THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

HEIMO RIEDEL,

Grievant,

v. **Docket No. 07-HE-101D**

WEST VIRGINIA UNIVERSITY,

Respondent.

ORDER DENYING DEFAULT

Heimo Riedel, Grievant, filed a claim of default against his employer, West Virginia University ("WVU"), on March 20, 2007, alleging a default occurred at Level III of the grievance process because the hearing was not completed within seven days of the receipt of the Remand Order. The underlying grievance was filed on November 13, 2006, and deals with WVU's refusal to allow Grievant to spend his start-up funds and to grant him a salary increase.

The parties elected to submit this default issue on proposed findings of fact and conclusions of law and attached documents. Grievant represented himself, and WVU was represented by Kristi McWhirter, Assistant Attorney General. This case became mature for decision on May 1, 2007, the date of Grievant's submission of his proposed findings of fact and conclusions of law.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed by WVU as a tenured Professor in the Department of Biochemistry and Molecular Pharmacology in July of 2003. Res. Exh. 1 & 2.

2. Grievant filed this grievance on November 13, 2006, at Level II, and the Level II

administrator directed Grievant to file at Level I, as the stated grievance did not meet the criteria for filing directly to Level II.

3. On November 20, 2006, Grievant filed this grievance to Level III, and a hearing was held only on the issue of whether Grievant could skip Level I of the grievance procedure. By Decision dated December 11, 2006, the Grievance Evaluator found Grievant was required to start the process at Level I.

4. On December 15, 2006, Grievant appealed to Level IV, and Respondent filed a Motion to Dismiss. A pre-hearing conference was conducted on February 1, 2007, and Senior Administrative Law Judge Sue Keller remanded the grievance to Level III of the grievance procedure by Order dated February 8, 2007.

5. Respondent received the Remand Order on February 12, 2007, and asked Grievant to waived the statutory time period until March 2, 2007, due to the unexpected death of Associate General Counsel Beverly Kerr's father. Grievant refused to grant this request.

6. On February 14, 2007, Angie Eaglen, Administrative Assistant, Senior, sent a Notice of Hearing for a three-hour hearing on the afternoon of February 20, 2007, with Bobbi Brandt, Associate General Counsel, serving in Ms. Kerr's stead.

7. On the morning of February 20, 2007, the Grievance Evaluator called in sick, and the grievance was continued over Grievant's objection. Grievant requested another Grievance Evaluator be selected, but this request was not granted. 8. On February 20, 2007, Ms. Eaglen requested dates not to go beyond March 9, 2007, to reschedule the Level III hearing. She resent this request on February 23, 2007, because only Dr. Prescott had responded.

9. On February 23, 2007, Ms. Brandt e-mailed Grievant noting he had not provided dates and requesting him to respond to Ms. Eaglen's request.

10. On February 23, 2007, Grievant responded to this e-mail stating he had given Ms. Eaglen dates that day, would make himself available over the "next days," expected a ruling by the end of the month, and disagreed to an extension of the schedule until March 9, 2007.

11. On February 26, 2007, Ms. Eaglen sent a Notice of Hearing for a three-hour hearing on the afternoon of March 2, 2007.

12. This March 2, 2007 hearing was held, and, as Grievant had the burden of proof, he presented his case first and took the vast majority of time, at least 2½ hours, for this presentation.

Ms. Kerr had not completed her cross-examination of Grievant when the hearing ended. The Hearing Examiner noted another hearing would be needed, and Grievant objected.

13. On March 2, 2007, Ms. Eaglen requested dates for the next Level III hearing, noting these dates needed to be for the week of March 12, 2007, as the Grievance Evaluator would be out of town the prior week.

14. On Sunday, March 4, 2007, Grievant wrote to the secretary in the Grievance Board's Westover office asserting WVU had not "honored the statutory time limits" directed by ALJ Keller. He averred he would not receive a fair hearing at WVU, and he wasplanning to appeal to Level IV again, unless ALJ Keller could tell him how a timely hearing could be enforced at Level III.

15. Grievant's request was directed to Paul Marteney, Chief Administrative Law Judge. He responded on March 6, 2007, and outlined Grievant's possible alternatives. He noted Grievant could file a default, appeal to Level IV, or file a Motion requesting the Grievance Board address the scheduling conflicts at the lower levels. CALJ Marteney pointed out that any of the identified options were likely to take substantially longer than a proposed date the week of March 12, 2007.

16. On March 7, 2007, a Notice of Hearing was sent to Grievant and others for a three-hour hearing scheduled on March 16, 2007.

17. This hearing was held. Grievant's cross-examination was completed and Respondent completed the testimony of 1½ of its four witnesses. The Hearing Examiner noted another hearing would be needed, and again Grievant objected.

18. On March 19, 2007, Ms. Eaglen requested dates for the next Level III hearing.

19. On March 20, 2007, Grievant filed a claim of default at Level III with WVU and the Grievance Board by fax.

20. On March 22, 2007, a Notice of Hearing was sent to Grievant and others for a three-hour hearing scheduled on March 30, 2007. This hearing was canceled because of the default claim.

Discussion

In a default grievance, 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 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). 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 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 WVU 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, supra; Williamson, supra.

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.

The first question to address is whether WVU defaulted. W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure. Thetimelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven working days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the Level II decision within five working days of the hearing. W. Va. Code § 29-6A-2(c)

Grievant asserts a default occurred because the hearing was not completed within the seven day timeframe. The first hearing day was within the seven day timeframe. WVU received notice of ALJ Keller's ruling on February 12, 2007, and the hearing was scheduled on February 20, 2007. The Grievance Evaluator was sick, and the hearing was continued. Illness is one of the identified statutory excuses that will absolve the employer from holding the hearing within the timeframe. W. Va. Code § 29-6A-3(a).

As soon as the need to reschedule the hearing was known on February 20, 2007, Ms. Eaglen

requested dates to reschedule the hearing, not to go beyond March 9, 2007. Grievant did not respond to this request until Friday, February 23, 2007. The three-hour hearing was scheduled for March 2, 2007, Grievant received notice, and he attended. The act of attending and participating in this hearing precludes any claim of default.

As Grievant had the burden of proof, he presented his case first and took up almost all the three hours with his testimony. While Grievant was within his rights to so do, WVU also had the right to cross-examine Grievant on his testimony and to call witnesses in its own right.

At the next hearing, Grievant's cross-examination was completed, and Respondent began the presentation of its case-in-chief. It is noted Grievant took full advantage of his right to cross-examine Respondent's witnesses, as the direct examination of the first witness took eighteen pages of the transcript, and the cross-examination appeared to take56 pages, followed by eight pages of redirect. The direct testimony of the second of Respondent's four witnesses was completed, and the cross-examination started when the time ran out. The Grievance Evaluator noted another hearing day would be required to complete the testimony of the witnesses. The next day, Grievant filed this default claim. It is not an unusual occurrence for hearings to take more than one day, but in retrospect, it would appear that scheduling a full day for hearings would have been a better choice than three hours. It is noted the third hearing, which was not held, was scheduled for four hours.

W. Va. Code § 29-6a-3(q) identifies the rights of the parties at a hearing.

> The aggrieved employee, employing agency and representatives of both have the right to call, examine and cross-examine witnesses who are employees of the agency against which the grievance is lodged and who have knowledge of the facts at issue.

Additionally, W. Va. Code § 29-6A-6(a) identifies the actions required of the individual conducting the hearing.

> [t]he chief administrator or his or her designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross-examine and to rebut evidence.

The facts recited above do not establish default. It would be patently unfair for a grievant to use the majority of time during a hearing to present his/her case, and then complain when the hearing must be continued to another day for the other side to present its case. As stated in the above-cited

Code Sections, both sides have the right to present their cases. Additionally, there does not appear to be foot-dragging on the part of WVU in scheduling the hearings. The first hearing was delayed because of a statutory excuse,Grievant delayed responding to the request for dates for the second hearing date, and as soon as he responded the hearing was scheduled within five days. The next hearing date was somewhat delayed because of the Grievance Evaluator's previously scheduled out of town trip, but it was set two weeks later, and Grievant did attend, after learning from CALJ Marteney what his options were. Again, the hearing process required another day because the testimony was not complete. As previously stated, these facts do not establish a default.

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 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).

2. A Level III hearing must be held within seven days of the appeal to Level III hearing. W. Va. Code § 29-6A-4(a). Within this context, days means working days. W. Va. Code § 29-6A-2(c).

3. W. Va. Code § 29-6a-3(q) identifies the rights of the parties at a hearing.

> The aggrieved employee, employing agency and representatives of both have the right to call, examine and cross-examine witnesses who are employees of the agency against which the grievance is lodged and who have knowledge of the facts at issue.

4. W. Va. Code § 29-6A-6(a) identifies the actions required of the individual conducting the hearing.

> [t]he chief administrator or his or her designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartialmanner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross-examine and to rebut evidence.

5. As both parties had not completed their presentation of evidence, the Grievance Evaluator was required to set another hearing date for the taking of evidence.

Accordingly, Grievant's claim for default is **DENIED**. This case is remanded to Level III, and the

parties are directed to schedule a FULL day of hearing for the completion of Level III hearing, within seven days from the receipt of this Decision.

JANIS I. REYNOLDS

Acting Chief Administrative Law Judge

Dated: September 7, 2007