MELISSA NICELY,

Grievant,

v. **Docket No. 04-DOH-099D**

WEST VIRGINIA DEPARTMENT of

TRANSPORTATION/DIVISION of HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT AND GRANTING MOTION TO DISMISS

Grievant, Melissa Nicely, filed this request for default against the Department of Highways ("DOH"), on March 5, 2004, with the Grievance Board. DOH requested a hearing on the default issue on March 11, 2004. The underlying grievance deals with Grievant's assertion that she should not have to train an employee who is in a higher classification than she. A Level IV default hearing was scheduled for April 5, 2004, but Grievant did not attend. A second default hearing was held on January 6, 2005, and this case became mature for decision on that date, as the parties elected not to file proposed findings of fact and conclusions of law. (See footnote 1) On December 8, 2004, Respondent filed a Motion to dismiss for three reasons: 1) Grievant is no longer employed by DOH; 2) Grievant had not pursued her default request in a timely manner, as her Level I default claim had not been filed until after she had received her Level III response; and 3) the passage of time had prejudiced DOH.

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

Findings of Fact

1. Grievant was employed as an Office Assistant 2 by DOH in the Right of Way Division.

2. She filed a grievance on February 4, 2004, alleging she should be reallocated to an Office Assistant 3. This grievance was denied at Levels I and II, as DOH had not yet received a response from the Division of Personnel about Grievant's request. There is no other information in the record about what happened to this grievance.

3. On February 25, 2004, Grievant filed a second grievance alleging she had been treated

unfairly when she was asked to train a Secretary 2 to perform some of her duties. In this grievance she requested her salary be increased from $18,648 to $25,536 because of this request from her employer.

4. On March 5, 2004, Grievant filed a request for default with this Grievance Board on the second grievance asserting Respondent had not responded at Level I within the required time frames. Grievant did not indicate when the Level I response was issued.

5. On March 10, 2004, DOH asked for a hearing on the default issue.

6. By notice dated March 10, 2004, the parties were informed the default hearing was scheduled for April 5, 2004.

7. Grievant's last day of work with DOH was April 16, 2004. She was on annual leave from April 5, 2004, to April 16, 2004.

8. On April 5, 2004, DOH was present for the default hearing with witnesses. Grievant did not attend or call.

9. On June 30, 2004, the undersigned Administrative Law Judge wrote Grievant noting her failure to attend this hearing and asking her to respond, in writing, by July 12, 2004, how she wished to proceed with her default grievance. 10. Grievant did not respond to this letter.

11. On November 8, 2004, the undersigned Administrative Law Judge sent Grievant a Show Cause Order noting her failure to proceed with her case and requesting her to respond, in writing, not later than November 22, 2004, why her case should not be dismissed.

12. By letter dated November 20, 2004, and received November 22, 2004, Grievant indicated she did not want her default claim dismissed. Grievant stated in this letter that she had been on annual leave during the first hearing date and had not responded to the status letter because she had surgery in June 2004, and was not released by her doctor until July 12, 2004. Grievant indicated she had not thought about this grievance in many months and thought it was dismissed.

13. A second default hearing was scheduled by Notice dated November 23, 2004, for December 14, 2004.

14. DOH filed a Motion to Dismiss on December 8, 2004, served on Grievant by regular mail that same day.

15. The December 8, 2004 hearing was continued due to the illness of DOH's counsel.

16. By letter dated December 14, 2004, Grievant objected to this continuance and complained

at length about how she had been inconvenienced by the last minute notice. She also maintained she had not received DOH's Motion to Dismiss. A copy of this Motion was sent to Grievant by this Grievance Board. 17. At the Level IV hearing, Grievant testified she did not attend the previously scheduled Level IV default hearing because she was on annual leave and "forgot," and did not respond to the status letter because she was on medical leave.

18. At the Level IV default hearing, Grievant did not have any data or evidence demonstrating the Level I grievance response was late. (See footnote 2)

Discussion

W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure. W. Va. Code § 29-6A-4(a) identifies the required response at Level I:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

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 generallyrecognized 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).

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 had occurred at Level I, but at hearing she had no information or documentation to support her contention. Grievant attached to her default request a photocopied piece of paper marked "CONFIDENTIAL" with her supervisor's name on it stating it was " **RECEIVED**" by the " **RW DIVISION** on FEB 25, 2004," but there was no testimony to connect this otherwise blank sheet with a filed grievance, or any information about who had stamped it, and when it was actually received by Mr. Light, her supervisor. Additionally, Grievant was unable to remember when she received the Level I response, or when this response was dated. Grievant did not bring a copy of the Level I Decision with her to the Level IV default hearing.

Further, Grievant did not show good cause for her failure to attend the first scheduled hearing or to answer the status letter. That she "forgot" to attend is an insufficient explanation. In the same vein, Grievant's failure to respond to the status letter because she was on sick leave is also insufficient. If Grievant was unable to write a response due to illness, a phone call would have been adequate, or Grievant could have written after her sick leave was over. She did neither.

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 inthis 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 written decision must be issued at Level I within six days of the receipt of a written notice of the default. W. Va. Code § 29-6A-4(a).

3. Grievant failed to meed her burden of proof and demonstrate a default occurred.

4. Grievant has failed to present good cause why her grievance should not be dismissed for failure to pursue.

Accordingly, Grievant's request that a default be entered is **DENIED**, and this case is **DISMISSED** from the docket of the Grievance Board.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 8, 2005

Footnote: 1

Grievant represented herself, and Respondent DOH was represented by Barbara Baxter, Esq.

Footnote: 2

Grievant indicated she had mailed this information to the Grievance Board with her original request for default. This belief was incorrect. Grievant had attached the lower level rulings from her first grievance, but she had not attached the allegedly late Level I response from the second grievance.