JAMES SIMMONS,

Grievant,

v. Docket No. 04-PEDTA-175D

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

ORDER GRANTING DEFAULT

Grievant, James Simmons, filed this grievance against the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about November 3, 2003. The underlying grievance deals with an allegation of unfair distribution of overtime. On June 4, 2004, Grievant filed a claim of default with the Grievance Board. A Level IV default hearing was held August 5, 2004, at the Grievance Board's Beckley Office. This case became mature for decision on August 20, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by PEDTA. On November 3, 2003, he completed a grievance form asserting overtime had been unfairly distributed. He listed his representative as Mr. Lilly.

2. There was no problem with the responses at the lower two levels. 3. Grievant appealed to Level III on December 4, 2003, and on

December 10, 2003, Respondent notified Grievant his Level III hearing was scheduled for December 15, 2003. Resp. No. 6, at Level IV.

4. On December 15, 2003, Grievant completed a time frame waiver requesting a continuance as his representative was ill. This waiver indicated the hearing was continued until an unspecified date after January 15, 2004. Resp. No. 7, at Level IV.

5. On January 16, 2004, Mr. Patrick called Carrie Rouché, PEDTA's Director of Human Resources, with proposed hearing dates for the Level III hearing. Mr. Patrick identified dates in February and March when he would be available. Resp. No. 8, at Level IV.

6. By notice dated February 18, 2004, the Level III hearing was scheduled for March 4, 2004. This notice was only sent to Mr. Lilly. Resp. No. 9, at Level IV.

7. On February 23, 2004, a certified copy of this notice was sent to AFSME, but it was returned to PEDTA unclaimed. Resp. No. 10, at Level IV.

8. On March 2, 2004, Mr. Lilly and Grievant requested a continuance of the March 4, 2004 hearing because Mr. Lilly was still ill. Grt. No. 1 at Level IV.

9. On March 5, 2004, Mr. Patrick wrote Ms. Rouché stating he had contacted her office previously regarding AFSME's representation of Grievant and still had not heard about a date for the Level III hearing. He noted the hearing was long overdue and asked Ms. Rouché to contact him as soon as possible. Resp. No. 11, at Level IV. 10. On March 8, 2004, Ms. Rouché attempted to fax Mr. Patrick a copy of the hearing notice, but this attempt failed. Resp. No. 12, at Level IV. She then sent him a copy of this notice by regular mail.

11. On or about March 30, 2004, Ms. Rouché received a message to call Mr. Patrick about this grievance. Mr. Patrick indicated he had been lobbying at the Capitol. Resp. No. 13, at Level IV.

12. On March 31, 2004, Ms. Rouché called Mr. Patrick and informed him he

needed to tell PEDTA officially that he was now Grievant's representative, as the representative of record was Mr. Lilly. Resp. No. 13, at Level IV.

13. On April 1, 2004, Mr. Patrick wrote PEDTA and notified the agency he was Grievant's representative. He requested the addresses and phone numbers of PEDTA attorney and Grievance Evaluator so he could send hearing dates. Resp. No. 14, at Level IV.

14. Ms. Rouché contacted Jerry Wright, PEDTA's Grievance Evaluator, and he responded by e-mail that Ms. Rouché could give Mr. Patrick his phone number, and Mr. Wright would deal directly with Mr. Patrick to arrange a hearing. Resp. No. 15, at Level IV.

15. On April 1, 2004, Mr. Wright called Mr. Patrick. When Mr. Patrick returned Mr. Wright's call that afternoon, he gave Grievance Evaluator Wright three dates for hearing, April 19, 20, and 21, 2004.

16. On April 2, 2004, Mr. Patrick wrote Ms. Rouché informing her he had talked to Mr. Wright and gave her Grievant's witness list for whenever the hearing would be scheduled. Ms. Rouché does not remember getting this letter. Grt. No. 2 at Level IV. 17. On April 5, 2004, Ms. Rouché wrote Mr. Patrick answering his request of April 1, 2004, for the Hearing Examiner's phone number. (See footnote 2) **Ms. Rouché noted in this letter that PEDTA's attorney would not be available for hearing until sometime in May. She sent a copy of this certified letter to Mr. Abrams and Mr. Wright. Resp. No. 16, at Level IV.**

18. This letter was received in Mr. Patrick's office on April 6, 2004.

19. Grievant filed a motion for default with this Grievance Board on June 4, 2004, stating he had no further word from PEDTA since the April 5, 2004 letter.

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of

the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002). 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. If a default occurs, 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. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if HHR 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, Grievant will not receive the requested relief. 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. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

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

> **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.**

At Level IV, Grievant asserted a default occurred because PEDTA did not schedule a Level III hearing within a reasonable time after the last continuance. In fact, Grievant noted there was no communication after Mr. Patrick returned Mr. Wright's phone call on April 1, 2004. PEDTA asserts the Hearing Examiner did try to schedule a Level III hearing without success, and Grievant's representative would not return his phone calls. PEDTAalso notes it had attempted to cooperate with Grievant in scheduling and had no idea he was contemplating filing a default motion.

I. Credibility

An issue that must be addressed is credibility. Mr. Wright indicated he called Mr. Patrick to schedule the hearing, and he did not receive any response from these attempts. Mr. Wright also indicated he called Ms. Rouché and Mr. Patrick on Saturdays and talked to them or their secretaries. Additionally, Mr. Wright testified he wrote Mr. Abrams a letter about scheduling. These assertions are in conflict with the testimony, and are unsupported by documentation.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd.

of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence ornonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 3) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Mr. Wright appeared to suffer from faulty recollection or perhaps got this grievance confused with another. His testimony was muddled, disorganized, and hesitant. He testified he received the case on April 1, 2004, called Mr. Patrick in mid-April, left a message, and got no response. He stated he did not talk to Mr. Patrick until early May 2004, when Mr. Patrick then gave him three dates in May that he would be available, and he then wrote a letter to Mr. Abrams with these dates. Mr. Wright did not have a copy of this letter, nor did Respondent place a copy into evidence.

Mr. Wright stated he called Ms. Rouché after he sent this letter, and she told him these dates in May were not good. Mr. Wright also testified Ms. Rouché informed him she had talked to Mr. Patrick and told him May would not work for either her or Mr. Abrams. Ms. Rouché did not confirm this statement about informing Mr. Patrick, and if fact she said did not talk to Mr. Patrick after the first of April, and Mr. Patrick agrees. Mr. Wright states he then called AFSME on May 15, 2004, and left a message for Mr. Patrick, and there was no further response from him. May 15, 2004, was a Saturday, and there is no one in Mr. Patrick's office to

take a message. Mr. Wright also stated he called Mr. Patrick on June 4, 2004, to schedule a hearing in June, but Mr. Patrick states he did not receive this call. Mr. Wright also testified he called Ms. Rouché and AFSME on June 19, 2004, a Saturday, and found out the default had been filed. Ms. Rouché does not work on Saturday.

Given that there is no documentation for the May letter, the undersigned Administrative Law Judge finds this letter was not sent. Given that Mr. Wright indicated he called and/or talked to Ms. Rouché and Mr. Patrick on weekends, the undersigned Administrative Law Judge finds these acts did not occur. While it is of course unclear, the undersigned Administrative Law Judge believes Mr. Wright talked to Mr. Patrick in early April and has confused this conversation with some other conversation. The undersigned Administrative Law Judge also finds the Grievance Evaluator did not communicate with Grievant's representative or place calls to him from early April until the time the default was filed.

II. Default

It is the Grievance Evaluator's responsibility to timely schedule a grievance hearing, and it is also his responsibility to reschedule it in a timely manner if something prevents him from holding the hearing as scheduled. D'Angelo v. Dep't of Health and Human Res., Docket No. 02-HHR-54D (Apr. 16, 2003). Grievant waited two months before he sent his letter to PEDTA and the Grievance Board to assert a default. The undersigned Administrative Law Judge believes that if the Grievance Evaluator had kept Grievant's representative informed of the situation and the need to find other dates, this default would never have been filed. As stated by Grievant's representative, this default was filed because he and Grievant heard nothing for two months. No evidence was presented that would explain or excuse Mr. Wright's failure to contact Mr. Patrick to reschedule the hearing or to tell him the difficulty he was having finding hearing dates. The Grievance

Evaluator is the individual who is to set hearing dates and has responsibility in scheduling the hearing. Smith v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 01-PEDTA-626D (Mar. 28, 2002). While Grievant did ask for two continuances and these were granted, it was still the responsibility of Hearing Examiner to either schedule the hearing or ask the parties for available dates. A grievance cannot be simply ignored.

In Smith the undersigned Administrative Law Judge found a default when the Hearing Examiner did not act for ten months. Here, there were activities and discussions, up until the two months from April to June, the period this grievance was assigned to Mr. Wright. The next question is whether this length of delay when Grievant had requested two continuances, and clearly did not appear to be in a hurry to have this grievance heard at Level III, amounts to default in this set of circumstances. The undersigned Administrative Law Judge finds this issue to be a close call, but D'Angelo is instructive. In that case the Hearing Examiner was ill, and this excused the failure to hold the Level III hearing, but a default occurred when the Hearing Examiner did not reschedule the hearing in a timely manner. As stated in D'Angelo, "[i]t is the Grievance Evaluator's responsibility to timely schedule a grievance hearing, and it is also his responsibility to re-schedule it in a timely manner if something prevents holding the hearing as scheduled." Accordingly, a default is found with this set of facts.

The above-discussion will be supplemented by 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).

2. A Level III hearing must be scheduled within seven working days of the date of receipt of the Level III appeal. W. Va. Code § 29-6A-4(a).

3. "It is the Grievance Evaluator's responsibility to timely schedule a grievance hearing, and it is also his responsibility to re-schedule it in a timely manner if something prevents [him from] holding the hearing as scheduled." D'Angelo v. Dep't of Health and Human Res., Docket No. 02-HHR-54D (Apr. 16, 2003). See Smith v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 01-PEDTA-626D (Mar. 28, 2002).

4. PEDTA defaulted on this grievance through its failure to hold a grievance within the required time frame.

5. Grievant has proven Respondent failed to schedule this grievance for a timely hearing at Level III after a request for a continuance had been granted. D'Angelo, supra; Smith, supra. See Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Wilson v. Bd. of Trustees, Docket No. 99-BOT-115D (May 13, 1999).

Accordingly, this default is GRANTED. The parties are directed to give the undersigned Administrative Law Judge dates for the hearing on the issue of whether the requested remedy is contrary to law or clearly wrong.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 22, 2004

Footnote: 1

Grievant was represented by Richard Patrick, Union Representative from AFSCME, and Respondent was represented by General Counsel, David Abrams. Boyd Lilly, a former co-worker and union member, assisted Mr. Patrick.

Footnote: 2

It appears Mr. Wright did not tell Ms. Rouché he had called Mr. Patrick.

Footnote: 3

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).