THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

KELLY CISCO,

Grievant,

v.

Docket No. 06-DOH-214D

DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Grievant, Kelly Cisco, filed a default claim against his employer, Division of Highways ("DOH"), on June 29, 2006, claiming his employer defaulted on his grievance at Level I. The underlying grievance alleges discrimination and political retaliation. A Level IV default hearing was held at the Grievance Board's Charleston office on August 23, 2006, for purposes of determining whether a default occurred. Grievant appeared *pro se*, and Respondent was represented by Barbara L. Baxter, Esq. This case became mature on September 29, 2006, upon the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following material facts have been proven:

Findings of Fact

1.

Grievant filed a grievance with his supervisor, Norman Stepp, on June 7, 2006.

2.

On June 16, 2006, Mr. Stepp verbally denied the grievance. On thatdate, Grievant informed Mr. Stepp that the response was already one day late, but agreed to accept the written decision on June 21, 2006.

3.

On June 21, 2006, Grievant asked Mr. Stepp for the written grievance decision. Mr. Stepp informed Grievant he had left the decision at home.

4.

On June 22, 2006, Grievant's wife, Bethany Cisco, went to Mr. Stepp's home to pick up the grievance response.

5.

While Mrs. Cisco was in Mr. Stepp's home, Mr. Stepp sat down, wrote out the response to the grievance and handed it to Ms. Cisco. (See footnote 2)

6.

After Mr. Stepp handed the response to Ms. Cisco, he then took it back from her and dated it June 14, 2006.

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. WVDHHR/Lakin Hos.*, Docket No. 99-HHR-329D (Sept. 24, 1999).

If a default occurs, Grievant is presumed to have prevailed. *W. Va. Code* § 29-6A- 3(a)(2); *Carter v. W. Va. Div. of Corr.*, 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 wasprevented from meeting the time lines 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 order to benefit from the "relief by default" provisions in subsection (a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997).

Grievant did not file default as soon as he became aware of the default. Instead, upon Mr. Stepp's request, Grievant agreed to extend the deadline for the written decision until June 21, 2006. When Mr. Stepp did not have the decision on that day, Grievant still did not file for default. Instead, he arranged for his wife to pick up the response the next day. These actions demonstrate Grievant waived the time frames statutorily prescribed. 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 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). It has been held by this Grievance Board that time lines 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).

Because Grievant did not immediately file for default, but instead voluntarily agreed to waive the time lines, this default must be denied.

However, Mr. Stepp was incorrect when he took the response back from Ms. Cisco and dated it June 14, 2006, some eight days prior to drafting it. This action could have affected Grievant's ability to appeal Mr. Stepp's decision. Respondent should strongly caution Mr. Stepp that this action was inappropriate and cannot occur again.

The following conclusions of law support this discussion.

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. WVDHHR/Lakin Hos.*, Docket No. 99-HHR-329D (Sept. 24, 1999).

2. 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 time lines 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).

3. In order to benefit from the "relief by default" provisions in subsection (a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997).

4. 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 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).

5. It has been held by this Grievance Board that time lines 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).

6. Grievant did not establish a default had occurred.

Accordingly, this grievance is hereby **DENIED**. This case is remanded back to Level II where Respondent is instructed to hold a conference within five days of receipt of this order.

DATE: December 15, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Proposed findings of fact and conclusions of law were only received from Respondent.

Footnote: 2

Mr. Stepp testified that he did this because he had lost the original response.