**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**THEODORE B. STUART,**

**Grievant,**

**v.** **Docket No. 2011-0171-MAPS**

**DIVISION OF JUVENILE SERVICES/LORRIE YEAGER JR. JUVENILE CENTER AND DIVISION OF PERSONNEL,**

**Respondent.**

## DECISION

Theodore B. Stuart ("Grievant") is employed by the Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center ("DJS") as a Correctional Counselor 2. Mr. Stuart filed his original Statement of Grievance on August 11, 2010, alleging as follows:

> 1. Grievant received his increment check for Fiscal Year 2010 on July 30, 2010, and was only paid for three (3) years of service. Grievant should have been paid increment for four (4) years of service as his increment check received at the end of July, 2009 was for three (3) years. Grievant is being disciplined by his employer for being off work due to on-the-job workers' compensation injuries in violation of West Virginia Code, § 23-5A-1.
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> 2. Grievant is being threatened with termination from employment for failure to sign a back-dated leave of absence without pay although grievant's absence has been caused by on-the-job workers' compensation injuries in violation of West Virginia Code, § 23-5A-1 and our Supreme Court decision in Canfield v. WV Division of Correction, 219 W. Va. 340, 617 S.E.2d 887 (2008).
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> 3. Grievant was not paid his wages in a timely fashion and

> contrary to law for the pay period ending December 31, 2009, and continuing, and when grievant had to get a lawyer to handle the matter the employer refused or failed to comply with law in violation of West Virginia Code, § 21-5-1 et seq. and West Virginia Code, § 23-5A-1 et seq.
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> 4. Grievant has been informed that his employer will cease making its contributions to grievant's health insurance after he has been off work for one (1) year due to his work caused workers' compensation injuries contrary to the statutes and law set out above.
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> 5. Grievant asserts that he has otherwise been discriminated against by his employer on account of grievant's workers' compensation injuries and that the employer has also otherwise failed to reasonable accommodate grievant's injuries; all of which is contrary to law. West Virginia Code, § 23=[sic]5A-1; West Virginia Human Rights Act.

As relief, Mr. Stuart seeks:

> Claimant requests an order directing his employer to cease discriminating against grievant; grievant seeks the penalty wages and attorney fees provided for by West Virginia Code, § 23[sic]-5-1 et seq.; grievant seeks an order directing his employer to place him in the status of "off work due to workers' compensation injuries;" grievant seeks an order directing his employer to pay its contribution to grievant's health insurance so long as he is "off work due to workers' compensation injuries;" and grievant seeks other further relief and damages as are proper under the circumstances.

On September 13, 2010, Grievant served upon the Respondent a Notice of Default and Intent to Enforce Default in which Grievant asserted that the Level 1 conference he had requested was not timely scheduled/held pursuant to W. VA. CODE §§ 6C-2-4(a)(1), 6C-2-3(b). On November 9, 2010, a hearing was held at the West Virginia Public

Employees Grievance Board's Charleston, West Virginia, office on the issue of default.[1] Appearing were the Grievant, in person and by counsel, David Stuart, Esq., the Respondent DJS, by counsel, Steven R. Compton, Esq., and Respondent Division of Personnel ("DOP"), by counsel, Karen O'Sullivan Thornton, Esq. At that hearing, Respondent DJS "conceded default" as Respondent DJS did not schedule the Level 1 conference within the required time frame.[2] Thereafter, by Order entered December 7, 2010, a hearing on the remedy for default was scheduled for December 20, 2010.

On December 20, 2010, the remedy hearing was held before the WVPEGB at its Charleston, West Virginia, office. Grievant appeared in person and by counsel, David Stuart, Esq. Respondent DJS appeared by counsel Steven R. Compton, Esq. Sharon Hayes appeared in person as the DJS representative. Respondent DOP appeared by counsel, Karen O'Sullivan Thornton, Esq. Joe Thomas appeared in person as the DOP representative.

During this hearing, a number of motions were addressed and ruled upon by ALJ Elswick. Prior to this hearing, Grievant filed a "Motion for Order Preserving Status Quo Pending Final Determination of Grievance" seeking an order "prohibiting the employer, and others aligned or in concert with the employer, from taking any further action, whether disciplinary, discriminatory, harassing, or otherwise, pending a final determination of the

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[1] Administrative Law Judge ("ALJ") Wendy A. Campbell presided over this hearing. ALJ Campbell resigned from the WVPEGB in February 2011. Thereafter, this matter was reassigned to the undersigned.

[2] Respondent DJS notes that it concedes default, but "does not admit liability."

grievance process." This motion concerned Respondent DJS' anticipated termination of its payment of the employer portion of Grievant's insurance benefits on December 29, 2010, that being one year following Grievant's placement on a medical leave of absence without pay. Upon consideration of the evidence presented and the arguments of both Grievant and Respondents, ALJ Elswick denied said motion because a grievable event had not yet occurred upon which a claim could be made.[3] Further at this hearing, Grievant orally moved to remove Respondent DOP as a named party to this matter. ALJ Elswick denied this motion as she determined DOP needed to remain a party as the DOP rules were at issue in this matter. Lastly, ALJ Elswick denied Grievant's attempts to assert bad faith claims, and/or his oral motions for findings of bad faith, against the Respondent, at the hearing because such were never alleged in his Statement of Grievance. Therefore, Grievant was not allowed to pursue a bad faith claim at the hearing in this matter. ALJ Elswick noted the objections of Grievant to each of these rulings.

At the conclusion of the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law by January 20, 2011. Thereafter, an extension of time to submit proposed Findings and Conclusions was granted. Both Grievant[4] and Respondent

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[3] At the time of the November 9, 2010, hearing, the issues addressed in this written motion were discussed among the parties and ALJ Elswick ruled upon the same; however, such was inadvertently left off the record. At that time, ALJ Elswick determined that no grievable event had yet occurred (no adverse action had been taken aside from what was encompassed in this Grievance) that would warrant granting the motion. Therefore, ALJ Elswick denied Grievant's motion. Thereafter, Grievant submitted his Motion to Preserve Status Quo to the Board on or about December 6, 2011.

[4] On January 14, 2011, David Stuart, Esq., counsel for Grievant, submitted a Notice of Withdrawal as Counsel for Grievant asserting that because of certain events occurring after the grievance hearing held on December 20, 2010, he had "been given

DJS submitted proposed Findings of Fact and Conclusions of Law to the Grievance Board on February 25, 2011.[5] Therefore, this matter became mature for decision on that date.

**Synopsis**

The only issue in this matter is whether the remedies Grievant seeks are contrary to law or are contrary to proper and available remedies. Such is because Grievant is viewed as having prevailed on the merits of his Grievance by default as Respondent conceded default. The remedy sought by Grievant requesting an order directing his employer to cease discriminating against him is GRANTED as such is not contrary to law and is an available and proper remedy. The remedies sought by the Grievant relating to penalty wages and attorney's fees are DENIED as such are contrary to law and not proper and available remedies. The remedies requested seeking orders directing Respondent to place Grievant in the status of "off work due to workers' compensation injuries" and directing Respondent to pay its contribution to Grievant's health insurance so long as he is "off work due to workers' compensation injuries" are DENIED as they are contrary to law and not proper and available remedies.

After a thorough review of the entire record in this matter, the following facts are

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no viable option but to withdraw as representative/counsel for Grievant." Initially, Respondent DJS objected to the same, but later withdrew its objection. Thereafter, Vincent J. King, Esq. appeared as Grievant's counsel in this matter. Mr. King submitted Grievant's proposed Findings of Facts and Conclusions of Law to the Board. Attorney King did not appear at either hearing referenced in this Decision.

[5] By letter dated January 20, 2010, counsel for Respondent DOP informed the WVPEGB that it would be deferring to the proposed Findings of Fact and Conclusions of Law submitted by Respondent DJS, and would not be filing its own proposals.

found to have been proven by a preponderance of the evidence.

## Findings of Fact

1. Grievant, Theodore B. Stuart ("Grievant"), was hired as a Correctional Counselor II at the Lorrie Yeager Juvenile Detention Center on January 16, 2006.

2. Grievant suffered job-related injuries in October 2006 and April 2009. As a result of the April 2009 injury, Grievant received Temporary Total Disability Benefits ("TTD") through workers' compensation until August 16, 2009.

3. For each of these injuries, Grievant filed workers' compensation claims that were determined compensable. Grievant was off work and received workers' compensation benefits for each injury. For the April 2009 workers' compensation claim, Grievant received TTD Benefits from May 20, 2009, until August 16, 2009.[6]

4. Grievant returned to work at the Lorrie Yeager, Jr. Juvenile Center on August 17, 2009, and continued to work until December 2009.

5. Grievant reported for work on December 8, 2009, but left work early that day because he was experiencing pain.

6. Grievant reported to work on December 11, 2009, but left work after about one hour due to his again experiencing pain. Grievant did not request to take any type of leave before leaving work this date.

7. When Grievant left work on December 11, 2009, he completed **no** leave request forms. No such form or forms have been completed by the Grievant since he left

[6] These benefits terminated when Grievant returned to work on August 17, 2009.

work on December 11, 2009.

8. Accordingly, Grievant's accrued sick leave and annual leave were then used to cover his absences from December 11, 2009 forward until the same were exhausted on December 29, 2009. Thereafter, the Director of the Lorrie Yeager, Jr. Juvenile Center, David Jones[7] placed Grievant in the status of "medical leave of absence without pay."

9. Jones chose to place Grievant in the status of "medical leave of absence without pay" because Grievant had not requested any type of leave when he left work on December 11, 2009. Grievant did not ask to be placed in this status or any other until this Grievance was filed.

10. When an employee is off work, his or her leave is designated as falling within some type of category for personnel purposes. Because Grievant was not receiving workers' compensation benefits, had exhausted his accrued leave, and had not requested any type of leave or leave status, Jones chose the status of medical leave of absence without pay.

11. Grievant remains off work.

12. In or about June 2010, Sharon Hayes, DJS Human Resources Director, mailed Grievant a request for Medical Leave of Absence Without Pay form, which was dated December 29, 2009, for his signature.[8] Grievant refused to sign the same because it was "back-dated." Grievant has further refused to sign any request for a leave of absence without pay because Grievant claims he is currently off work due to workers'

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[7] See, Grievant's Exhibit 1, Memorandum from David Jones to Grievant dated December 29, 2009.

[8] See Grievant's Exhibit 3.

compensation injuries.

13. Since leaving work on December 11, 2009, Grievant has attempted to reopen his workers' compensation claims for TTD benefits with Brickstreet Insurance, but Grievant's requests have been denied. Grievant has appealed those decisions. These appeals remain pending.

14. As of December 20, 2010, the date of the Level 3 hearing in this matter, Brickstreet Insurance's records indicate that Grievant's TTD claim closed as of August 16, 2009.[9]

15. Grievant's treating physician has not released Grievant to return to work.

16. Grievant's treating physician has never identified to Respondent DJS any accommodations that need to be made for Grievant to return to work.

17. Grievant has not been suspended from employment, discharged/ terminated, or laid off by Respondent DJS. Further, Grievant has not quit or resigned from employment with the Respondent DJS.

18. Grievant's position of Correctional Counselor II remains open, at the Respondent DJS' facility, meaning no one has been hired to replace Grievant, and Respondent DJS cannot hire someone else to fill that position.

19. Grievant has been on a medical leave of absence without pay since December 2009, which is well beyond the six-month period maximum allowed by the DOP rules for such leaves of absence.

20. Respondent has granted Grievant greater time on his medical leave of

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[9] See Respondent's Exhibit 1.

absence without pay than it has granted other employees in the past.

21. Grievant's last pay check for the period beginning December 16, 2009 through December 31, 2009 was not timely issued partly because of a clerical error on the part of Respondent DJS' facility in submitting the proper paperwork to Sharon Hayes in Charleston, West Virginia, and because the Respondent facility incorrectly believed that Grievant was paid current and not paid two weeks in arrears.[10] This error was also partly the fault of Grievant for failing to request any type of leave to cover his absence. This last paycheck was issued to Grievant on or about June 30, 2010, after the error was brought to the attention of Sharon Hayes.[11] Respondent concedes that the last paycheck to Grievant was issued late.

22. Grievant received his annual increment check in July 2010. Grievant was paid for three years of service, the same as he was paid in 2009.

23. Respondent DJS was paying the employer portion of Grievant's insurance premiums at the time of the December 20, 2010 Level 3 hearing in this matter. Prior to the Level 3 hearing, Respondent DJS had given Grievant notice that it intended to stop paying the employer portion of the insurance premiums on December 29, 2011.[12]

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[10] See testimony of Sharon Hayes.

[11] See testimony of Sharon Hayes.

[12] The record indicates that notice of this intent was provided to Grievant's counsel, David Stuart, by communications with counsel for Respondent DJS and at the November 9, 2010, hearing on default. This issue was not addressed at the Level 3 hearing on December 20, 2010 hearing because ALJ Elswick determined that because Respondent DJS had not terminated the payment of the employer's portion of the insurance premiums, such was not yet a grievable event upon which a claim could be made.

## Discussion

Default grievances filed after July 1, 2007, are controlled by West Virginia Code § 6C-2-3(b).[13] When a grievant asserts that his employer has failed to respond to the grievance in a timely manner, resulting in a default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-

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[13] In 2007, The West Virginia Legislature in S.B. 442, 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). The effective date of S.B. 442 was July 1, 2007. All grievances commenced after that date are controlled by W. VA. CODE §§ 6C-2-1 *et seq.*

Former W. VA. CODE § 29-6A-3(a)(2) "Grievance procedure generally" (***now repealed***) stated, in part, as follows:

> . . .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 that 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.

080D (Mar. 21, 2008); W. VA. CODE § 6C-2-3(b).[14] 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 "injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1). Further, West Virginia Code § 6C-2-3(b)(2) provides the employer another defense to the default by "showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2).

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[14] W. VA. CODE § 6C-2-3(b) states as follows:

> (b) Default.
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> (1) The grievant prevails by default if a required response is not made by the employer within the time limits established in this article, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process.
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> (2) Within ten days of the default, the grievant may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default. If the chief administrator objects to the default, then the chief administrator may, within five days of the filing of the notice of intent, request a hearing before an administrative law judge for the purpose of stating a defense to the default, as permitted by subdivision (1) of this subsection, or showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law.
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> (3) If the administrative law judge finds that the employer has a defense to the default as permitted by subdivision (1) of this subsection or that the remedy is contrary to law or not proper or available at law, the administrative law judge may deny the default or modify the remedy to be granted to comply with the law or otherwise make the grievant whole.

Default grievances are generally bifurcated.[15] In the first hearing, it is determined whether a default actually occurred. If a default is found to have occurred, a second hearing is conducted to determine whether any of the remedies sought by the grievant are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). In the first hearing, the grievant who alleges a default at a lower level of the grievance process, has the burden of proving such occurred by a preponderance of the evidence. 156 C.S.R. 1 §3 (2008); *Donnellan v. Harrison County Bd. of Educ.,* Docket No. 02-17-003 (Sept. 20, 2002); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008- 567-LogED (Oct. 24, 2008); *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

In this matter, however, the Respondent conceded to the default claimed by the Grievant because the Level 1 proceeding was not scheduled within the proper time frame. Respondent raised no defenses to the default. Consequently, Grievant prevailed on his Grievance at the first default hearing.[16] See, Order entered December 7, 2010. It is noted

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[15] Public Employees Grievance Board, 156 C.S.R. 1 § 7.1 (2008) provides the following:

> The default proceeding is usually bifurcated into two hearings. Once a grievant files a written claim for relief by default with the Board, or the chief administrator files an objection, all proceedings at the lower levels are automatically stayed until all default matters have been ruled on unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

[16] As Respondent conceded to default because the Level 1 proceeding was not timely scheduled, Grievant is considered to have prevailed on his Grievance at Level 1. Respondent has offered no defenses to the default. Respondent has admitted that the Level 1 proceeding was not set within the applicable time frames, but admits no liability. However, with default conceded, the Grievant is considered to have prevailed on his

that under the prior, now repealed, statute on default, grievants were "presumed" to have prevailed on their grievances, and respondents could then attempt to rebut that presumption. With the enactment of West Virginia Code § 6C-2-3, the presumption and the ability to attempt to rebut the same were eliminated. Therefore, cases dealing with the issue of default under the now repealed Code section(s) are no longer controlling.

Once default is established, the second hearing addresses the remedies requested by the grievant. At that hearing, the respondent has the opportunity of showing that the remedy requested by the grievant is contrary to law or contrary to proper and available remedies. These issues are sometimes matters of law that may not require the presentation of evidence, but to the extent that proof is required, the respondent has the burden of proving this affirmative defense by a preponderance of the evidence. *See*, 156 C.S.R. 1 § 3; *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (March 20, 2009); *Hoff v. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

Because Grievant prevailed on his Grievance by default, Respondent then has the burden of proving, by a preponderance of the evidence, that remedies sought by Grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3; 156 C.S.R. 1 § 3 (2008).

Grievant is seeking the following remedies:

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Grievance. Therefore, the claims as set forth in Grievant's Statement of Grievance are not at issue. The only issue before the Board is whether the remedies requested by the Grievant in his Statement of Grievant are proper, not contrary to law, and available.

> Claimant requests an order directing his employer to cease discriminating against grievant; grievant seeks the penalty wages and attorney fees provided for by West Virginia Code, § 23[sic]-5-1 et seq.; grievant seeks an order directing his employer to place him in the status of "off work due to workers' compensation injuries;" grievant seeks an order directing his employer to pay its contribution to grievant's health insurance so long as he is "off work due to workers' compensation injuries;" and grievant seeks other further relief and damages as are proper under the circumstances.

See, Grievance form dated August 10, 2010; Notice of Default and Intent to Enforce Default dated September 13, 2010. The undersigned will address each remedy sought, as stated by the Grievant in his Statement of Grievance, individually below.

**a. Grievant first requests an order directing his employer to cease discriminating against him.**

Because Respondent conceded to default in this matter as the Level 1 hearing was not timely scheduled as required, the merits of this grievance are not relevant in this proceeding. Accordingly, to the extent that Respondent is discriminating against Grievant, such discrimination should be ceased immediately.[17] Therefore, to the extent there has been any discrimination as claimed by Grievant, this remedy is not contrary to law and is available and proper in this grievance.

**b. Grievant seeks the penalty wages and attorney fees provided for by WEST VIRGINIA CODE, § 23[sic]-5-1 *et seq.*[18]**

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[17] Because Respondent conceded the default, Grievant is considered to have prevailed on the merits of his grievance. The only relevant issues at the December 20, 2010 hearing were whether the remedies sought by the Grievant were proper and not contrary to law . As Grievant did not seek a more specific remedy, one cannot be granted herein.

[18] It appears that the Code section cited in this part of Grievant's requested relief contains a typographical error. It appears that the Code citation should be W. VA. CODE §21-5-1 *et seq.* as such concerns penalty wages and attorney's fees for failure to pay

Based upon the Grievant's filings and the record of the hearing held on December 20, 2010, the undersigned interprets this request to be for relief due to Respondent paying Grievant the value of his leave accrued as of December 31, 2009, in June 2010, which was six months late. Respondent concedes that the Grievant was paid these funds late, but states such was the result of a clerical error. Further, the evidence presented establishes that the late payment was partly due to Grievant's failure to request any type of leave or submit any type of leave paperwork pursuant to the policies of DOP after he left work on December 11, 2009.[19] However, as default has been established, the reason, or reasons, for the late payment are totally irrelevant.

West Virginia Code §21-5-4 Cash orders; employees separated from payroll before paydays, states as follows:

> (a) In lieu of lawful money of the United States, any person, firm or corporation may compensate employees for services by cash order which may include checks or money orders on banks convenient to the place of employment where suitable arrangements have been made for the cashing of such checks by employees for the full amount of wages.
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> (b) Whenever a person, firm or corporation discharges an employee, such person, firm, or corporation shall pay the employee's wages in full within seventy-two hours.
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> (c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

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wages timely.

[19] See testimony of Sharon Hayes.

> (d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.
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> (e) If a person, firm or corporation fails to pay an employee as required under this section, such person, firm or corporation shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages. Every employee shall have such lien and all other rights and remedies for protection and enforcement of such salary or wages, as he or she would have been entitled to had he or she rendered service therefor in the manner as last employed; except that, for the purpose of such liquidated damages, such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon such petition.

W. Va. Code §21-5-4. From the evidence presented, clearly, Grievant has not resigned and has not been suspended, laid off, or terminated from his employment with the Respondent. Grievant's status is considered to be "on medical leave of absence without pay," even though he has been in this status longer than permitted by the DOP rules. Grievant is still employed by Respondent, and given his status, Grievant's position cannot be filled by another at this time. Therefore, West Virginia Code § 21-5-4 does not apply to the situation set forth in this Grievance. Accordingly, the remedies provided by W. VA. CODE § 21-5-1 *et seq.* are not available to the Grievant.

Lastly, an ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6*; Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No.

95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, "(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" W. VA. CODE § 6C-2-6. Thus, the Board has no authority to grant attorneys fees as sought by Grievant. Therefore, these remedies are contrary to law and are not available and proper in this grievance.

**c. Grievant seeks an order directing his employer to place him in the status of "off work due to workers' compensation injuries."**

Regarding DOP's employee status categories, Grievant is currently in the status of "on medical leave without pay." Grievant did not request a medical leave of any kind. Grievant's employer was required to place Grievant in a status for personnel purposes and selected this status, as explained previously herein. Grievant is not receiving TTD benefits and has not so received TTD benefits since August 2009. Further, his workers' compensation claims appear as being "closed" in Brickstreet Insurance's database as of December 20, 2010.[20] It is not disputed that Grievant is appealing his workers' compensation claims and the same are now pending. WEST VIRGINIA CODE § 23-5A-3 states in part as follows:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and *is receiving or is eligible to receive* temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. . . .

[20] See Respondent's Exhibit 1.

(Emphasis added) W. VA. CODE §23-5A-3. An employee is not "eligible to receive temporary total disability benefits" during the appeals period after the TTD benefits have been discontinued. *See, Little v. Dep't of Environmental Protection*, Docket No. 05-DEP-248 (May 2, 2006); *Addair v. Dep't of Health and Human Res.*, Docket No. 03-HHR-147 (Feb. 2, 2004); *Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 486 S.E.2d 768 (1997). To the extent there is a status called "off work due to workers' compensation injuries" Grievant would not qualify for the same because he is not considered to be *eligible* to receive workers' compensation TTD benefits.[21] Therefore, this remedy is contrary to law, and is not available and proper in this grievance.

**d. Grievant seeks an order directing his employer to pay its contribution to grievant's health insurance so long as he is "off work due to workers' compensation injuries."**

As Grievant is not considered to be "off work due to workers' compensation injuries," this remedy is contrary to law, and it is not available and proper in this grievance. *See, Little V. Dep't of Environmental Protection*, Docket No. 05-DEP-248 (May 2, 2006); *Addair v. Dep't of Health and Human Res.*, Docket No. 03-HHR-147 (Feb. 2, 2004); *Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 486 S.E.2d 768 (1997).

**Increment Pay, Health Insurance Contributions, Bad Faith, and Other Issues**

It is noted that Grievant did not state in the "relief sought" section of his Grievance any remedies concerning his increment pay. Grievant makes allegations regarding his increment pay in his Statement of Grievance (the sheet attached to his Grievance Form),

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[21] It was not clear from the evidence presented what status types exist or may be available for use.

but states no request for relief regarding the same. The discussion of Grievant's eligibility to receive workers' compensation benefits as set forth above, as well as the case of *Canfield v. West Virginia Div. of Corrections*, 217 W. Va. 340, 617 S.E.2d 887 (2005), should be followed for guidance regarding the calculation of Grievant's increment pay, if the same is affected.[22]

At the December 20, 2010 hearing held in this matter, ALJ Elswick ruled that as the Respondent Employer had not yet terminated Grievant's health insurance benefits, the same was not properly before the Board as a grievable event had not yet occurred. Further, in January 2011, Grievant filed a second Grievance pertaining to the termination of health insurance benefits. Therefore, any such claim or relief regarding this issue is not addressed herein.

Grievant, by counsel David Stuart, Esq., attempted to raise a bad faith claim during the Level 3 hearing in this matter. ALJ Elswick addressed this issue and denied Grievant's attempts to assert a bad faith claim in this matter as such was not raised in the Grievant's Statement of Grievance. Accordingly, any such claim or relief regarding the same is not being addressed herein. It is noted that Grievant raised a bad faith claim in his subsequent grievance regarding the payment of his insurance premiums, which is now pending before the WVPEGB.

Lastly, it is noted that Grievant asserts in his proposed Findings of Fact and Conclusions of Law that counsel for Respondent "unilaterally quashed" subpoenas

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[22] The West Virginia Supreme Court of Appeals has held that State employees off work and receiving workers' compensation TTD benefits may continue to accrue annual leave and to accrue credit for years of service. *See Canfield v. West Virginia Div. of Corrections*, 217 W. Va. 340, 617 S.E.2d 887 (2005).

Grievant had issued for certain witnesses who did not testify at the December 20, 2010 hearing. Respondent's counsel did not unilaterally quash any subpoenas. Subpoenas were issued by the WVPEGB as requested by the Grievant. However, Grievant did not properly serve the same on his witnesses pursuant to the WVPEGB rules. Therefore, these individuals did not appear for the hearing. ALJ Elswick addressed this issue at the December 20, 2010 hearing when the matter was brought to her attention. Counsel for Grievant stated that he had one witness he wanted to call who was not present. ALJ Elswick referred him to the Board's procedural rules and offered him the opportunity to call the witness by telephone. Counsel for Grievant declined ALJ Elswick's offer. Grievant's counsel did not address any of the other witnesses he had attempted to subpoena to testify at this hearing. Accordingly, counsel for Respondent did not "unilaterally quash" any of Grievant's subpoenas.

**Conclusions of Law**

1. When a grievant asserts that his employer has failed to respond to the grievance in a timely manner, resulting in a default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-080D (Mar. 21, 2008).

2. 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 "injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1). Further, West Virginia Code § 6C-2-3(b)(2) provides the employer another defense to the default by "showing that the remedy requested by the

prevailing grievant is contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2).

3. Default grievances are generally bifurcated. In the first hearing, it is determined whether a default actually occurred. If a default is found to have occurred, a second hearing is conducted to determine whether any of the remedies sought by the grievant are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). In the first hearing, the grievant who alleges a default at a lower level of the grievance process, has the burden of proving such occurred by a preponderance of the evidence. 156 C.S.R. 1 §3 (2008); *Donnellan v. Harrison County Bd. of Educ.,* Docket No. 02-17-003 (Sept. 20, 2002); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-567-LogED (Oct. 24, 2008); *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

4. Once default is established, the second hearing addresses the remedies requested by the grievant. At that hearing, the respondent has the opportunity of showing that the remedy requested by the grievant is contrary to law or contrary to proper and available remedies. These issues are sometimes matters of law that may not require the presentation of evidence, but to the extent that proof is required, the respondent has the burden of proving this affirmative defense by a preponderance of the evidence. *See*, 156 C.S.R. 1 § 3; *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (March 20, 2009); *Hoff v. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

5. Because Grievant prevailed on his grievance by default, Respondent then has the burden of proving, by a preponderance of the evidence, that remedies sought by Grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3; 156 C.S.R. 1 § 3 (2008).

6. Grievant has not resigned and has not been suspended, laid off, or terminated from his employment with the Respondent. Grievant is still employed by Respondent, therefore, West Virginia Code § 21-5-4 does not apply to the situation set forth in this Grievance. Accordingly, the remedies provided by W. VA. CODE § 21-5-1 *et seq.* are not available to the Grievant.

7. An ALJ for the Grievance Board is not authorized by law to grant attorney's fees at a Level 3 hearing. W. VA. CODE § 6C-2-6*; Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, "(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." W. VA. CODE § 6C-2-6. Thus, the Board has no authority to grant attorneys fees as sought by Grievant.

8. WEST VIRGINIA CODE § 23-5A-3 states in part as follows:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and *is receiving or is eligible to receive* temporary total disability benefits, unless the

> injured employee has committed a separate dischargeable offense. . . .

(Emphasis added) W. VA. CODE §23-5A-3.

9. An employee is not "eligible to receive temporary total disability benefits" during the appeals period after the TTD benefits have been discontinued. *See, Little V. Dep't of Environmental Protection*, Docket No. 05-DEP-248 (May 2, 2006); *Addair v. Dep't of Health and Human Res.*, Docket No. 03-HHR-147 (Feb. 2, 2004); *Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 486 S.E.2d 768 (1997).

Accordingly, this Grievance is **GRANTED in part** and **DENIED in part.**

To the extent that Respondent is discriminating against Grievant, Respondent is Ordered to cease immediately. The remedies sought by the Grievant relating to penalty wages and attorney's fees are **DENIED** as such are contrary to law and not proper and available remedies. The remedies requested seeking orders directing Respondent to place Grievant in the status of "off work due to workers' compensation injuries" and directing Respondent to pay its contribution to Grievant's health insurance so long as he is "off work due to workers' compensation injuries" are **DENIED** as they are contrary to law and not proper and available remedies.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: September 23, 2011.**

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**CARRIE H. LEFEVRE**
**ADMINISTRATIVE LAW JUDGE**