**GLENN D. ALLISON,**

**Grievant,**

**v.** **DOCKET NO. 98-DOH-415D**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,**

**Respondent.**

## ORDER DENYING EMPLOYER'S REQUEST FOR DEFAULT HEARING

On October 16, 1998, the Division of Highways (DOH) filed a "Notice of Appeal on Default Claim and Request for Hearing" at level four. On the same date, Grievant's representative filed a Motion to Dismiss the employer's claim, based upon DOH's alleged failure to comply with statutory time limits.[1] In a prehearing telephonic conference, the parties agreed that the issues to be addressed at the level four hearing would be Grievant's timeliness allegations and whether a default had occurred at level two of the grievance procedure. A level four hearing was conducted in the Grievance Board's office in Morgantown, West Virginia, on December 4, 1998. The parties waived written arguments, and this matter became mature for decision at the conclusion of the hearing.

The following findings of fact are made from a preponderance of the evidence presented at the level four hearing, including testimony, documentary evidence, and statements of counsel.

## Findings of Fact

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[1]Grievant was represented by Kevin Church of the State Employees' Union, and DOH was represented by its counsel, Timbera Carrico.

1. A level two grievance conference was held before Daniel Sikora, District Engineer, on August 17, 1998.

2. At the August 17 conference, Mr. Sikora informed Grievant orally that he could not grant the relief Grievant requested.

3. When he did not receive a written level two response from Mr. Sikora, Grievant filed a written notice of default on September 8, 1998.

4. Grievant's notice of default was received by Mr. Sikora and Samuel Beverage, Commissioner of DOH, on September 14, 1998, as verified by certified mail receipts.

5. The Commissioner forwarded the notice of default to the DOH Legal Division, on an unknown date.

6. DOH did not request a level four hearing until October 16, 1998.

7. After receiving Grievant's notice of default, Mr. Sikora wrote a letter to Grievant dated September 16, 1998, claiming that, because of a heavy workload and a death in his family, he had not prepared a written level two response until August 31, 1998. He also stated that the written response had been forwarded directly to the EEO Division, instead of being sent to Grievant.

8. The written level two response was not introduced as evidence at the level four hearing, and Mr. Sikora did not testify.

## 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. 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."

This matter is before the Grievance Board pursuant to the portion of the new statute allowing the employer to request a hearing to show that the Grievant's remedy is clearly wrong or contrary to law. However, Grievant alleges, and DOH does not dispute, that this request was not made "within five days of receipt of a written notice of default" as required by the statute. In fact, DOH did not request a hearing until at least a full month after the Commissioner received Grievant's notice. DOH's only defense to its failure to act in a timely manner is that the Director of the Legal Division, Anthony Halkais, was out of the office on sick leave after suffering a heart attack, and no other person was authorized to

open the Legal Division's mail.[2] This information was provided at level four only through the statements of DOH's attorney, Ms. Carrico, who did not know exactly when Mr. Halkais suffered his heart attack or what the exact time period of his absence was. Moreover, Ms. Carrico was not a sworn witness in this proceeding, so her statements are not considered "evidence" in support of Respondent's alleged defense to its failure to timely request a hearing.

DOH has provided insufficient information or excuse to justify its failure to timely request a level four hearing in this default matter. There is no question that Grievant notified the proper officials at DOH and that the Commissioner received the notice of default on September 14, 1998. What happened after that point is completely unknown. There is no evidence as to when the Commissioner forwarded the notice to the Legal Division, which could also have been beyond the five-day limitation for requesting a level four hearing. Nevertheless, such scant information cannot serve to justify an employer's lengthy delay in exercising its statutory rights. Moreover, knowing that only five days are allowed for such a request, it is incumbent upon the employer, in this case the Commissioner, to insure that action is taken quickly. An employee should not have his rights adversely affected due to communication problems between his employer and its counsel, let alone by the Legal Division's obviously inadequate system for processing its mail.

This Grievance Board has not hesitated in the past to dismiss a Grievant's claim when it has not been timely filed at level four, and no sufficient justification for the delay

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[2]The DOH Legal Division is strongly urged to formulate a more efficient system for processing its mail, in order to avoid similar problems in the future.

has been proven. See Lambert/White v. Division of Environmental Protection, Docket No. 97-DEP-275 (Aug. 20, 1997); Short v. Dept. of Health & Human Resources, Docket No. 97-HHR-270 (July 29, 1997); Hicks v. Dept. of Health & Human Resources, Docket No. 97-HHR-170 (June 10, 1997). The same principle is applicable to an employer attempting to defeat an employee's default claim.

There is no question that a default occurred in this case. W. Va. Code § 29-6A-4(b) requires that a written level two response be issued within five days of the level two response. The only evidence addressing this issue is Mr. Sikora's September 16 letter to Grievant, in which he states, in pertinent part:

> Because of a heavy workload brought on by the retirement of the Assistant District Engineer -Maintenance, as well as having to take time off for family illness, I did not respond in writing to the Level II hearing until I returned to my office on August 31, 1998. Further, . . . my response was sent directly to EEO Division so as to expedite the scheduling of a Level III hearing.

No witness was presented at the level four hearing to explain Mr. Sikora's allegations regarding workload, family illness, or even the existence of his written level two response. At the very least, it would seem that DOH could have produced the level two response. Nevertheless, DOH has not provided sufficient evidence to excuse its undisputed delay in providing a level two response.

Although the evidence proves that a default has occurred, Respondent is not entitled to a hearing to show that the remedy sought is contrary to law or clearly wrong. DOH's request for a level four hearing in this case was untimely, and it is entitled to no further relief.

The following conclusions of law support the decision reached.

## Conclusions of Law

1. "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." W. Va. Code § 29-6A-3(a)(2).

2. Grievant proved by a preponderance of the evidence that Respondent did not request a level four hearing within five days of receipt of his written notice of default.

3. When a party to a grievance has failed to assert its rights at level four in a timely fashion, dismissal of the grievance is an appropriate remedy. See Lambert/White v. Division of Environmental Protection, Docket No. 97-DEP-275 (Aug. 20, 1997); Short v. Dept. of Health & Human Resources, Docket No. 97-HHR-270 (July 29, 1997); Hicks v. Dept. of Health & Human Resources, Docket No. 97-HHR-170 (June 10, 1997).

4. Respondent has failed to provide a legitimate justification for its untimely request for a level four hearing, so it is entitled to no further relief at level four.

Accordingly, Grievant's Motion to Dismiss is hereby **GRANTED**, and Respondent's request for a level four hearing pursuant to W. Va. Code § 29-6A-3(a)(2) is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Order. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

**Date: December 30, 1998**

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**DENISE M. SPATAFORE**
**Administrative Law Judge**