issue on March 6, 2003, in the Grievance Board's Wheeling, West Virginia office. The matterbecame mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on April 8, 2003. Grievant was represented by Wayne R. Mielke, Esq., and WLSC was represented by Kristi A. McWhirter, Esq., Assistant Attorney General.

The following facts of this matter are undisputed.

Findings of Fact

1. Grievant was employed by WLSC as Secretary assigned to the Department of Humanities in September, 2002.

2. Grievant filed a grievance on September 26, 2002, and received a level one response from her supervisor on October 1, 2002..

3. Grievant appealed to level two on October 3, 2002, and received a level two response from

Dean Javersak on the same date.

4. Dean Javersak also sent his decision with a cover letter to the Director of Human Resources on October 3, 2002. Grievant did not file an appeal with Human Resources.

5. On October 15, 2002, Grievant notified WLSC through Dean Javersak that it was in default. Grievant's claim of default was sent to Mr. Warmuth by memorandum dated October 16, 2002.

Discussion

Grievant bears the burden of establishing she prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A default claim is based on the employer's alleged procedural violation of failing to respond to the grievance within the time limits contained in W. Va. Code § 29-6A-4. The default provision applicable to state personnel grievances is contained in W. Va. Code § 29-6A-3(a), and states 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 that 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.

W. Va. Code § 29-6A-4(c) provides the following directions regarding when Respondent must act at level three:

Within five days of receiving the decision of the administrator of the grievant's work location . . .the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.

The chief administrator or his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the appeal. . . .

The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

Grievant asserts she has prevailed by default because no level three hearing was held within seven days of her appeal. WLSC denies it is in default because Grievant failed to file an appeal at level three. There is no dispute that a level three hearing was not held.

The facts of this situation indicate confusion due to lack of information and/or understanding by Grievant and Dr. Javersak. Grievant credibly testified that she understood Dr. Javersak had sent the grievance on to level three. Dr. Javersak did send the documentation to Human Resources, after having Grievant sign the grievance form, indicating a level two decision had been issued. However, there is no evidence that Mr. Warmuth should have understood this to constitute an appeal. On the contrary, it was simply a notification of what had occurred at level two. W. Va. Code § 29-6A-4 specifically states that the Grievant shall provide the Director of Human Resources with an appeal and copy of the level two decision. Thus, while Dr. Javersak intended to be of assistance to Grievant, it simply led to a misunderstanding that an appeal was requested. There can be no default when the evidence establishes that a level three appeal was never properly filed.

Therefore, it is appropriate to make the following conclusions of law.

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." W. Va. Code § 29-6A-3(a).

2. The burden of proof is upon the grievant who files his default claim at level four to prove by a preponderance of the evidence that a default has occurred. Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). 3. W. Va. Code § 29-6A-4(c) provides the following directions regarding when Respondent must act at level three:

Within five days of receiving the decision of the administrator of the grievant's work location . . .the grievant may file a written appeal of the decision with the chief administrator of the grievant's

employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.

The chief administrator or his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the appeal. . . .

The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

4. Grievant has failed to prove that a default occurred at level three because the evidence shows that she did not file a level three appeal with the Director of Human Resources.

Accordingly, Grievant's claim of default is **DENIED**, and this case is dismissed from the docket of this Grievance Board and remanded to level three for hearing. The parties are further instructed to set a level three hearing on the merits of this grievance within seven days of receipt of this Order.

DATE: APRIL 29, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE