WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DANIEL CINCOTTA,

Grievant,

v. **Docket No. 07-DNR-359D**

DIVISION OF NATURAL RESOURCES,

Respondent.

ORDER DENYING DEFAULT

This matter was brought before this Grievance Board on July 13, 2007, pursuant to Grievant's filing of a claim of default at level three of the grievance process, on July 9, 2007. After a substantial delay caused by legislative changes in the grievance procedure and this agency, a default hearing was held in Elkins, West Virginia, on January 11, 2008. Grievant appeared pro se, and Respondent appeared by counsel, William R. Valentino, Assistant Attorney General. The default issue became mature for consideration on January 23, 2008, pursuant to counsel's representation that he had decided not to submit a written post-hearing argument, as had been requested at the conclusion of the default hearing.

Synopsis

Grievant asserts that a default occurred at level three, because a hearing was never scheduled by Respondent. Grievant appealed to level three on February 1, 2006. Because numerous similar grievances had been filed by other employees, Respondent requested a time waiver until March 17,

2006, for scheduling the level three hearings, towhich Grievant agreed. A hearing was not scheduled by that date, nor at any time thereafter. Grievant made no contact with level three officials or inquired when the hearing would be scheduled, and filed this default claim on July 9, 2007. Due to the requirement that a default claim be raised as soon as the Grievant is aware of it, the substantial delay in this case prohibits relief by default judgment.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is employed by the West Virginia Division of Natural Resources ("DNR") as a Wildlife Biologist 1.

2. After requesting reallocation to Wildlife Biologist 3 and having this request denied by the Division of Personnel, Grievant filed a grievance with his immediate supervisor on January 3, 2006.

3. The grievance was appealed to level three, following adverse decisions at levels one and two, on February 2, 2006.

4. Pursuant to previous discussions between Grievant and DNR officials, a time frame waiver had been proposed for scheduling the level three hearing. Multiple employees in the biologist classifications had filed reallocation grievances, and the parties agreed to attempt to either coordinate or consolidate the level three hearings for all of the grievances.

5. Grievant attached a signed "Agreement to Waive Time Frame" to his level three appeal, which stated that the level three hearing would be conducted "no later than 17 March 2006." 6. A level three hearing was not scheduled by March 17, 2006, or at any time thereafter, nor did any DNR official contact Grievant regarding scheduling the hearing.

7. Although the hearing was not scheduled within the agreed time period, Grievant made no inquiries as to why the hearing had not been scheduled, nor did he request that it be scheduled.

8. Due to substantial changes in the grievances statutes which were adopted by the 2007 West Virginia Legislature, Executive Order 2-07 was issued by the governor's office on May 8, 2007, clarifying how grievances would be processed. Because the Order stated that any grievance which had already been filed prior to the effective date of the new legislation would "be completed as

expeditiously as possible," Grievant filed a default claim on July 9, 2007.

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).

Generally, W. Va. Code § 29-6A-3(a) provides that a grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response within the statutory time limits, unless prevented from doing so directlyas a result of sickness, injury, excusable neglect, unavoidable cause or fraud. At level three, W. Va. Code § 29-6A-4(c) requires that a hearing be held within seven days of receipt of the appeal. Of course, in this case, the time period for holding the hearing was agreed upon by the parties. It has been held by this Grievance Board that time lines may be extended by the actions of the grievant and by the agreements of the parties. *Gerencir v. Kanawha County Bd. of Educ*., Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 01-20-038D (Apr. 10, 2001).

Respondent does not dispute that the level three hearing was not held or scheduled within the agreed-upon time limit, nor has it been scheduled to this day. In addition, DNR has offered no explanation as to the reason for its failure in this regard, and it has not asserted that any of the statutory "excuses" apply to the situation presented in this case.

However, while it is obvious that Respondent failed to fulfil its responsibility at level three, it is also well-settled that an employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995); *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997). As explained by the Court in *Hanlon*, this requirement ensures that the issue, by being presented to the Grievance Board in a timely fashion, is dealt with promptly and preserved for appeal. "Long standing case law and procedural requirements in this state mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal,"

and "in 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 bydefault' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." *Goodall/Phillips v. Workforce W. Va.,* Docket No. 06-WWV-246 (Aug. 30, 2007) (citing *Hanlon*, *supra*).

Grievant provided no explanation of his significant delay in bringing the default to Respondent's attention. He testified that another employee who had grieved her misclassification questioned DNR Director Frank Jezioro regarding the lack of level three action in her grievance. According to what this employee told Grievant, Director Jezioro indicated that the delay was unacceptable and directed his "staffing administrator" to respond by the end of that week, which apparently did not occur.

The information provided by Grievant in this regard is clearly hearsay, but relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Dec. 9, 1997). However, even if this information were accepted as true, there has been no explanation as to what occurred during the fifteen months between the time waiver agreement and the May 2007 meeting. No hearing was scheduled, and apparently Grievant did not request that it be scheduled for more than a year. Moreover, even if the other employee brought the issue of the level three delay in her grievance to Director Jezioro's attention, there is no evidence regarding the extent of his understanding of the situation or if he was aware that Grievant and others had similar cases pending at level three.

Respondent was in default at level three when March 17, 2006, came and passed, and no hearing was held. The evidence in this case establishes that, for approximately 16 months thereafter, Grievant made no inquiries or requested that the hearing be scheduled. The Grievance Board has determined that such a delay amounts to a defacto waiver of thedefault provision. *Goodall/Phillips v. Bureau of Emp't Programs,* Docket No. 02-BEP-045D (Sept. 28, 2004).

The following conclusions of law are appropriate in this matter.

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).

2. Time lines may be extended by the actions of the grievant and by the agreements of the parties. *Gerencir v. Kanawha County Bd. of Educ*., Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 01-20-038D (Apr. 10, 2001).

3. An employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995); *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997).

4. Grievant waited more than a year after he knew that Respondent had defaulted at level three before filing a default claim.

Accordingly, Grievants' request for judgment by default is **DENIED**, and this matter is **REMANDED** to level three for a hearing on the merits to be held within **TEN DAYS** of the date of this Order, or as otherwise agreed to in writing by the parties.

Date: January 30, 2008

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DENISE M. SPATAFOREActing Deputy Chief

Administrative Law Judge