THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

HAROLD CRINER,

Grievant,

v. **Docket No. 06-DOH-269D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Harold Criner, Grievant, filed a claim of default against Respondent on August 7, 2006, alleging default at Level II of the grievance process. The underlying grievance deals with Grievant's claims of harassment, discrimination, and retaliation. A Level IV default hearing was held on October 2, 2006, at the Grievance Board's Charleston office. Grievant represented himself, and Respondent was represented by Barbara Baxter, Esq., General Counsel. This case became mature on November 2, 2006, upon the parties' submissions of findings of fact and conclusions of law.

The following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2, Equipment Operator. He is located at the Braxton County Headquarters.

2. Grievant filed the grievance in question on July 13, 2006, alleging he was a victim of harassment, discrimination and retaliation. This grievance was filed directly to Level II.

3. Ron Hooten, District Administrator for District 7, assigned the grievance toRon Smith, District 7 Maintenance Engineer. Mr. Smith is located at Weston.

4. Mr. Smith set the Level II conference for July 20, 2006, and notified Grievant.

5. On July 19, 2006, Grievant informed Mr. Smith he had a doctor's appointment on July 20th. Grievant and Mr. Smith agreed to hold the Level II conference on July 25, 2006.

6. The conference was held as scheduled on July 25, 2006.

7. A Level II decision was signed by Mr. Smith on August 1, 2006. Respondent's Exhibit 3.

8. Mr. Smith's secretary placed the decision in an envelope and mailed it via interdepartmental mail to Braxton County on August 1, 2006.

9. The mail typically takes 2 days to reach Braxton County from Weston. 10. The decision was received at the Braxton County Headquarters on August 8, 2006.

Discussion

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).

If a default occurs, the 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). 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). ___*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.

Grievant argues Respondent defaulted because the Level II decision was not received until nine days after the conference. DOH asserts that the decision was effectively, and timely, transmitted to Grievant on August 1, 2006. Mr. Smith testified his secretary typed the decision, he signed and dated it and she deposited the decision in interdepartmental mail on that date.

The Grievance Board has previously held that a decision is timely issued if placedin the mail on or before the date by which the decision is required to be made. *Cain, et al. v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-402DEF (Dec. 16, 2005), *citing Stover v. Raleigh County Bd. of Educ.*, 02-41-179 (Sept. 19, 2002).

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Mr. Smith credibly testified that he signed and dated the decision on August 1, 2006. He also testified that his secretary placed the decision in an envelope and put the envelope in interdepartmental mail. Mr. Smith believed Grievant would receive the response onAugust 2, 2006.

Not only did he provide testimony, but he presented a condensed calendar complete with personal notes. His notes all referred to this grievance and the timing with which the events occurred. Based on the signed decision which was dated on August 1, 2006, and the notes presented at the default hearing, it appears as if Respondent was within the required time frame when it placed the decision in interdepartmental mail.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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).

2. If a default occurs, the 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). 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 notreceive 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. A decision is timely issued if placed in the mail on or before the date by which the decision is required to be made. *Cain, et al. v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-402DEF (Dec. 16, 2005), *citing Stover v. Raleigh County Bd. of Educ.*, 02-41-179 (Sept. 19, 2002).

4. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*.,

Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

5. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

6. Respondent complied with the required time frame by placing the grievance response in the mail prior to the day its due date.

7. Grievant failed to prove Respondent defaulted.

Accordingly, this default is **DENIED**. This case is remanded to Level III where it is instructed to hold a hearing within the statutorily prescribed time frames.

DATE:

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Wendy A. Campbell

Administrative Law Judge