THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JUDDIE BURGESS,

Grievant,

v. **Docket No. 06-DEP-392D**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF ENVIRONMENTAL

PROTECTION and DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING DEFAULT

Juddie Burgess, Grievant, filed a claim of default against his employer, the Department of Environmental Protection ("DEP") on October 26, 2006, alleging default occurred at Level III of the grievance process. The underlying grievance deals with a request for reallocation. A Level IV default hearing was held on January 8, 2007, at the Grievance Board's office in Charleston, to determine if a default had occurred. Grievant represented himself, and Respondent was represented by Fenway Pollack, Assistant Attorney General. This case became mature on that date, as the parties did not wish to submit proposed findings of fact and conclusions of law.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by DEP as an Environmental Resources Specialist 2.

2. This grievance requesting reallocation was filed on August 29, 2006, and the Level I and II Decisions were issued in a timely manner. 3. Grievant appealed to Level III on September 1, 2006.

4. A Level III hearing was held on September 19, 2006. Lowell Basford, the Division of Personnel's Assistant Director of the Classification and Compensation Section appeared on behalf of the Division of Personnel. At the hearing, the parties agreed the proposed Findings of Fact and Conclusions of Law would be exchanged fifteen days after receiving the transcript of the Level III hearing. Additionally, the parties agreed that after they received each others proposals they would have five days to respond to them. After that time, the Hearing Examiner would issue his decision within fifteen days. Level III Trans. at 62.

5. Debbie Hughes is the EEO coordinator and deals with grievances for DEP. The Grievance Evaluator did not tell her the parties were to be sent transcripts. She did not send Grievant a copy of the transcript until October 3, 2006, after he requested it. As she had not been informed she should send Mr. Basford a copy of the transcript, she did not send him one.

6. Grievant filed his proposals with DEP on October 5, 2006. Ms. Hughes then forwarded these proposals to the Grievance Evaluator and Mr. Basford.

7. On October 26, 2006, Mr. Basford wrote Ms. Hughes asking about a copy of the transcript, and a copy was hand-delivered that same day.

8. On October 26, 2006, Mr. Basford placed the Grievance Evaluator on notice that he would need until October 31, 2006, to complete his proposals, and the Grievance Evaluator granted Mr. Basford a week.

9. Grievant objected to this decision of the Grievance Evaluator. 10. By letter dated October 26, 2006, Grievant filed a notice of default with DEP and requested reallocation to an Environmental Resources Specialist 3. Grievant also filed a notice of

default with the Grievance Board. (See footnote 1)

11. Mr. Basford filed his proposals on November 1, 2006, four working days after receipt of the transcript. Grievant responded to these proposals on November 2, 2006.

12. No decision was ever issued because of the filing of default.

Synopsis

Grievant asserts Mr. Basford and the Division of Personnel are in default, as Mr. Basford should have realized when he got Grievant's proposals that Grievant had received a copy of the transcript, and Mr. Basford should have inquired at that time about his copy. Grievant argues the Grievance Evaluator should not have given Mr. Basford time after receipt of the transcript to complete his proposals.

Respondent asserts a default did not occur, as Mr. Basford timely filed his proposals after receipt of the transcript. In the alternative, Respondent asserts if a default did occur it was the result of excusable neglect as neither Ms. Hughes nor the court reporter sent a copy of the transcript to Mr. Basford, and the Grievance Evaluator was unaware of this mistake until notified by Mr. Basford.

No default on the part of Division of Personnel or DEP occurred with this set of facts. Grievant's filing of default was premature because at the time of filing, no default had occurred.

Discussion

When a grievant asserts 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 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 timelines to be followed at Level III of the

grievance procedure and provides:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

Thus, the timelines for Level III require the chief administrator, to issue a written decision within five days of the hearing. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Huston v. W. Va. Dep't of Tax and Revenue/Div. of Personnel, Docket No. 99-T&R 469D (Feb. 29, 2000); Parker v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-296D (Nov. 30, 1999). This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). Here, the parties, agreed on the record, that their proposals would be due fifteen days after receipt of the transcript, they would have five days to respond to each other's proposals, and then the Grievance Evaluator would have fifteen days to write his decision. The receipt of Grievant's proposals did not put Mr. Basford on notice that Grievant had been sent a copy of the transcript. Parties frequently submit their proposals without the benefit of a written record. Mr. Basford waited for his copy, and when it did not appear within a reasonable time, he called to check into the matter. He then submitted his proposals within the agreed upon time frame.

After Mr. Basford's response on November 1, 2006, the parties had five days to exchange responses. Only after these events occurred did the fifteen days the Grievance Evaluator had to write the decision start to run. Grievant's filing for default

was premature.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Board v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-329D (Sept. 24, 1999).

2. W. Va. Code § 29-6A-4(b) provides:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appealand issue a written decision upon the appeal within five days of the conference.

3. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties, and such waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Huston v. W. Va. Dep't of Tax and Revenue/Div. of Personnel, Docket No. 99-T&R 469D (Feb. 29, 2000); Parker v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-296D (Nov. 30, 1999).

4. The practice of waiving the timelines to receive a transcript and/or to allow the Grievance Evaluator time for research, benefits both parties by allowing the parties sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

5. No default occurred within this set of facts as Grievant's claim of default was prematurely filed.

Accordingly, this default is **DENIED**. Respondent is directed to issue a Level III Decision within five days of the receipt of this Order

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: January 31, 2007

Footnote: 1 *This Notice is misdated as October 16, 2006.*