JAMEY LITTLE,

Grievant,

v. **Docket No. 04-ADJ-348D**

ADJUTANT GENERAL'S OFFICE/

DEPARTMENT OF THE AIR FORCE,

Respondent.

ORDER GRANTING DEFAULT

This default proceeding arises out of a grievance filed by Jamey Little ("Grievant") against his employer, the respondent Adjutant General's Office/Department of the Air Force ("Respondent") on August 30, 2004. The relief sought in the underlying grievance was reinstatement to his position as a firefighter. After Grievant claimed that a default had occurred at Level II in the underlying grievance, Respondent requested a Level IV hearing pursuant to West Virginia Code section 29-6A-3(a)(2) and W. VA. CODE ST. R. § 156-1-5 (2000). Respondent's request was received at the Charleston office of the West Virginia Education and State Employees Grievance Board ("Grievance Board") on September 28, 2004.

A Level IV default hearing was held on November 10, 2004, at the Grievance Board's Charleston office. The purpose of the hearing was to afford Grievant an opportunity to substantiate, by a preponderance of the evidence, his claim that a default occurred at Level II during the processing of his August 30 grievance. (See footnote 1) At the Level IV hearing Grievant represented himself. Respondent was represented by counsel,Lieutenant Colonel James M. Barber. At the conclusion of the Level IV hearing, the default claim was ripe for decision.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

I 1. On August 30, 2004, Grievant filed a grievance at Level I in which he sought reinstatement to his position as a firefighter. (See footnote 2)

II 2. As of the date of the default hearing, Grievant had not received a medical release to return to his employment as a firefighter for Respondent.

III 3. In response to his Level I grievance, Grievant was informed that "[u]ntil the Medical Group Commander releases you to full duty, you may not return to work in your position as a firefighter."

IV 4. Grievant received the same response at Level II regarding the necessity for a medical release before he could return to a firefighter position. The Level II response was in the form of a memorandum, dated September 14, 2004, from Major John Dulin, Base Civil Engineer for the 130th Civil Engineer Squadron ("Major Dulin").

V 5. The Level II response from Major Dulin was issued four days after Grievant appealed to Level II. VI 6. Major Dulin did not hold a conference with Grievant before issuing the September 14, 2004, memorandum.

VII 7. On September 8, 2004, Grievant filed a second grievance in which he alleged retaliation.

VIII 8. Thereafter, on September 23, 2004, Grievant claimed a default had occurred at Level II in his August 30 reinstatement grievance.

IX 9. On September 28, 2004, Respondent exercised its right to request a Level IV default hearing. (See footnote 3)

X 10. Absent a written agreement to the contrary, the docketing of the default proceeding at the Grievance Board should have stayed further action at lower levels with respect to the August 30 grievance. W. VA. CODE ST. R. § 156-1-5 (2000). No evidence was presented regarding the existence of any such agreement.

XI 11. Nonetheless, at some point prior to October 7, 2004, the parties agreed to consolidate Grievant's reinstatement grievance and his retaliation grievance.

XII 12. On October 7, 2004, a Level III hearing was held with respect to the consolidated grievances. The Level III decision was issued on October 14, 2004.

XIII 13. Grievant appealed the consolidated Level III decision to the Grievance Board on October 25, 2004. The appeal is currently pending before the Grievance Board under docket number

04-ADJ-377.

Discussion

Grievant submitted an undated memorandum to the Grievance Board and to Major Dulin, in which he alleged a default by Respondent in processing his August 30 grievance at Level II. In pertinent part, he asserted as follows:

> The level II appeal was filed with my employer on September 10th as shown by the attached letter [*i.e.,* grievance form]. I received the attached letter [*i.e.*, memorandum entitled "Response to Level Two State Grievance"] via certified mail on 17 September 2004. This is a clear violation of Article 29- 6A-4(b) of the West Virginia State Code, which states that the administrator or designee must hold a conference within 5 days of receipt of appeal and issue a written decision within 5 days of the conference. My employer issued a decision before they held the conference that the State Code requires and did not hold a conference within 5 days of receipt of appeal.

Grievant further alleged that Respondent failed to comply with the pertinent statute because the Level I and II decisions did not include "the next point of contact for appeal."

On September 8, 2004, during the pendency of his August 30 reinstatement grievance, Grievant filed a second grievance in which he alleged retaliation. By agreement of the parties, the September 8 grievance was consolidated with the August 30 grievance for hearing at Level III. An evidentiary Level III hearing was conducted with respect to the consolidated grievances on October 7, 2004, despite the fact that lower level proceedings with respect to the August 30 grievance should have been held in abeyance pending resolution of Grievant's default claim. W. VA. CODE ST. R. § 156-1-5(2000).

Citing the consolidation of the two grievances and the fact that a Level III hearing was conducted after Grievant alleged that a default had occurred, Respondent moved to dismiss the default proceeding. Respondent argues that, by agreeing to the consolidation, Grievant waived his default claim with respect to the August 30 grievance. However, based on Grievant's testimony, it does not appear that this was his intention. Respondent further argues that Grievant's claim of a default at Level II was mooted or cured by theLevel III hearing held on October 7, 2004. Accordingly, Respondent seeks dismissal of Grievant's default claim and this action.

There is no evidence that Grievant intended to forego his default claim by agreeing to consolidation of the grievances and proceeding with the Level III hearing. If a waiver of the default claim was intended, Respondent would have been well-advised to reduce any such understanding to

writing. Absent such indicia, there is no way to conclude that there was a knowing and intelligent waiver by Grievant of his right to pursue a default.

As to the question of whether the Level III hearing cured the default and rendered Grievant's default claim moot, Respondent has not offered any legal authority to support the argument on this point. Furthermore, Respondent was aware on September 23, 2004, that Grievant had claimed that a default had occurred in his August 30 grievance. On September 28, 2004, Respondent requested a Level IV hearing on the default issue. It is thus clear that Respondent proceeded with the Level III hearing on October 7, 2004, at a time when it was well aware that Grievant had a default claim pending before the Grievance Board.

If the parties intended to moot the default claim by proceeding with the hearing at Level III, steps should have been taken to clarify and memorialize their intent. On the current state of the record, the default claim cannot be said to have been mooted by the Level III hearing. Accordingly, the motion to dismiss this action on grounds of mootness or waiver is denied. However, there remains the question of whether a default occurred. This question must be resolved on the basis of a very minimal evidentiary record. There was no evidence regarding such things as the supervisory chain under which Grievant worked and whether Grievant is currently on sick leave or whether such leave hasbeen exhausted. In light of the fact that there is no evidence to the contrary, and the issue was not raised by Respondent, it is assumed for purposes of this decision that Major Dulin (See footnote 4) is in Grievant's supervisory chain.

In any event, the burden falls to Grievant to establish by a preponderance of the evidence that a default occurred at Level II. *Stanley v. Higher Educ. Policy Comm'n,* Docket No. 01-HEPC-503D (Dec. 20, 2001) (citing *Friend v. Dep't of Health & Human Res.*, Docket No. 98-HHR-346D (Nov. 25, 1998)). (See footnote 5) 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. 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).

A default occurs where a “grievance evaluator required to respond to a grievance at any level fails to make a required response in the [statutory] time limits[.]” W. Va. Code § 29-6A-3(a)(2). If there is a default, the grievant is entitled to a presumption that the grievant “prevailed on the merits” in the underlying grievance. W. Va. Code § 29-6A- 3(a)(2). With respect to an appeal to Level II from an

adverse decision at Level I, West Virginia Code section 29-6A-4(b) requires that "[t]he administrator or his designee shall hold a conference within five days of receipt of the appeal and issue a written decisionupon the appeal within five days of the conference." The five-day period does not include "Saturday, Sunday or official holidays." W. Va. Code § 29-6A-2(c).

It is well-established that, "[a]bsent an agreement by the parties to extend the statutory time lines, a level two conference must be conducted within five working days from the date the level two grievance was filed. W. Va. Code § 29-6A-4(a)." *Stanley v. Higher Educ. Policy Comm'n,* Docket No. 01-HEPC-503D (Dec. 20, 2001). There is no evidence in this case of an agreement to extend the deadline at Level II. There is no dispute that a Level II conference was never held.

The question thus becomes whether the failure to hold the conference constitutes a default despite timely issuance of the written response. Resolution of this question depends upon whether the conference is considered part of the "response" Respondent was required to make in accordance with the provisions of West Virginia Code section 29-6A-4(b).

The Grievance Board has previously concluded that "[a] level two conference is a required response under Code § 29-6A-4(b)." *Rutherford v. Bureau of Employment Programs*, Docket No. 03-BEP-040D at 6 (Mar. 24, 2003). In *Rutherford* the Grievance Board declined to find a default where the employer issued a written decision without conducting a Level II conference. The employer deemed the conference to be unnecessary because the employer considered the grievance to be untimely. *Rutherford* at 4-5.

It was decided in *Rutherford* that it would be exalting form over function to find that there was a default, despite the employer's failure to schedule and conduct a Level IIconference. This result is inconsistent with the legal conclusion in *Rutherford* that the conference is a part of the statutorily-required response from the employer. It is also inconsistent with the discussion in *Rutherford* that the employer's unilateral decision to forego the conference

> was not in accord with the spirit of the grievance process, which is to try to resolve grievances a the lowest level possible. Even if an administrator believes a grievance is untimely, he or she is required by statute to hold a level two conference, precisely so that the merits of the grievance are not forgotten. To resolve a grievance at level two based strictly upon legal theories, regardless of the facts, only serves to complicate the grievance process, and alienate employees who are intended to benefit from the process.

Rutherford at 5.

The legal conclusion in *Rutherford,* to the effect that a timely conference is an essential element of the employer's “response,” is consistent with the reasoning of the West Virginia Supreme Court of Appeals in *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 305-306, 465 S.E.2d 399, 407-408 (1995). The *Martin* Court was addressing the provisions relating to education employees, which provide for a hearing rather than a conference at Level II. After analyzing the analogous provisions of the education employees grievance statutes, the Court stated its belief that “the term 'response' was intended to include hearings.” *Martin*, 195 W. Va. at 306, 465 S.E.2d at 408. Upon similar reasoning, the response called for by the statutes relating to state employees includes a timely Level II conference.

In another decision based on an analogous statute relating to education employees, the Supreme Court of Appeals of West Virginia reiterated that the grounds for avoiding the results of an untimely grievance response are limited to the grounds set forth in the statute. *Harmon v. Fayette County Bd. of Educ.*, 205 W. Va. 125, 134-35, 516 S.E.2d 748, 757-58 (1999). Application of the equitable principles for vacating a default judgment (See footnote 6) was specifically disapproved in the grievance context. Pursuant to West Virginia Code section 18-29-3(a), an untimely response in an education employee's grievance may only be excused if the delay is the result of “sickness or illness[.]” Under the corresponding provisions of West Virginia Code section 29-6A-3 (a)(2), relating to state employees, the grounds for excusing an untimely response are “sickness, injury, excusable neglect, unavoidable cause or fraud.” None of the enumerated exceptions apply to Respondent's failure to hold a Level II conference.

There is no doubt that the parties could have agreed to waive the conference or to extend the deadline for conferring. However, there was no evidence of such agreement in this case. The conclusion that Respondent's failure to hold a Level II conference is synonymous with a failure to make a timely response seems unavoidable. To the extent that *Rutherford* suggests otherwise, it is overruled.

In light of the express language of the grievance statutes and the pertinent discussion by the *Martin* Court of what is encompassed by the term “response,” failing to find a default under the circumstances of this grievance would require the Grievance Board to ignore the plain meaning of West Virginia Code section 29-6A-4(a). Although reason and common sense suggest that Grievant did not suffer any harm from Respondent's failure to hold a Level II conference, the pertinent inquiry

is whether a default occurred. Grievant has proven that the Level II conference did not take place. Grievance Boardprecedent and the decisions of the Supreme Court of Appeals of West Virginia lead ineluctably to the conclusion that the statutorily-mandated conference is part of the response required of an employer. Consequently, Grievant has proven a default on the part of Respondent. The other issues raised by Grievant in his default claim need not be addressed in light of this conclusion.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

Conclusions of Law

I 1. The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Stanley v. Higher Educ. Policy Comm'n,* Docket No. 01-HEPC-503D (Dec. 20, 2001) (citing *Friend v. Dep't of Health & Human Res.*, Docket No. 98-HHR-346D (Nov. 25, 1998)).

II 2. 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).

III 3. "The language of the grievance statute 'makes mandatory the time periods within which grievances . . . must be filed, heard, and decided. If a grievance evaluator does not comply with the hearing and decision time periods, and his/her inactions [sic] does not come within one of the enumerated statutory exceptions, the grievant shall prevail by default.'" *Stanley v. Higher Educ. Policy Comm'n*, Docket No. 01-HEPC-503D (Dec. 20,2001)(internal quotation marks omitted)(citing *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997); *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995)).

IV 4. "A level two conference is a required response under Code § 29-6A-4(b)." *Rutherford v. Bureau of Employment Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003). V 5. By failing to "hold a conference within five days of receipt of the appeal" at Level II, Respondent failed "to make a required response in the time limits required[.]" This constitutes a default, within the meaning of West Virginia Code section 29-6A-3(a)(2), unless Respondent can establish that the failure to hold the conference was the result of "sickness, injury, excusable neglect, unavoidable cause or fraud." W.

Va. Code § 29-6A- 3(a)(2); *Sheppard v. Dep't of Health & Human Res*., Docket No. 01-HHR-598D (May 9, 2002) (citing *Friend v. Dep't of Health & Human Res.*, Docket No. 98-HHR-346D (Nov. 25, 1998)).

VI 6. To the extent that the decision in *Rutherford v. Bureau of Employment Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003), does not comport with the foregoing conclusion of law, it is overruled.

VII 7. Respondent did not demonstrate the applicability of any of the statutorily- enumerated bases for failing to make a timely response at Level II.

VIII 8. Grievant has proven that a default occurred at Level II. This grievance must now be set for an evidentiary hearing to determine whether the relief requested is "contrary to law or clearly wrong." W. Va. Code § 29-6A-3(a)(2). Accordingly, Grievant's request that a default be entered is **GRANTED**. The parties shall consult with each other and provide at least three mutually agreeable dates for a Level IV hearing at which the default remedy will be addressed. The hearing dates shall be provided to Cricket Powell at the Charleston office of the Grievance Board on or before December 8, 2004.

Date: November 24, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The merits of the underlying grievance are not at issue herein.

Footnote: 2

It appears that, when he filed his grievance, Grievant was not working due to a medical disability. Respondent did not raise the issue of what effect, if any, this would have had under the caveat found in West Virginia Code section 29-6A-3(a)(1) ("[T]he specified time limits shall be extended whenever a grievant is not working because of accident, sickness, . . . or other cause necessitating the grievant to take personal leave from his or her employment.") Therefore, this issue will not be addressed.

Footnote: 3

In the ordinary course of events, when an employer requests a default hearing, there is an initial hearing to determine whether a default has occurred. If a default is found, there is a subsequent hearing to determine whether the relief to which a grievant would be entitled as a result of the default is lawful.

Footnote: 4

The initials "WVANG" after Major Dulin's signature on the September 14 memorandum indicate that he is a member of the West Virginia Air National Guard. See Marcum v. Dep't of Military Affairs & Public Safety/Adjutant General's Office, Docket No. 04-ADJ-005. However, it is unclear whether Grievant's employment as a firefighter was in the capacity of a civilian employee or a member of the West Virginia Air National Guard. *(See footnote 7)*

Footnote: 5

Stanley was decided after the grievance procedures set forth in West Virginia Code sections 29-6A-1 et seq. were made applicable to higher education employees.

Footnote: 6

These are set forth in Syl. pt. 3, Parsons v. Consolidated Gas Supply Corp., 163 W. Va. 464, 256 S.E.2d 758 (1979).

Footnote: 7

West Virginia Code section 15-1B-26, which took effect June 2, 2004, requires that only "members of the West Virginia national guard may be employed by the adjutant general as firefighters and security guards[.]" There is, however, a grandfather clause for anyone who was so employed on the effective date of the statute.