ROGER AMOS,

Grievant,

v. **Docket No. 05-DOH-311D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On August 30, 2005, this matter was brought to level four pursuant to Grievant's claim of default at level three. Accordingly, a hearing was conducted in the Grievance Board's office in Westover, West Virginia, on October 19, 2005, for the purpose of determining whether a default had occurred. Grievant represented himself at the hearing, and Respondent was represented by counsel, Barbara Baxter. This issue became mature for consideration at the conclusion of that hearing.

The following material facts have been proven by a preponderance of the evidence introduced at the level four hearing.

Findings of Fact

1. On an unspecified date, Grievant initiated four grievances regarding several different matters, which proceeded through levels one and two uneventfully. Apparently, these grievances were consolidated and addressed together. 2. At level three, Grievant executed a “Time Frame Waiver,” which stated that Grievant agreed to waive the procedural time frames at Level III, but with the addendum that the “waiver is with the understanding that my decision will be mailed no later than August 22, 2005.” Grievant signed the waiver on August 15, 2005.

3. The level three decision was not issued or mailed on August 22, 2005.

4. On August 23, 2005, an employee from the level three hearing evaluator's office telephoned Grievant and informed him that the decision was not yet ready. (See footnote 1) The employee then

asked Grievant if it would be all right with him if the decision was mailed out the following day, August 24, 2005. To this, Grievant responded, “Do whatever you want to do, because you're late.” After the employee again told him the decision would be done the following day, Grievant said “Well, if you are going to send it tomorrow, I'll wait until tomorrow.” He then stated something to the effect of “well, why not, you're gonna call [again] tomorrow,” to which the employee responded that there would be no further problems, and the decision would undoubtedly be issued the next day.

5. The level three decision was signed and mailed on August 24, 2005.

6. After receiving the level three decision, Grievant filed a default claim on August 30, 2005.

(See footnote 2)

Discussion

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 DOH 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)

In the instant case, Respondent argues that, through his actions during the phone conversation with the hearing evaluator's office, Grievant agreed to another extension of the agreed timeframe, resulting in a waiver. The concept of an actual waiver of one's established rights implies a voluntary act. Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). “'A waiver of legal rights will not

be implied except upon clear andunmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). It has been held by this Grievance Board that timelines may be extended by the actions of the grievant and by the agreements of the parties. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). However, in the instant case, Grievant argues that "it just isn't right" that Respondent asked for a fourth extension, after the decision was already later than agreed. Nevertheless, he did not deny what was said during the telephone conversation, during which he made statements to the effect of "do whatever you want," "why not," and "I'll wait until tomorrow."

Under similar circumstances, this Grievance Board has held that, when a representative raised no objection when she was orally informed that a decision would be delayed, a later assertion of default was prohibited. See Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (April 10, 2001). Similarly, Grievant also acquiesced to the delay by the statements he made during the phone conversation with the hearing evaluator's office. At that time, he could have stated that he would not agree to the delay, and he could have claimed default right then. Instead, he made statements to the effect that he would not be objecting to the additional delay, and he did not file his claim of default until after the decision was issued and received by him. A grievant is required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). Accordingly, Grievant has failed to prove entitlement to relief by default. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. 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).

2. "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v.

U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). 3. Timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001).

4. The grievant is required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

Accordingly, Grievant's claim of default is **DENIED**. Because level three proceedings have concluded, this matter will proceed to a level four hearing on the merits. The parties are directed to confer with one another and provide this office with at least four mutually agreeable dates for scheduling the hearing **no later than November 14, 2005**.

Date: November 2, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This telephone conversation was recorded by the hearing evaluator's office without Grievant's knowledge or permission, which is apparently a common practice of Respondent. The undersigned refused to accept the transcript of the recording into evidence because Grievant was not informed of the recording, but does not believe it affects the outcome in this case, due to Grievant's admission of what he said during the conversation.

Footnote: 2

Although the default claim itself was dated August 27, 2005, the postmark reflects that it was not mailed until August 30, 2005.