THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JAMES M. HILL, JR.,

Grievant,

v. **Docket No. 06-DEP-178D**

DEPARTMENT OF
ENVIRONMENTAL PROTECTION

AND

DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING DEFAULT

James M. Hill, Jr., Grievant, filed a claim of default against Respondents May 25, 2006, alleging default at Level III of the grievance process. (See footnote 1) The underlying grievance deals with Grievant's request to be reallocated. A Level IV default hearing was held on June 27, 2006, at the Grievance Board's Charleston office. Grievant represented himself, and Respondent was represented by Heather A. Connolly, General Counsel. This case became mature on June 27, 2006, upon the parties' submissions of findings of fact and conclusions of law. (See footnote 2) The following material facts have been proven:

Findings of Fact

1. Grievant is employed by Division of Environmental Protection ("DEP") as an Environmental Resource Specialist 2.

2. Grievant filed a grievance at Level I on March 1, 2006.

3. The grievance was denied at Levels I and II, and on May 2, 2006, a Level III hearing was held.

4. The Level III court reporter indicated the transcript of the hearing would be prepared in approximately 2 weeks.

5. The deadline for filing proposed findings of fact and conclusions of law was then set for June 1, 2006.

6. The transcript was delivered to DEP on May 15, 2006, and Ms. Connolly prepared DEP's proposed findings of fact and conclusions of law and submitted them to Grievant and the Level III evaluator on May 19, 2006.

7. A cover letter was attached to DEP's filing, and Grievant received a copy of the letter and the filing together. The cover letter stated:

Enclosed for filing is Respondent's Proposed Findings of Fact and Conclusions of Law in the above styled manner. Respondent received the transcript of proceedings on May 15, 2006. A certified copy has been sent to the Grievant on the same day.

DEP's Response to Grievant's Motion for Default Exhibit A.

8. Grievant believed he was entitled to a transcript of the Level III proceeding.

9. Grievant never requested a copy of the transcript from DEP or the Level III court reporter. 10. The wording of DEP's cover letter also led Grievant to conclude he was entitled to a transcript of the Level III hearing.

11. DEP has a policy of sending out the Level III transcript with the decision, unless a Grievant specifically requests the transcript prior to receiving the decision.

12. On May 25, 2006, DEP received Grievant's letter requesting default judgement. Grievant requested the default because he had not received a copy of the transcript from DEP.

13. Upon receipt of the request for default, DEP provided Grievant with an electronic copy of the transcript and offered to extend the deadline for filing proposed findings of fact and conclusions of law. Grievant refused the extension.

Discussion

When a grievant asserts that his employer is in default in accordance with *W. Va. Code* § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the

grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See W. Va. Code* § 29-6A-3(a)(2). *Board, et al. v. W. Va. Dep't of Health and Human Res./Lakin Hospital*, Docket No. 99- HHR-329D (Sept. 24, 1999).

Grievant has not established default. Default occurs when the grievance evaluator fails to make a required response within the statutorily imposed time frames, unless prevented from doing so by sickness, injury, excusable neglect, unavoidable cause or fraud. *W. Va. Code* § 29-6A-3(2). Providing Grievant with a transcript of the proceeding is not a required response unless requested. *W. Va. Code* § 29-6A-6(d) explains that if a transcript is requested, it is to be provided "promptly." There is no imposed statutory time frame for providing a transcript when none is requested. Grievant argues it does not seem logical to require him to request a transcript instead of automatically supplying one prior to the deadline for filing proposed findings of fact and conclusions of law. Grievant believes the transcript is imperative when drafting the proposed findings of fact and conclusions of law, and therefore it is logical to assume he would need a copy of the transcript. This is clearly not a default issue. Default has to do with the timeliness of a decision, conference or hearing, not the receipt of a transcript. However, the burden is on Grievant to request a transcript if he believes the transcript is necessary in effectively presenting his case. Even though Grievant is unfamiliar with the process and assumed he would receive a transcript, this faulty assumption does not prove default. This Grievance Board has held, “[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive.” *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991).

The following conclusions of law support the discussion above:

Conclusions of Law

1. When a grievant asserts that his employer is in default in accordance with *W. Va. Code* § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See W. Va. Code* § 29-6A-3(a)(2). *Board, et al. v. W. Va. Dep't Health and Human Res./Lakin Hospital*, Docket No. 99-HHR-329D (Sept. 24, 1999).

2. Default occurs when the grievance evaluator fails to make a required response within the statutorily imposed time frames, unless prevented from doing so bysickness, injury, excusable neglect, unavoidable cause or fraud. *W. Va. Code* § 29-6A-3(2). 3. Providing Grievant with a transcript of the proceeding is not a required response unless requested. *W. Va. Code* § 29-6A-6(d) explains that if a transcript is requested, it is to be provided "promptly."

4. This Grievance Board has held, “[A]s a general rule, ignorance of the law... will not suffice to keep a claim alive.” *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991).

3. Grievant failed to establish default occurred.

Accordingly, this default is **DENIED**. This case is remanded back to Level III.

DATE: September 13, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Grievant also alleges Division of Environmental Protection bargained in bad faith at mediation. Grievant asserts that he has not been provided an official record of the reason his reallocation was denied. However, since this order only deals with default, these issues will not be discussed.

Footnote: 2

On September 6, 2006, Grievant filed a second default claim asserting default at Level IV because his decision was not issued within 30 days of the hearing. Default cannot be claimed at Level IV. W. Va. Code § 29-6A-4(d)(2) only has a deadline for the decision on the merits. W. Va. Code § 29-6A-3(2), the default provision, defines default in terms of a grievance evaluators "required responses." Administrative law judges are termed hearing examiners throughout the code, so the default provision does not apply at this level.