TERRY BROWN,

Grievant,

v.

DOCKET NO. 99-HHR-027

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievant, Terry Brown, filed the following grievance against her employer, the Department of Health and Human Resources ("HHR" or "Agency"), on October 26, 1998:

> Rejection of application for Social Service Worker III position. Denied position. Back wage difference to date. Paperwork forwarded. Written apology.

The level one grievance evaluator was without authority to grant the relief requested, and the grievance proceeded to a level two conference on November 4, 1998. James E. Kimbler denied the grievance at level two by memorandum dated November 9, 1998. A level three hearing was held on November 23, 1998, and the grievance was denied by Jack Frazier, Commissioner, on January 5, 1999. Grievant appealed to level four on January 13, 1999, and a hearing was conducted in the Grievance Board's Charleston, West Virginia office on March 23, 1999. Grievant appeared pro se, and HHR wasrepresented by Tiffany M. Bost, Esq., Assistant Attorney General. This matter became mature for decision on May 4, 1999, upon receipt of the level three transcript.

SUMMARY OF EVIDENCE

Level III Grievant's Exhibits

Ex. 1 -

Daniel Boone Award

Ex. 2 -

Classification Specifications for Social Service Worker II and III.

Ex. 3 -

January 23, 1996 memorandum from James Kimbler to Grievant.

Ex. 4 -

February 7, 1995 memorandum from Daniel Boone to Grievant.

Level IV Grievant's Exhibit

Ex. 1 -

Packet of information regarding Grievant's Workers' Compensation claim.

Level III/IV HHR's Exhibits (See footnote 1)

Ex. 1 -

DHHR Policy Memorandum 2106: Employee Selection.

Ex. 2 -

Social Service Work III Interview Questions.

Ex. 3 -

Individual Attendance Report of Grievant for October 1998; Personnel Service Record.

Ex. 4 -

Performance Evaluation of Grievant for 1997 rating period.

Ex. 5 -

Memoranda from Daniel Boone to Grievant from November through December 1997.

Ex. 6 -

Handwritten note from Grievant to supervisory staff.

PRELIMINARY ISSUE

Grievant alleges HHR violated the time limitations prescribed in the grievance statute for State employees, W. Va. Code §§ 29-6A-1, et seq, and therefore she prevails by default. HHR denies it defaulted in processing this grievance. At level three, "[t]he chief administrator or his designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of such [level three] hearing." W. Va. Code § 29-6A-4(d). W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> (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. (Emphasis added).

Further, W. Va. Code § 29-6A-5(a) provides that "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

The level three hearing was conducted in this matter on November 23, 1998. Written submissions were to be received from the parties by December 16, 1998. Grievant's level three decision was issued on January 5, 1999, more than five days after the mature date of December 16, 1998.

Barbara J. Wheeler, HHR's Level III Grievance Evaluator Supervisor, wrote Grievant on January 5, 1999, explaining that Jack Frazier, Commissioner, had been on annual leavefrom December 23 through December 30, 1998, and on Holiday leave from December 31, 1998 through January 1, 1999, and thus was unable to sign the level three decision until he returned on January 5, 1999. Ms. Wheeler characterized the delay in issuing the level three decision an "unavoidable cause", and

denied Grievant's claim of default.

"Unavoidable cause" has been found in at least one instance to encompass unforeseen events which prohibit the employer from responding to a grievance in a timely manner. Patteson v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR- 326D (Oct. 6, 1998). In Patteson, the Grievance Evaluator who held the level three hearing resigned unexpectedly, leaving an unfinished caseload. In addition, the Grievance Evaluator Supervisor ultimately responsible for HHR's caseload, was off on military leave. Thus, she did not realize that the resigned evaluator had left unfinished cases until she returned from military leave.

However, where a Grievant properly notified proper officials of his claim of default, and no action was taken by his employer until more than one month later due to the employer's legal counsel being off on medical leave, this Grievance Board has held that communication problems between an employer and its counsel are an insufficient excuse to justify its failure to act timely in a default situation. See Allison v. W. Va. Dep't of Transp., Docket No. 98-DOH-415D (Dec. 30, 1998).

In the instant case, I do not find HHR's explanation sufficient to constitute "unavoidable cause." There is no evidence that Commissioner Frazier's vacation time off came as a surprise, and the statute specifically authorizes the Commissioner to appoint a designee to act in his behalf. In this case, Grievance Evaluator Paul Marteney actuallypresided over the level three hearing, and there is nothing which would have prevented HHR from instituting alternative procedures to make sure grievance decisions were timely handled while the Commissioner was off on vacation.

However, a grieved employee must raise the "relief by default" issue during the grievance proceedings as soon as the employee becomes aware of such default. See Syl. Pt. 4, Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997) ; State ex. rel. Catron v. Raleigh County Bd. of Educ., 201 W. Va. 302, 496 S.E.2d 447 (1997). See also Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). In the instant case, five days following the mature date of December 16, 1998, would have been December 23, 1998, excluding Saturday and Sunday. Grievant received the level three decision on January 5, 1999, but did not raise her default claim until she appealed that decision to level four on January 13, 1999. Therefore, because Grievant waited until after she received the level three decision to claim default, she is deemed to have waived entitlement to the relief provided in the default provision of W. Va. Code § 29-6A-3(a). We now turn to the discussion of the merits of the case.

FINDINGS OF FACT

1. Grievant has been assigned to the Youth Services Unit under the supervision of Rebecca Farmer since January 1998.

2. At the time the Unit was formed in January 1998, Grievant was on a medical leave of absence. When Grievant returned to work, she was assigned to the Unit.

3. Prior to January 1998, Grievant was under the supervision of Daniel Boone.

4. Grievant has not been off work since returning in January 1998. 5. In September 1998, the Logan office received a Social Service Worker III position from the Wayne office, and posted the vacancy. There was a time crunch to fill the position, because a hiring freeze was going to be instituted in the Agency.

6. There were initially three candidates, two of which were interviewed for the position, Ms. Plumley and Grievant. Ms. Farmer and Mr. James Kimbler, Community Services Manager, Logan District, conducted the interviews, using the same questionnaire for both candidates. Following the interviews, Ms. Farmer and Mr. Kimbler discussed the candidates, and selected Ms. Plumley for the position. Ms. Farmer informed Grievant in person that she had not been selected.

7. Subsequently, Ms. Plumley withdrew her application. Ms. Farmer inquired whether Grievant was still interested in a position, and recommended to Mr. Kimbler that Grievant be selected.

8. Mr. Kimbler recommended Grievant be selected, and forwarded her paperwork to Thomas Gunnoe, Regional Director.

9. Mr. Gunnoe called Mr. Kimbler with some concerns he had regarding selecting Grievant for the position. Specifically, he was concerned about things he had heard regarding her refusal to follow supervisory directives, her work habits, and meeting guidelines. LIII Tr., p. 10. Mr. Gunnoe told Mr. Kimbler he felt Grievant “lacked credibility.”

10. Subsequent to that conversation, Mr. Kimbler rescinded his recommendation for Grievant, and told Ms. Farmer to repost the position.

11. Judy Hall applied during the second posting, and was selected to fill the position.

DISCUSSION

Grievant, although not clearly pled, alleges HHR violated its Employee Selection Policy in filling the Social Service Worker III position, that it discriminated against her because of work-related injuries, and that its selection decision was arbitrary and capricious. HHR denies it violated its hiring policy, that it discriminated against Grievant in any way, and that its decision was based on all of the pertinent information it had available at the time of the selection.

DHHR Policy Memorandum 2106, Employee Selection, outlines the "general guidelines for considering applicants for posted positions, conducting employment interviews and making a selection from the candidates in a manner consistent with Department policies, Division of Personnel Administrative Regulations and applicable Federal and State Civil Rights Laws." LIV R. Ex. 1.

The Policy indicates that the "Office Director/Administrator or designees may, at their discretion, choose to interview all applicants who meet the minimum qualifications, or choose only to interview those applicants who clearly possess the best qualifications for the position." LIV R. Ex. 1. In this instance, after the first posting for the Social Service Worker III position, Ms. Farmer and Mr. Kimbler chose to interview only the two applicants they believed possessed the best qualifications for the position, Ms. Plumley and Grievant. They utilized the same interview questions for both candidates, and there is no evidence that the interview process was flawed. Also, the same interview questions were utilized when interviewing Ms. Hall following the second posting. Contrary to Grievant's assertions, she was not "hired" when Mr. Kimbler forwarded his recommendation to Mr. Gunnoe. A state employee is not officially "hired" for employment until all paperwork has been approved and signed by the appropriate authority within the Division of Personnel. See Chapman v. W. Va. Dept. of Transp., Docket No. 97- DOH-261 (1997); Ollar v. W. Va. Dept. of Health and Human Resources, Docket No. 92- HHR-186 (1993). There is no dispute that this had not occurred when Mr. Kimbler rescinded his recommendation of Grievant for the position.

Also contrary to Grievant's assertions, there is no policy or regulation which prevents an employer from reposting a position, even after it had interviewed candidates following a first posting. Absent a policy whereby the employer is bound by a first posting, an employee-applicant who has not received an offer of employment cannot claim that he or she obtained rights via the posting. Lilly v. W. Va. Dept. of Tax & Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). Thus, no policy violation occurred when Mr. Kimbler requested the second posting for the position.

With regard to Grievant's allegations that she was discriminated against because of work-related

injuries, the West Virginia Workers' Compensation statute, W. Va. Code § 23-5A-1, specifically provides, that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter."

W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order toestablish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

It is undisputed that Grievant was off work due to work-related injuries several times during her career in state government, the latest period ending in January 1998, when she was assigned to the Unit. It is also undisputed that Grievant has never missed long periods of work without proper and adequate medical documentation, and only when associated with work-related injuries. Since January 1998, Grievant has not missed any

work.

In his level two response to Grievant, Mr. Kimbler wrote:

> This position [SSWIII] is a demanding job that requires a person that will be working 40 hours per week or more, possesses exceptional work habits, and has the ability to deal with a great deal of stress. During the last ten months your job performance has improved, however, I have serious concerns regarding your past performance when you demonstrated periods of time where you did not comply with supervisory directives, you have not been able to work full time, and you have not had a positive attitude about the Agency.

At level three, Mr. Kimbler testified he was concerned about Grievant's availability for work. He explained Grievant had been off work on one type of leave or another for a total of six years, three months, and twenty-seven days, and that there was a time she had to work part-time. LIII Tr., p. 15; LIV R. Ex. 3. Mr. Kimbler did not deny that Grievant had presented all the proper medical documentation to support her leaves of absences, and was vaguely aware that her disability had to do with an on-the-job injury. LIII Tr., p. 16. Mr. Kimbler admitted that Grievant's attendance had not been a problem since she began in the Youth Service Unit in January 1998, upon return from her latest medical leave. LIII Tr., p. 17. Mr. Kimbler testified inconsistently at level four that he did not consider Grievant disabled or unable to work, and that her attendance and work record were not problems at the time of her selection.

I find Grievant has established a prima facie of discrimination under both the Workers' Compensation statute and the Grievance statute for state employees. Grievant was off work due to work-related injuries of which Mr. Kimbler was aware. In determining to rescind his recommendation of her for the subject position, one of Mr. Kimbler'sconcerns was that she missed work due to work-related injuries. Mr. Kimbler then rescinded his recommendation for promotion for Grievant and reposted the position.

However, Mr. Kimbler testified that, even taking away his concerns regarding attendance, he still would not have recommended Grievant because of his additional concerns regarding her “pattern” of refusing to follow supervisory directives, her negative attitude, and her ability to be at work to perform the functions of the job. Level II Response.

Despite Mr. Kimbler's concern that Grievant did not follow supervisory directives, he was unable to relate any specific incident where Grievant refused to follow directions. LIII Tr., p. 11. It was

Grievant who related an incident in which she was asked to do something by her supervisor, Daniel Boone, regarding entering information into the SSIS System. She told Mr. Boone she was not comfortable entering the information, because she had not done the work. She agreed to do it, but only if she could prepare a note that it was under supervisory directive. Mr. Boone later retracted the request. Mr. Kimbler agreed that this was the incident he was referring to when he said he had concerns about Grievant not following orders. LIII Tr., p. 12.

Mr. Kimbler knew of no complaints from others regarding Grievant's attendance or ability to perform her work. Indeed, Ms. Farmer testified she was satisfied with Grievant's work and, in fact, did recommend her for the position.

Mr. Kimbler had general concerns about Grievant's attitude, which, in his opinion, was not very positive towards the Agency. LIII Tr., p. 19. Specifically, he referred to her resistance to follow Mr. Boone's request, mentioned above, as accusing her supervisor ofasking her to commit fraud. LIII Tr., p. 19. Another incident Mr. Kimbler related was that Grievant had written him a memorandum pleading for merit increases for the staff, which he took as showing no appreciation for an ice cream party they were given for a job well done. LIII Tr., p. 20.

Despite these incidents, Mr. Kimbler testified that it his own personal observation that Grievant has a negative attitude, and that he has never heard anything negative about her from anyone else, and in fact, “the only time [he] heard [her] name mentioned is in a complimentary way.” LIII Tr., p. 21.

Mr. Boone, Grievant's former supervisor, testified that he had ongoing discussions with Grievant regarding reporting deadlines, and that Grievant was frequently late in meeting her deadlines. He also expressed some concern regarding Grievant's attitude, which he illustrated through a rather sarcastic handwritten letter she had written to him and others when asked to perform a specific job function. R. Ex. 6. While Grievant characterized this letter as a joke, and Mr. Boone admitted he took most of it “tongue in cheek”, he nevertheless felt the letter was inappropriate and unprofessional.

Mr. Boone testified that, as he reported directly to Mr. Kimbler, he kept him informed of his discussions and concerns regarding Grievant as an employee. Therefore, Mr. Kimbler certainly would have been aware of these things at the time of the selection for the subject position.

The grievance procedure set forth in W. Va. Code §§ 29-6A-1, et seq, is not intended to be a “super interview”, but rather, allows for a review of the legal sufficiency of the selection process. Furthermore, an agency's decision as to which candidate is mostqualified will be upheld unless

shown to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

In this case, there is no dispute that Grievant was qualified to perform the Social Service Worker III position. However, Mr. Kimbler had some concerns about Grievant's attitude toward the Agency, her ability to follow orders, and her ability to be present to perform the work. Evidence was presented to support those concerns, and they cannot found to be arbitrary, capricious, or clearly wrong. Thus, the Agency's decision not to hire Grievant for the Social Service Worker III position will stand.

CONCLUSIONS OF LAW

1. W. Va. Code § 29-6A-4(d) provides that, "[t]he chief administrator or his designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of such hearing."

2. W. Va. Code § 29-6A-3(a) provides that, "[t]he 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 . . ., unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud."

3. The level three decision was not issued within five days following the mature date for rendering the decision, and the employer did not prove it was prevented from doing so due to any of the enumerated excuses provided in the Code.

4. A grievant cannot wait to claim a default has occurred until after receiving the decision or reply which he alleges constituted the default. A grieved employee must raise the "relief by default" issue during the grievance proceedings as soon as the employeebecomes aware of such default. See Syl Pt. 4, Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); State ex rel. Catron v. Raleigh County Bd. of Educ., 201 W. Va. 302, 496 S.E.2d 447 (1997). See also Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

5. Grievant did not raise the "relief by default" issue until well after she received the level three decision she claimed was in default. Therefore, she cannot prevail on her claim of default.

6. Grievant was not "hired" for the Social Service Worker III position when Mr. Kimbler initially recommended her for the position to his superior, Thomas Gunnoe. See Chapman v. W. Va. Dept. of Transp., Docket No. 97-DOH-261 (1997); Ollar v. W. Va. Dept. of Health and Human Resources,

Docket No. 92-HHR-186 (1993).

7. There is no policy or regulation which prevents an employer from reposting a position, even after it had interviewed candidates following a first posting. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No.95-T&R-576 (Apr. 5, 1996).

8. W. Va. Code § 23-5A-1 prevents an employer from discriminating against an employee for his or her receipt or attempt to receive benefits under the West Virginia Workers' Compensation law.

9. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” 10. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that s he has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

11. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

12. Grievant established a prima facie case of discrimination under W. Va. Code §§ 23-5A-1 and 29-6A-2(d).

13. HHR offered legitimate, non-discriminatory reasons for its decision not to hire her for the

Social Service Worker III position, and those reasons were not arbitrary, capricious, or clearly wrong. See Thibault v. Div. of Rehabilitation Services, Docket No. 93-RS-489 (July 29, 1994).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: June 2, 1999

Footnote: 1

HHR presented the same exhibits at both the level three and level four hearings, although numbered differently in each hearing. For brevity's sake, they are combined here under the numbers assigned at level four.