KENNETH P. PATRICK,

Grievant,

v. **Docket No. 04-DOH-378D**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On the 7th day of December 2004, the grievant, Kenneth P. Patrick ("Grievant"), appeared in person and with his representative, David Reed, for a hearing on Grievant's claims of default at Level II. Grievant's employer, the respondent West Virginia Division of Highways ("DOH"), appeared by counsel, Barbara Baxter, Esquire. Grievant's claims of default at Level II are related to Grievant's earlier claims that a default occurred at Level I in each of the two underlying grievances. Those earlier claims were addressed and found to be without merit in *Patrick v. Div. of Highways*, Docket No. 04-DOH-143D (Sept. 30, 2004). A review of the procedural history of those grievances will assist in understanding the disposition of Grievant's current claims.

PROCEDURAL BACKGROUND

Grievant filed two grievances (hereafter sometimes "the underlying grievances"), in which he claimed that defaults had occurred at Level I. The default claims were consolidated for hearing pursuant to West Virginia Code section 29-6A-3(a)(2) before the West Virginia Education and State Employees Grievance Board ("Grievance Board"). The consolidated hearing was held on August 16, 2004. Thereafter, on September 30, 2004, an "Order Denying Defaults" was issued. It appears that, during the pendency of the consolidated default actions, Grievant filed an appeal to Level II in both of the underlying grievances. His avowed purpose in filing the Level II appeals "on April 21, 2004, [was] to protect my rights." He now complains that "[t]here was no activity by the Division of

Highways concerning the subject grievances until October 21, 2004." This led to his current claims that there were defaults at Level II in each of the underlying grievances.

At the request of DOH, the claims of default at Level II were brought on for hearing on December 7, 2004, at the Grievance Board's hearing room in Charleston. The purpose of this hearing was to afford Grievant an opportunity to substantiate, by a preponderance of the evidence, his claims that there had been defaults at Level II in the underlying grievances. (See footnote 1) At the conclusion of the default hearing, this case was submitted for decision.

After careful review of the entire record, which includes the "Order Denying Defaults" that was issued in *Patrick*, Docket No. 04-DOH-143D, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Grievant is employed by DOH as Assistant Maintenance Engineer for District Three.

2 2. Grievant filed the two underlying grievances on March 30, 2004, alleging in one that he had been improperly removed as duty officer for District Three for a portion of March 2004, and alleging in the other that he had not been given an opportunity "to work any shifts covering the radio room or provided any training for such work."

3 3. Grievant's claims that there had been defaults in both of the underlying grievances were litigated in *Patrick*, Docket No. 04-DOH-143D, resulting in issuance of the "Order Denying Defaults" on September 30, 2004.

4 4. The final sentence of the "Order Denying Defaults" states that "Grievant may, if he so desires, pursue the underlying grievances at Level II."

5 5. While *Patrick*, Docket No. 04-DOH-143D, was pending at Level IV, Grievant went ahead and, on April 21, 2004, filed Level II appeals in the underlying grievances. He claimed his purpose in filing the Level II appeals at that time was to "protect" his rights.

6 6. After he received the "Order Denying Defaults," Grievant failed to take any action to affirmatively apprise DOH that he wanted to pursue his grievances at Level II.

7 7. Ultimately, action on the Level II grievances was initiated by DOH rather than Grievant. This occurred when, on October 21, 2004, Rusty Roten, District Engineer, received a copy of the "Order Denying Defaults."

8 8. DOH failed to offer any explanation as to why it took so long for the "Order Denying Defaults" to make its way to Rusty Roten.

DISCUSSION

Grievant claims defaults on the grounds that the Level II hearings were not scheduled until 19 days after the order denying Grievant's claim of defaults at Level I was issued. He argues that the hearing should have been scheduled within five days of the issuance of the "Order Denying Defaults" on September 30, 2004. Although Grievant doesnot make reference to any specific statutory provision, it appears that he is relying upon West Virginia Code section 29-6A-4(b). (See footnote 2)

Grievant claimed defaults at Level I in the two underlying grievances. DOH forwarded a request for a consolidated default hearing on April 19, 2004. Absent a written agreement by the parties, the default proceedings at the Grievance Board placed the underlying grievances in abeyance. (See footnote 3) Nonetheless, Grievant filed Level II appeals in those grievances on April 21, 2004. His stated purpose in filing the Level II appeals was to protect his rights.

Thereafter, Grievant received a copy of the "Order Denying Defaults" in which he was expressly informed that he could pursue his grievances at Level II, if he so desired. Nonetheless, Grievant failed to take any action to indicate to DOH that he intended to proceed at Level II. There is no evidence to suggest that Grievant or his representative contacted the Grievance Board to seek any clarification with respect to the contents or the meaning of the "Order Denying Defaults" issued in *Patrick*, Docket No. 04-DOH-143D.

For some unknown reason, the "Order Denying Defaults" was not received by District Engineer Rusty Roten until October 21, 2004. This is clearly problematic in light of the fact that said order was issued on September 30, 2004. DOH did not offer any explanation for the time lag between issuance of the decision and its receipt by RustyRoten. Were it not for the permissive language of the "Order Denying Defaults" this time lag would likely place DOH in default.

However, the "Order Denying Defaults" expressly states that "Grievant may, if he so desires, pursue the underlying grievances at Level II." This permissive language does not automatically trigger the running of the timeline for Grievant's Level II appeals. Rather, it requires an affirmative action on the part of Grievant to inform DOH that he does, in fact, intend to pursue his grievances at Level II.

West Virginia Code section 29-6A-5(a) vests the Grievance Board with "jurisdiction regarding

procedural matters at levels two and three of the grievance procedure." Requiring a grievant to expressly indicate to his employer that he wants to proceed to the next level of his grievance, after matters have been stayed during the Grievance Board's disposition of a default claim, comports with this provision by allowing the Grievance Board to define the triggering event for the running of the lower level procedural timelines. This eliminates the confusion that might otherwise result when the various parties receive the order from the default proceeding at different times. Clarity as to when the statutory timelines are triggered inures to the benefit of everyone involved in the grievance process.

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

1 1. West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that "[t]he 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 thisarticle, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud."

2 2. 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).

3 3. 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).

4 4. The general rule with respect to Level II is that "[t]he administrator or his or her 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." W. Va. Code § 29-6A-4(b).

5 5. The Level II appeals at issue herein were filed at a time when lower level proceedings in the underlying grievances were stayed pending disposition by the Grievance Board of Grievant's claims of defaults at Level I. (See footnote 4) Grievant claims that he filed the Level II appeal simply to protect and preserve his rights. However, contrary to this assertion, his efforts to claim a default under these circumstances signals that he is attempting to use his filing at Level II offensively rather than defensively.

6 6. It comports with the provisions of West Virginia Code section 29-6A-5(a), which vest the Grievance Board with "jurisdiction regarding procedural matters at levels two and three of the grievance procedure," for the Grievance Board to define how the timelines for the lower level procedures will be triggered when a grievance is returned to lower levels.

7 7. Grievant failed to take the action required under the express terms of the "Order Denying Defaults" to trigger the running of the statutory timelines for processing his grievances at Level II.

8 8. Grievant is unable to sustain his burden of proving that his employer defaulted in the underlying grievances at Level II.

Based upon the foregoing, Grievant's requests that defaults be entered are **DENIED**. This grievance is hereby **REMANDED** to the Division of Highways for scheduling of a Level II conference in each of the two underlying grievances. It is **ORDERED** that, unless otherwise mutually agreed by the parties in writing, the Division of Highways shall schedule the Level II conferences to be held within ten working days of the issuance of this Order.

Date: February 7, 2005

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

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

Footnote: 2

With respect to Level II, this statute requires the administrator to schedule a conference within five days of receiving the appeal and to issue a written decision within five days of holding the conference.

Footnote: 3

"Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all the default matters have been ruled upon at Level Four, unless all parties agree in writing the lower level proceedings can go forward." W. VA. CODE ST. R. § 156-1-5.1(2004)

Footnote: 4

See footnote 3, above.