LAVADA L. WILLIAMSON,

Grievant,

v. **Docket No. 98-T&R-275D**

WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE,

Respondent.

ORDER GRANTING DEFAULT

and

ORDER OF JOINDER

On July 27,1998, Respondent West Virginia Department of Tax & Revenue (T&R) submitted the following matter to this Grievance Board at Level IV:

> Pursuant to the provisions of W. Va. Code § 29-6A-3(a)(1) (1998), the West Virginia Department of Tax and Revenue ("Employer") requests a hearing before a level four hearing examiner regarding the greivance (sic) of Lavada L. Williams ("Grievant") in order to establish: (1) that Grievant should not prevail by default since the failure of the level two grievance evaluator to respond within the required time was unavoidable due to the leave schedules of both the grievance evaluator and Grievant; and (2) that, even if Grievant is presumed to have prevailed on the merits of the grievance, her reclassification to Accountant/Auditor V is clearly wrong and contrary to law.

On August 31, 1998, the parties participated in a telephonic pre-hearing conference wherein it was determined that the only issue to be addressed at the Level IV hearing was whether or not Respondent was in default, thereby triggering Respondent's obligation to

establish that the remedy sought was clearly wrong or contrary to law. Subsequently, a Level IV hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Charleston, West Virginia, on September 16, 1998. The parties presented oral arguments, waiving written arguments, and this matter became mature for decision on that date.[1]

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

FINDINGS OF FACT

1. On July 1, 1998, Grievant initiated a grievance contesting her classification as an Accountant Auditor II, contending that she should be classified as an Accountant/ Auditor V, retroactive to December 1, 1997. On the morning of July 1, Grievant met with her immediate supervisor, Mack E. Parsons, Assistant Director of T&R's Chief Inspector Division, regarding her grievance. Mr. Parsons provided a written response that same day, advising Grievant that he was without authority to grant the grievance. J Ex 1.

2. Grievant immediately elevated her grievance to Level II, appealing to her second-level supervisor, Lisa Thornburg, Director of the Chief Inspection Division, on July 1, 1998. J Ex 1. At that time, Grievant and Ms. Thornburg had a brief meeting to discuss the grievance.

[1] Grievant appeared pro se. Respondent was represented by Assistant Attorney General Steve Stockton.

3. Grievant and Ms. Thornburg had discussed Grievant's concerns regarding her classification on a number of occasions during the two months which preceded the filing of this grievance.

4. Thursday, July 2, 1998, was a regular work day for Ms. Thornburg and Grievant.

5. Friday, July 3, 1998, was an official holiday.

6. July 4, 11 and 18, 1998, were Saturdays. July 5, 12, and 19, 1998, were Sundays.

7. Grievant was on scheduled annual leave on July 6, 7, 8, 9 and 10, 1998. See G Ex 1.

8. Grievant called Ms. Thornburg at work on Friday, July 10,1998, to inquire whether a Level II decision had been issued. Ms. Thornburg told Grievant that a decision would be provided when Grievant returned to work on Monday morning.

9. Monday, July 13, 1998, was a regular work day for Grievant and Ms. Thornburg.

10. Ms. Thornburg was off work on sick leave on Tuesday, July 14, 1998, due to an illness in her immediate family. Ms. Thornburg was off on scheduled annual leave on Wednesday, July 15, 1998.

11. Tuesday and Wednesday, July 14 and 15, 1998, were regular work days for Grievant.

12. Thursday and Friday, July 16 and 17, 1998, were regular work days for Grievant and Ms. Thornburg.

13. Ms. Thornburg originally signed the grievance form on July 8, 1998, but due to the demands of routine business in her area of responsibility, did not complete a written response to the grievance until after regular working hours on Friday, July 17, 1998.

14. On July 20, 1998, Ms. Thornburg provided Grievant a written response to the grievance. Ms. Thornburg's response indicates that she did not have authority to grant the relief sought by Grievant. See J Ex 1.

15. On July 20, 1998, after receiving Ms. Thornburg's Level II response, Grievant submitted a written declaration of default to the State Tax Commissioner.

DISCUSSION

The issue of default in a grievance filed by a state employee has only recently come within the jurisdiction of the Grievance Board. On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998.[2] That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> (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 shall

[2] This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998). As this grievance was initiated on July 1, 1998, it falls under the new statute.

> 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.

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A-5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

W. Va. Code § 29-6A-4(b) provides as follows regarding when Respondent must act at Level II:

> 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.

If a default has occurred, then the grievant wins and Respondent may request a ruling at Level IV regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure. Respondent argues that no default occurred under the terms of the statute. This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Because Respondent is asserting that no default

has occurred under the terms of the statute, Respondent bears the burden of establishing its defense by a preponderance of the evidence. See Ehle, supra.

According to the undisputed facts in this matter, Grievant elevated her grievance to Level II on July 1, 1998, held a conference with her supervisor that same day, and did not receive a response to her grievance until July 20, 1998. In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Thus, July 3, 1998, a state and federal holiday, is excluded, as are the weekends of July 4-5, July 11-12, and July 18-19, 1998. Further, in computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E. 362 (1911). See also W. Va. R. Civ. P. 6(a). Therefore, July 1, 1998, is excluded.

Accordingly, 12 work days remain to be included or excluded from the allowable 5-day time frame in which Grievant's second-level supervisor was required to respond to her grievance; July 2, July 6-10, July 13-17, and July 20. W. Va. Code § 29-6A-3(a)(2) requires a timely response to a grievance unless the supervisor is "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud."

T&R concedes that July 2, 13, 16, 17 and 20, 1998 may properly be included in the time frame allowed for a response, but argues various grounds for excluding the remaining days. Respondent correctly asserts that Tuesday, July 14, 1998, may be excluded from the time period because Ms. Thornburg was off on sick leave that day. Sickness is one of the reasons specified in W. Va. Code § 29-6A-3(a)(2) for extending the time to respond. The employer seeks to exclude the remaining days under W. Va. Code § 29-6A-3(a)(1),

the subsection which precedes the new default provision in the grievance procedure statute. That subsection, which was not amended, states:

> A grievance shall be filed within the times specified in section four [§ 29-6A-4] of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment. (emphasis added)

Respondent contends that the five days Grievant was not working due to personal leave should be excluded from the time limits in accordance with the foregoing language.[3] Assuming, without deciding, that those days may be excluded, as well as Ms. Thornburg's one day of sick leave, the Level II response would have then been due on the fifth work day, Friday, July 17, 1998. Respondent seeks to further extend the deadline to Monday, July 20, 1998, by excluding Wednesday, July 15, 1998, the day Ms. Thornburg was on annual leave. However, there is no provision in the statute which allows excluding the supervisor's annual leave from the computation of time.

In any event, Ms. Thornburg returned to work on Thursday, July 16, 1998. That gave her two work days to prepare a letter to Grievant advising that she had no authority to grant the relief requested. This response was not issued to Grievant until Monday, July 20, 1998. In these circumstances, the employer has failed to demonstrate by a preponderance of the evidence that it was prevented from providing a timely response at

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[3]The Grievance Board has previously concluded that the time for filing a grievance under the education employees grievance procedure, W. Va. Code § 18-29-1, et seq., may be tolled while a grievant is off on sick leave. Beverly v. Wyoming County Bd. of Educ., Docket No. 91-55-408 (Jan. 23, 1992).

Level II in compliance with W. Va. Code § 29-6A-4(b) "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud" as provided by W. Va. Code § 29-6A-3(a)(2).

It should be noted that the Supreme Court of Appeals of West Virginia, in a matter arising under the education employee grievance procedure, W. Va. Code §§ 18-29-1, et seq., has held:

> in order to benefit from the "relief by default" provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Vol. 1994), a grieved employee or his/her representative must raise the "relief by default" issue during the grievance proceedings or as soon as the employee or his/her representative becomes aware of such default.

Hanlon v. Logan County Bd. of Educ., 496 S.E.2d 447 (1997). Further, this Grievance Board has determined that a grievant should not be permitted to claim a default under W. Va. Code § 18-29-3(a), once a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 26, 1997).

Grievant in this matter complied with Hanlon by declaring a default under W. Va. Code § 29-6A-3(a) on the first work day after the default occurred. Our Supreme Court of Appeals cautioned in Hanlon: "we do not profess to require grievance proceedings to adhere to the procedural rules and specific objection requirements applicable to circuit court proceedings." Hanlon, supra. In Harmon, the grievants waited over a month after receiving an untimely Level II decision before declaring a default. Grievant called her supervisor on at least two occasions while the time period to respond to her grievance was moving forward. Extending the employer the benefit of the five days Grievant was on annual leave, as previously discussed, the time limit for issuing a timely response to this grievance expired, at the latest, on Friday, July 17, 1998. Grievant declared a default in

writing on Monday, July 20, 1998, the first work day following the default, albeit after she received her Level II response from her supervisor. It is difficult to imagine an employee being more diligent about pursuing her rights under the grievance procedure.

The undersigned administrative law judge is persuaded that the equities on this issue favor Grievant's position, and this Grievance Board's Harmon decision does not require her to forfeit the benefits of the newly-enacted default provision, solely because she waited for her supervisor's response before declaring a default.

Accordingly, it is hereby determined the Respondent is in default in regard to this grievance seeking reclassification to Accountant/Auditor V, retroactive to December 1, 1997, and Respondent must proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2) that the remedy sought is contrary to law or clearly wrong. Based upon the evidence presented at the Level IV hearing in this matter, it is further determined that the West Virginia Department of Administration, Division of Personnel, is an indispensable party to this grievance.

Therefore, pursuant to Rule 4.13 of the Procedural Rules of the West Virginia Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.13 (1996), the West Virginia Division of Personnel is hereby officially **JOINED** as a party respondent. The instant case shall hereinafter be styled and referred to as Lavada L. Williamson v. West Virginia Department of Tax and Revenue and Department of Administration, Division of Personnel, Docket No. 98-T&R-275. A Level IV hearing will be scheduled to provide the parties an opportunity to present evidence on the issue of whether the remedy Grievant has obtained by default is clearly wrong or contrary to law.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

CONCLUSIONS OF LAW

1. "If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such 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 party is contrary to law or clearly wrong." W. Va. Code § 18-29-3(a).

2. When the employer asserts that the remedy received is contrary to law in accordance with W. Va. Code § 29-6A-3(a)(2) because, in fact, no default occurred, the employer must establish such a defense by a preponderance of the evidence. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

3. Respondent failed to establish, by a preponderance of the evidence, that a timely response was provided to Grievant at Level II, or that Respondent was prevented, as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud from providing a required response in a timely manner. See W. Va. Code § 29-6A-3(a)(2).

Accordingly, Respondent's request for a determination under W. Va. Code § 29-6A-3(a)(2), that no default occurred is **DENIED**. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order.

LEWIS G. BREWER
ADMINISTRATIVE LAW JUDGE

Dated: September 30, 1998