RANDALL PATTERSON,

Grievant,

v. **Docket No. 02-DOH-353D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On October 29, 2002, the Grievance Board received a letter from Felicia Williams of the Division of Highways, forwarding the default claim which had been filed at Level III by Grievant, Randall Patterson. Grievant's default claim against his employer, Respondent, Department of Transportation/Division of Highways ("DOH"), originally alleged a default occurred when Grievant did not receive the Level II decision within five days of the Level II conference. At a pre-hearing telephonic conference held on November 15, 2002, Grievant also asserted a default occurred when his default claim was not forwarded to Level IV by Ms. Williams in a timely manner. Respondent, represented by its counsel, Barbara Baxter, Esquire, did not object to this claim being addressed as part of this default, and Grievant was advised that he would be allowed to pursue that issue. After a continuance was granted for good cause, a Level IV hearing was held on January 6, 2003, solely for the purpose of taking evidence on the issues of whether a default had occurred, and whether Respondent had a statutory excuse to default. Grievant represented himself, and DOH was represented at the hearing by Belinda Jackson, Esquire. The parties declined to submit written argument, and this default claim became mature for decision at the conclusion of the Level IV hearing.

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

Findings of Fact

1. Grievant filed a grievance on July 11, 2002, and met with his supervisor, Richard E. Crigger, Jr., shortly thereafter. Mr. Crigger issued his Level I written decision denying the grievance on July 16, 2002.

2. Grievant appealed to Level II, and met with William Bennett, District Engineer, for his Level II conference on July 25, 2002.

3. Mr. Bennett prepared a response to the grievance on July 30, 2002, and it was sent to Grievant by certified mail, on July 30, 2002.

4. The postal records reflect that delivery of this piece of mail was attempted on August 3, 2002, and that a notice was left for Grievant that he had a piece of certified mail which he needed to pick up. Grievant did not receive this notice from the post office.

5. Grievant called Mr. Bennett's office on August 6, 2002, inquiring about the Level II response, and a copy of the Level II response was provided to him that day.

6. On August 20, 2002, Grievant received the response which had been sent by certified mail on July 30.

7. On August 8, 2002, Grievant mailed an appeal of the Level II decision to the Level III hearing examiner's office, Jeff Black, DOH's Director of Personnel, and the Division of Personnel. Grievant attached a letter to his appeal in which he stated he was appealing to Level III because he was “unsatisfied with several aspects of the procedure leading to the unfavorable Level II decision.” He then outlined what had occurred, noting that he did not receive a Level II response within five days of the Level II conference.

8. Grievant's appeal was received in the Level III hearing examiner's office on August 12, 2002. Felicia A. Williams in the Level III hearing examiner's office spoke with Grievant on August 12 or 13, and asked him if he was appealing the Level II decision to Level III, or claiming default. Grievant told her he was claiming default. Ms. Williams then informed him that they did not handle defaults at Level III, and she would forward the documents on to Level IV for him.

9. Grievant heard nothing further about his default claim. On October 29, 2002, Grievant called Ms. Williams. She told him to contact the Grievance Board, and he did so. The Grievance Board had no record of the default claim.

10. Ms. Williams forwarded Grievant's default claim to Level IV on October 29, 2002, with a

letter stating she had sent the default claim to Level IV on August 12, 2002. (See footnote 1)

Discussion

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which 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.

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

Grievant's default claim is based upon the fact that he did not receive a Level II decision within five days of the Level II conference. W. Va. Code § 29-6A-4 provides as follows regarding when Respondent must act 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 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 pointed out that the grievance procedure statute does not require a grievant to receive his or her decision within five days. It only requires that the decision be issued and transmitted to Grievant within five days, and Respondent followed this procedure. Respondent is

quite correct. The fact that Grievant did not receive the decision within five days of the Level II conference is not determinative. Respondent has proven that the decision was issued and transmitted to Grievant in a timely manner, and that is all that is required. Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998).

As to the issue of the default claim not getting to Level IV until October 2002, the undersigned concludes that, while Ms. Williams was under no obligation to do so, she did, in fact, attempt to forward Grievant's default documents to Level IV on August 12 or 13, 2002, as she told Grievant she would, and as they agreed would be done. Somewhere along the way, however, these documents were simply lost. However, even had Ms. Williams failed to forward the documents, this would not constitute a default, as there is no statutory requirement that DOH forward a default claim to Level IV for Grievant.

W. Va. Code § 29-6A-3(a) does require the grievant's employer to request a hearing on whether the remedy is contrary to law or clearly wrong, within five days of being given notice of default. The statute is unclear as to what constitutes notice to the employer of a default. This Grievance Board accepts default claims filed by grievants, and sets them for hearing without any request by the employer for a hearing, as occurred in this case. In such cases, the Grievance Board has in the past required the employer to request a hearing on the remedy within five days of receipt of a Grievance Board order finding, after a hearing on the issue, that a default had occurred. Brackman v. W. Va. Div. of Corrections, Docket No. 99-CORR-374D (Apr. 10, 2000). This Grievance Board has also found that an employer had an obligation to request a hearing at Level IV within five days of receipt of a notice that the grievant was claiming default, sent by the grievant to the Level II grievance evaluator, and the Commissioner of the Division of Highways. Allison v. W. Va. Dep't of Transp., Docket No. 99-DOH-415D (Dec. 30, 1998).

The undersigned concludes that Grievant's appeal to Level III, his subsequent discussion with Ms. Williams, and the agreement that she should send the default claim to Level IV for disposition does not constitute the notice to the employer contemplated by the statute which would trigger a requirement that the employer request a hearing at Level IV.

In addition, 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 claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

3. W. Va. Code § 29-6A-4 requires the employer to issue a Level II decision within five days of the Level II conference.

4. Respondent demonstrated that the Level II decision was issued and transmitted to Grievant in a timely manner, and that is all that is required. There is no requirement that Grievant receive the decision within any particular time frame. Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998).

5. Ms. Williams was under no obligation to forward Grievant's default claim to Level IV for him, and had she not done so, this would not constitute a default.

6. W. Va. Code § 29-6A-3(a) requires the grievant's employer to request a hearing on whether the remedy is contrary to law or clearly wrong, within five days of being given notice of default. The statute is unclear as to what constitutes notice to the employer of a default.

7. Grievant's appeal to Level III, his subsequent discussion with Ms. Williams, and the agreement that she should send the default claim to Level IV for disposition, does not constitute the notice to the employer contemplated by the statute which would trigger a requirement that the employer request a hearing at Level IV.

Accordingly, Grievant's request that a default be entered is **DENIED**. This grievance should be, and the same hereby is, **ORDERED REMANDED TO LEVEL III** of the grievance procedure for state employees for hearing within seven days of receipt of this Order. This grievance is **ORDERED DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 5, 2003

Footnote: 1

Ms. Williams was not called as a witness, and this information has been taken from the documents sent to Level IV by Ms. Williams.