EMILY JANE MOORE,

Grievant,

v. **DOCKET NO. 98-HHR-382D**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES and DIVISION OF PERSONNEL,

Respondents.

O R D E R

Grievant, Emily Jane Moore, filed a motion for default judgment in the above-styled grievance on September 21, 1998, in accordance with W. Va. Code § 29-6A-3(a)(2)(1998). A hearing on this matter was held in this Board's Charleston, West Virginia, office on November 19, 1998. Grievant was represented by her designated representative, Lawrence Moore, Respondent Department of Health and Human Resources ("HHR") was represented by Meredith Harron, Esq., Assistant Attorney General, and Respondent Division of Personnel ("DOP") was represented by Lowell D. Basford.

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.[1] 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 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(c) provides as follows regarding when Respondent must act at Level III:

> Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.
>
> The chief administrator of his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the

---

[1] 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).

> appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.
>
> The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing. (Emphasis added).

Respondents did not challenge whether Grievant could pursue her allegation of default at Level IV. If a default has occurred, then the grievant wins, and Respondents 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. Thus, a grievant may come to Level IV asking for guidance on the lower level procedural issue of whether a default has occurred, requesting that a notice of default be issued, and in order to know how to proceed with his grievance.

This Grievance Board has found that the burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Galloway v. Div. of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). It is appropriate that this same principle apply to an assertion of default by a grievant, so that the burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence.[2] In this case, the burden is upon Grievant to demonstrate

[2] If the respondent is the party appealing to Level IV, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no

that the Level III decision was not issued on or before August 14, 1998. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

In evaluating whether a default has occurred, it must also be kept in mind that "default judgements are not favored by the law." Thompson v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-117 (Apr. 30, 1998). Rule 55 of the West Virginia Rules of Civil Procedure allows a plaintiff to obtain a judgment by default when a defendant fails to timely "plead or otherwise defend." However, "[t]he principle is well founded that courts look with disfavor on judgments obtained by default." Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, ___ (1970). Rule 60 provides excuses which may be asserted to set aside a default.

> If any doubt exists as to whether relief should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits. McDaniel v. Romano, 155 W. Va. 875, 878, 190 S.E.2d 8, 11 (1972). The law strongly favors an opportunity for the defendant to make a case to an action against him. Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, 456 (1970).

Graley v. Graley, 174 W. Va. 396, ___, 327 S.E.2d 158, 160 (1985). In determining whether a default judgment should be entered in the face of a Rule 6(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice

---

default occurred, due to the presumption set forth in W. Va. Code § 29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors/W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party. Syl. Pt. 3, Parsons v. Consolidated Gas Supply Corp., 256 S.E.2d 758 (W. Va. 1979).

FINDINGS OF FACT

The following findings of fact are supported by the evidence and testimony provided at the November 19, 1998 default hearing.

1. Grievant had a level three hearing on her grievance on September 2, 198. DOP had telefaxed a motion for continuance to Barbara Wheeler, Level Three Grievance Evaluator Supervisor, on August 31, 1998. G. Ex. 1. However, Ms. Wheeler was unable to communicate this request to the Grievance Evaluator assigned to Grievant's case, Paul Marteney, until the morning of September 2, 1998, at Lakin Hospital, where the hearing was to take place.

2. DOP's request for continuance did not state any reason. Mr. Marteney advised Grievant she could go ahead with the hearing if she wished, as everyone else was present at Lakin Hospital. Grievant elected to go forward with the hearing. During the hearing, Mr. Marteney told Grievant that, in all fairness, he wanted DOP to be able to submit any evidence or position statements it wanted, and asked her to agree to extend the timelines for receiving the level three decision by five (5) days. If DOP did submit any evidence, Grievant would have another five (5) days to respond. Grievant agreed to this compromise. LIII Tr., p. 18.

3. Subsequently, Mr. Marteney issued an Order memorializing the above agreement, however, the Order indicated that the timelines were extended to five (5) days

after DOP received a copy of the level three transcript. G. Ex. 2. This is not what Grievant agreed to at the level three hearing.

4. Mr. Lowell D. Basford, Director of Classification and Compensation for DOP, upon receiving Mr. Marteney's Order, wrote a memorandum to Michael F. McCabe, Director, Office of Personnel Services for HHR on September 10, 1998, protesting Mr. Marteney's action of denying his request for continuance. In that memorandum, Mr. Basford explained that DOP could not attend the September 2, 1998, hearing, because it had already been scheduled to appear at another level three HHR grievance hearing that same day. R. Ex. 2. Mr. Basford asked Mr. McCabe to intervene on his behalf, in fact, to "direct Mr. Marteney to reconvene the Level III hearing at an appropriate time so that I am able to fully and properly represent the interest of the Division of Personnel in this matter." R. Ex. 1.

5. In the meantime, Grievant had not heard anything from the level three evaluator, nor had DOP submitted any evidence or position statements on her grievance. Therefore, on September 21, 1998, she submitted her proposed findings of fact on her case, and notified Mr. Marteney that she considered Respondents to be in default on her grievance. G. Ex. 3. Ms. Wheeler responded to Grievant by letter dated September 28, 1998, explaining that she was going to reopen the hearing so that DOP could have a chance to present its evidence, and denying Grievant's motion for default. The next day, September 29, 1998, Ms. Wheeler issued a notice of Continuance of Hearing, setting a second hearing date for October 7, 1998. G. Ex. 5.

DISCUSSION

Grievant alleges her hearing was concluded on September 2, 1998, that she did not agree to a continuance of that hearing, and that the Grievance Evaluator failed to issue a level three decision within five (5) days following the five-day extension given at the close of the hearing, as agreed.

Respondents raise two alternative defenses in support of their argument that the motion for default should be denied. First, Respondents argue that no default has occurred because the level three hearing has not yet concluded. This argument merely begs the question of whether or not the level three hearing was concluded on September 2, 1998, and whether the Grievance Evaluator failed to issue a decision according to the timelines set forth in this statute. Second, Respondents argue the delay was a result of unavoidable cause, because DOP is an indispensable party to a misclassification grievance, and must be given an opportunity to be heard.

Many mistakes were made in the handling of this grievance which, understandably, have left Grievant with very little trust in the grievance process. However, the mistakes were not only made to her detriment, but also to DOP's detriment. It must be remembered that DOP and HHR are not one in the same entity; they are two separate parties in this grievance.

The first mistake occurred when no communication by HHR was made to DOP between August 31 and September 2, 1998, that its request for continuance had been denied. DOP relied upon the normal and usual past practice that its request for continuance would be granted, or in the alternative, it would have time to review the transcript of the level three hearing and submit additional evidence. While it was certainly

within Mr. Marteney's discretion as Grievance Evaluator to deny the request for continuance, especially since no reason was given on the telefax, the better way to handle this would have been to contact DOP to ask why it could not be there and discuss the matter with all of the parties. Clearly, DOP had a valid reason: it could not be two places at once, and already had another grievance hearing scheduled that day. Had this reason been explained to Grievant, she may not have liked it, but more likely than no would have agreed to the continuance.

The second mistake that was made was unilaterally changing the terms of the agreement regarding extending the timelines at the level three hearing. Barbara Wheeler testified she told Mr. Marteney that it customary to send DOP a copy of the level three transcript when extending the time for DOP to submit evidence. Again, communication between Mr. Marteney or Ms. Wheeler and Grievant would have been helpful at this stage. Nobody told Grievant, though, and she received an Order setting forth terms of extension to which she had not agreed. Ms. Wheeler testified that it was not necessary to get Grievant's approval to extend the timelines to issue a level three decision. Quite to the contrary, the statute provides exactly the opposite. To accept Ms. Wheeler's assertion that level three grievance evaluators can extend timelines at their discretion defeats the plain meaning of the statute setting forth explicit timelines for setting hearings and issuing decisions.

The third mistake occurred when Mr. Basford wrote to Mr. McCabe, without copying the Grievant. While this is a minor problem, the result was major. Mr. McCabe told Ms. Wheeler to take care of the matter. Ms. Wheeler issued an order continuing the hearing to allow DOP an opportunity to present evidence and examine witnesses. The mistake

was that the grievance was taken entirely out of the hands of the Grievance Evaluator, Mr. Marteney. The appeal to reopen the hearing should have been made to Mr. Marteney, or at least forwarded to him by Ms. Wheeler to make the decision. Having Mr. McCabe and Ms. Wheeler step in to "fix" the problem creates a very real appearance of impropriety, and makes the level three grievance evaluator's impartiality suspect.

Respondents' argument that no default has occurred because the hearing is not over is too easy and simplistic, and gives the impression that, indeed, the employer can violate the timelines anytime it wants, while grievants are held to strict adherence. That argument is denied; however, due to the unfairness shown to both Grievant and DOP, I do not find granting a default to be the equitable resolution to this matter.

Respondents' second argument that default should not issue, as DOP is an indispensable party, also fails. While it is true that DOP is an indispensable party, this is not a case where DOP did not receive any notice of the grievance hearing at all. DOP did receive notice of the hearing, but did not attend. Just because DOP is an indispensable party does not give it the unfettered discretion to decide what hearings to attend and what timelines it will adhere to. It is a party, and as such, is required to make an appearance. However, DOP was between the proverbial "rock and a hard place." It simply could not attend the September 2, 1998 hearing because it had no personnel available; they were already scheduled to appear at another hearing. DOP relied on past practice and hoped the hearing had been continued. It was never contacted regarding the request and did not know it was denied until after the fact.

Applying the analysis outlined in Parsons, supra, to the facts in this grievance, I find the Grievant did not suffer undue prejudice by the delay in this matter. The merits of the

grievance involve only a back pay issue. Grievant is employed and this was not a disciplinary matter. Furthermore, while many mistakes did occur, I do not find that the parties acted in bad faith or in some conspiratorial way to prejudice the Grievant. As with any contested matter, a default is not favored, and a decision on the merits is more beneficial to all parties involved.

Accordingly, Grievant's motion for default judgment is **DENIED**. This grievance is hereby **DISMISSED** from the Grievance Board's docket and **REMANDED** to level three for a completion of the level three hearing in this matter. Should Grievant not prevail at level three, she is entitled to refile her appeal at level four at that time, and within the timelines prescribed by W. Va. Code § 29-6A-1, et seq.

_____

MARY JO SWARTZ
Administrative Law Judge

Dated: December 8, 1998