THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TWILLA CASSELL,

Grievant,

v. **DOCKET NO. 06-DEP-355D**

DEPARTMENT OF ENVIRONMENTAL

PROTECTION,

Respondent.

ORDER GRANTING DEFAULT

and

ORDER JOINING INDISPENSABLE PARTY

Grievant filed this grievance on July 17, 2006, alleging she is misclassified and seeking to be reallocated from Environmental Resource Specialist 1 to Environmental Resource Specialist 2. On October 17, 2006, Grievant filed a claim stating that a default occurred at level three. A level four hearing on the default claim was held in the Grievance Board's Charleston office on January 18, 2007. Grievant appeared *pro se*, and Respondent was represented by A. M. “Fenway” Pollack, Assistant Attorney General. The matter became mature for decision at the conclusion of the hearing.

Synopsis

Grievant alleged a default occurred at level three when the decision was not mailed within the required time. Grievant had waived the statutory time limit, but only for a definite time. Respondent did not issue its level three decision until almost two weeks after the end of the extended time limit. Respondent stipulated that a default had occurred.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. A level three hearing in this matter on September 12, 2006. At the conclusion of the hearing, Grievant agreed to waive the time limit for issuing a decision until no later than October 4, 2006.

2. As of October 17, 2006, Grievant had yet to receive the decision, and she filed this default claim.

3. Respondent mailed the level three decision on October 17, but Grievant had not received it when she filed the default claim.

4. Respondent did not offer an reason to excuse the late decision, and at the hearing of this matter, admitted and stipulated that a default occurred.

5. The level three decision denied the grievance.

Discussion

"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." (See footnote 1) In this matter, Respondent has admitted that a default occurred, and did not assert the default was excused.

A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a level four hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awardingsuch remedy would be contrary to law or clearly wrong. (See footnote 2) Respondent has requested a hearing on the question of whether the remedy requested is contrary to law or clearly wrong. To rebut the presumption created in W. Va. Code § 29-6A-3(a)(2), the employer must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. (See footnote 3)

The following conclusions of law support this discussion:

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 in this 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. Respondent defaulted at level three by failing to timely issue a decision, and the default was not excused.

For the foregoing reasons, Grievant's request that a determination of default be made is GRANTED. Grievant is presumed to have prevailed on the merits of her grievance. A telephone conference will be set to schedule a date for a hearing on the remedy requested, to determine whether it is contrary to law or clearly wrong. As the remedy issue involves reclassification, the **Division of Personnel is hereby Joined as an indispensable party**.

January 18, 2007

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-3(a).

Footnote: 2

Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

Footnote: 3

Lohr v. Div. of Corrections, Docket No. 95-CORR-157D (Nov. 15, 1999).