THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DEBRA ANN FERRELL,

Grievant,

v. **Docket No. 06-DOH-344D**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Debra Ann Ferrell, ("Grievant"), filed a claim of default against her employer, the Division of Highways ("DOH") on October 6, 2006, alleging a default occurred at level one of the grievance process. The underlying grievance deals with Grievant's nonselection for the position of Acting Inventory Control Manager. A level four default hearing was held on January 10, 2007, at the Grievance Board's office in Westover, to determine if a default had occurred. Grievant represented herself, and DOH was represented by Barbara Baxter, Esq. The case became mature for decision upon receipt of post hearing submissions filed by the parties on or before February 16, 2007.

The following facts essential to this matter are undisputed and may be set forth as Findings of Fact.

Findings of Fact

1. Grievant has been employed by DOH for approximately twenty-eight years and is currently classified as a Supervisor 2 - Warehouse.

2. By memorandum dated July 19, 2006, Robert Andrew, Director of the Equipment Division, notified all division employees that Kevin Riley had been appointedto the position of Acting Inventory Control Manager for the Equipment Division Warehouse. Mr. Riley was also to continue in his position of Procurement Officer.

3. Grievant notified Mr. Andrew by e-mail on August 1, 2006, that she wished to schedule an informal conference with him the following day, prior to filing formal complaint.

4. After speaking with Mr. Riley about a grievance, Grievant filed a level one grievance regarding her nonselection for the temporary upgrade with Mr. Andrew on August 2, 2006.

5. Mr. Andrew conducted a conference with Grievant on August 3, 2006. Mr. Andrew advised Grievant at that time that levels one and two of the grievance process were going to be consolidated, because Mr. Riley had not been officially approved as the Acting Inventory Control Manager. Grievant voiced no objection at that time.

6. Mr. Andrew denied the grievance by level two decision dated August 14,2006.

7. Grievant filed an appeal to level three on August 21, 2006.

8. On October 6, 2006, Grievant filed a notice of default with DOH and the Grievance Board, alleging that levels one and two had been improperly consolidated without her consent.

Synopsis

Grievant asserts that DOH is in default, as the grievance statute requires decisions to be issued at all levels. Grievant states that she had not requested an initial review at level two, and the complaint is not of a nature to qualify for the expedited process. DOH asserts a default did not occur, as Mr. Riley had not yet received final approval for the temporary upgrade on August 2, 2007, and that Grievant failed to timely allege a default had occurred. Grievant knew on August 3, 2006, that she had not received a level one decision. Therefore, her claim of default two months later, after she had appealed to level three, was untimely.

Discussion

When a grievant asserts her 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 a default occurred, the employer may show it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *Board v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-329D (Sept. 24, 1999).

W. Va. Code § 29-6A-4(b) sets forth the time lines to be followed at level one of the grievance procedure and provides:Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance,

the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

Thus, the time lines for level one require the immediate supervisor, to issue a written decision within six days of receipt of the grievance.

It is undisputed that the grievance was never processed at level one. However, Grievant's delay of two months renders the claim of default untimely. The West Virginia Supreme Court of Appeals has held, "[i]n order to benefit from the 'relief by default' provisions contained in W. Va. Code § 18-29-3(a) . . . a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." (See footnote 1) *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997); *Harmon and Chiles v. Fayette County Bd. of Educ*., 205 W. Va. 125, 516 S.E.2d 748 (1999). *See Malcolm v. Bureau of Employment Programs*, Docket No. 03-BEP-313D (Jan. 29, 2004). This Grievance Board has held that an employee is allowed to raise a default claim, so long asshe raises it as soon as she becomes aware of the default and submits the claim before a response to the grievance has been received. *Bell v. Northern Reg'l Jail and Corr. Facility*, Docket No. 99-CORR-054D (Apr. 14, 1999). Grievant's delay of more than two months prior to stating her claim for default, after receiving a level two decision and filing a level three appeal, renders the assertion untimely.

The preceding findings of fact and discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. When a grievant asserts that her 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. *Board v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-329D (Sept. 24, 1999).

2. In order to benefit from the 'relief by default' . . . a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997); *Harmon and Chiles v. Fayette County Bd. of Educ*., 205 W. Va. 125, 516 S.E.2d 748 (1999). *See Malcolm v. Bureau of Employment Programs*, Docket No. 03-BEP-313D (Jan. 29, 2004).

3. An employee is allowed to raise a default claim, so long as she raises it as soon as she becomes aware of the default and submits the claim before a response to thegrievance has been received. *Bell v. Northern Reg'l Jail and Corr. Facility*, Docket No. 99-CORR-054D (Apr. 14, 1999).

4. Grievant failed to state her claim for default in timely manner.

Accordingly, this default is **DENIED**. DOH is directed to conduct a level three hearing within five days of the receipt of this Order.

DATE: FEBRUARY 28,2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Although the Court was reviewing a claim filed under the grievance procedure for education employees, the ruling would apply equally to those grievances filed under W. Va. Code §§ 29-6A-1, et seq.