THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CONNI MCMORRIS,

Grievant,

v.

DOCKET NO. 07-C&H-316D

DIVISION OF CULTURE AND HISTORY,

Respondent.

ORDER GRANTING DEFAULT

Conni McMorris, Grievant, filed a claim of default against her employer, the Division of Culture and History, on June 7, 2007, alleging a default occurred at level three of the grievance procedure. A level four hearing was held on December 19, 2007, (See footnote 1) at the Grievance Board's Charleston office, before Acting Chief Administrative Law Judge Janis I. Reynolds, to determine if a default had occurred. Grievant was represented by Gordon Simmons, Steward, UE Local 170, and Respondent was represented by Gregory Skinner, Senior Assistant Attorney General. This case became mature for decision upon the conclusion of the hearing. Due to the retirement of ALJ Reynolds, this matter was transferred to the undersigned on April 8, 2008.

Synopsis

Grievant argued a default occurred when the level three decision was not issued by the date agreed to by the parties. Respondent agreed that a default had occurred, butargued it had a statutory excuse for the failure to meet the agreed upon extended timeline. Respondent asserted that it was excused from issuing the level three decision by the agreed upon date, because of sickness, injury, excusable neglect, and unavoidable cause. Respondent's representative stated that the level three grievance evaluator had experienced a series of difficulties, including a surgery, his twelve year old daughter had been seriously ill, his house flooded which affected his home office, and he was having some marital problems. Unfortunately, the level three grievance evaluator did not appear at the level four hearing to provide testimony to support Respondent's argument. Grievant's claim for default will be Granted.

The following Findings of Fact are made based upon a preponderance of the evidence presented at level four.

Findings of Fact

1. Grievant is employed by the Division of Culture and History ("C&H").

2. On or about October 5, 2006, Grievant was suspended for three days without pay.

3. This grievance, contesting the suspension, was filed on October 6, 2006, and the level one and two decisions were issued in a timely manner.

4. Grievant appealed to level three, and a level three hearing was held on December 20, 2006, before Warren Morford, the grievance evaluator designated by C&H to hear this grievance at level three, and issue a recommended decision.

5. At the conclusion of the level three hearing, the parties were advised that the transcript of the hearing would be prepared by January 19, 2007. They were also advisedthat Mr. Morford's decision would be a recommended decision to the Commissioner of C&H, and the Commissioner would have five days to act on the recommended decision.

6. The parties agreed at the level three hearing that they would submit written proposed findings of fact and conclusions of law after receipt of the hearing transcript, and that the deadline for their joint submission would be February 20, 2007. The parties agreed to extend the statutory timelines for rendering the level three decision. The parties agreed that the recommended decision would be rendered by March 9, 2007, and that C&H Commissioner Randall Reid-Smith would then

have five business days after that to act on the recommended decision.

7. On April 25, 2007, Grievant's representative sent an email to Mr. Morford, asking whether a level three decision had been issued on Ms. McMorris' grievance. Mr. Morford responded by email dated May 1, 2007, that he was still working on the decision, and that he had been delayed by surgery, and by the illness of his daughter. Mr. Morford requested an extension until May 18, 2007, to issue the recommended decision, and Grievant's representative agreed to this extension.

8. Grievant filed a default claim at level four of the grievance procedure on June 7, 2007, asserting that a default had occurred at level three. The default claim states that an extension had been granted to May 18, 2007, to issue the level three decision, and that Grievant had not yet received the level three decision.

9. On June 8, 2007, Mr. Morford sent an email to Grievant's representative, advising that he had been unable to complete the level three decision due to “some issues in my personal life that have made it impossible for me to complete the Level III decision.” Mr. Morford requested an extension to June 29, 2007, to issue the recommended decision. 10. Grievant's representative responded to Mr. Morford's email on June 8, 2007, stating, “[w]e do not agree to a further, and untimely, extension.”

11. The deadline for issuance of the level three recommended decision was May 18, 2007. The deadline for the Commissioner of C&H to act on the recommended decision was May 25, 2007.

12. The level three recommended decision denying the grievance was issued on June 28, 2007, and the Commissioner of C&H adopted the recommended decision as his own on June 29, 2007.

Discussion

The default provision for state employees is found in *W. Va. Code §* 29-6A-3(a) (See footnote 2) , which provides, in pertinent part:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. 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 shalldetermine 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.

When a grievant asserts his employer is in default, the grievant must establish by a preponderance of the evidence, that a default occurred. Once the grievant establishes a default occurred, the employer may show it was prevented from responding to the grievance 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 requires that the level three decision be issued within five days of the level three hearing. The statutory time limits may be extended by mutual agreement of the parties, as was done here. The "Grievance Board has held on numerous occasions that an agreement to extend the timelines for issuance of a decision is binding upon the parties when made during a formal, recorded hearing and constitutes a valid waiver of the statutory requirement. *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-296D (Nov. 30, 1999); *Bowyer v. Bd. of Trustees*, Docket No. 99-BOT-197D (July 13, 1999); *Jackson v. Hancock County Bd. of Educ.*, Docket No. 99- 15-081D (May 5, 1999). *See Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.' (Citations omitted). *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). " *Leo v. Dep't of Envtl. Protection*, Docket No. 03-DEP-235DEF (Oct. 8, 2003). In this case, the parties agreed at the level three hearing to an extension of the statutory timelines for issuance of the level three decision to a date certain, five business days after March 9, 2007. The level three decision was not issued by this date. It was only after Grievant's representative checked to see whether the decision had been issued that the level three grievance evaluator asked for an additional extension of time to issue the decision. Grievant's representative agreed to extend the time period for issuance of the recommended decision once again, but only to May 18, 2007. When the recommended decision had not been issued by this date, Grievant filed a default claim, and declined to grant any additional extension of time. A default occurred at level three.

Respondent did not dispute that a default occurred under these circumstances. Respondent argued that the grievance evaluator at level three was excused from issuing the level three

recommended decision by May 18, 2007, due to sickness, injury, excusable neglect and unavoidable cause. The level three grievance evaluator did not appear at the level four hearing to explain the reason for the delay in issuing the level three decision. The record does not contain any evidence from which the undersigned can conclude that the default should be excused.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a grievant asserts that his employer is in default, the grievant must establish that a default occurred, 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. The grievance statute requires that a level three decision be issued within five days of the level three hearing. *W. Va. Code §* 29-6A-4.

3. The parties may agree to an extension of the statutory time limits for issuance of a decision, which constitutes a valid waiver of the statutory requirements. *Leo v. Dep't of Envtl. Protection*, Docket No. 03-DEP-235DEF (Oct. 8, 2003); *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-296D (Nov. 30, 1999); *Bowyer v. Bd. of Trustees*, Docket No. 99-BOT-197D (July 13, 1999); J*ackson v. Hancock County Bd. of Educ.*, Docket No. 99-15-081D (May 5, 1999). *See Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989).

4. The parties agreed to extend the statutory time frame for issuance of the level three decision. The latest extension of the statutory time frame for issuance of the level three recommended decision expired on May 18, 2007.

5. The level three decision was not issued within the agreed upon time limit. Respondent defaulted at level three of the grievance procedure.

6. Respondent did not prove a statutory excuse to the default.

Accordingly, this default is **GRANTED**, and Respondent may proceed to show that the remedy sought by Grievant is contrary to law or clearly wrong. The parties are directed to confer with one another and provide the Grievance Board with at least **three mutually agreeable dates** for scheduling the remedy hearing, no later than **May 15, 2008**.

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BRENDA L. GOULD

Administrative Law Judge

Date: April 18, 2008

Footnote: 1

The hearing was originally scheduled for December 11, 2007, but was continued on the day of the hearing, apparently because there was some confusion regarding the subject matter of the hearing.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.