SANDRA DEEL,

Grievant,

v. **Docket No. 00-BEP-256D**

BUREAU OF EMPLOYMENT PROGRAMS,

Respondent.

ORDER DENYING DEFAULT

On May 22, 2000, Grievant, Sandra Deel, filed a grievance against her employer, Respondent, the Bureau of Employment Programs ("BEP"), asserting she was misclassified. Grievant's supervisor, Dana Browning, responded to her grievance at Level I on May 30, 2000, stating he agreed Grievant was misclassified, but he was unable to grant the relief requested. (See footnote 1) He further stated, "I am referring your grievance to Mr. Pat Hanna who will handle the next level in the grievance process." Grievant signed the grievance form to appeal to Level II on June 15, 2000, and Mr. Browning forwarded it for her to his supervisor, Pat Hanna. Mr. Hanna determined that Tim Marton, Director of Management Information Systems, should be the Level II grievance evaluator, and forwarded the grievance to him.

Mr. Marton met with Grievant, and timely provided a written response to the grievance on June 27, 2000. Mr. Marton's written response reads in its entirety:

> Though it would appear that you perform functions that are listed for a Database Administrator II (DBA-II), I believe that you require more than the "limited supervision" that is expected of a DBA-II. Since I do not observe you in your daily routine, I must rely on your immediate supervisor's opinion and accept that you are performing as a DBA-II. Furthermore, since I do not have the authority to grant the remedy you seek, I will forward this on to the next grievance level.

The response did not tell Grievant what she was to do if she wished to appeal to Level III. Grievant did not appeal to Level III. She believed Mr. Marton would do this for her because his letter stated he would, and because a co-worker had told her he had taken her classification grievance to

the Division of Personnel on her behalf after the Level II conference. Mr. Marton did not forward an appeal to Level III on Grievant's behalf.

Grievant contacted Commissioner William F. Vieweg's office on June 29, 2000, to see whether her grievance had been forwarded to Level III. She received a response from Commissioner Vieweg's office on July 27, 2000, stating that the grievance had not been filed at Level III. Grievant did not explain why she did not ask Mr. Marton whether he had submitted her appeal to Level III. Had she done so, it is likely he would have responded to her in less than a month, thereby lessening the delay. On July 28, 2000, Grievant filed a claim of default at Level IV, based upon a claim that Mr. Marton had caused an unreasonable delay in the processing of the grievance.

A Level IV hearing was held on October 16, 2000, solely for the purpose of determining whether a default had occurred. Grievant represented herself, and Respondent was represented by Patricia J. Shipman, Esquire. The parties did not wish to submit written argument, and the issue of whether a default occurred became mature for decision at the conclusion of the hearing. 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.

Respondent did not challenge whether Grievant could pursue her allegation of default at Level IV, and in fact, filed a request for a hearing on the default claim shortly after the default was filed. This Grievance Board has determined that a grievant may come to Level IV asking for a ruling on the lower level procedural issue of whether a default has occurred, in order to know how to proceed with her grievance. Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998).

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. (See footnote 2) Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 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.

Respondent made several arguments, one of which was that the events which occurred, even if taken as presented by Grievant, could not result in a default. Respondent pointed to the default language which clearly provides for relief by default when a grievance evaluator does not respond within the statutory time frames. In this case, Grievant does not claim that a grievance evaluator did not timely respond. Her claim is that the Level II grievance evaluator delayed the process when he did not forward her appeal to Level III as he said he would. Respondent notes that the grievance procedure does not require a grievance evaluator to forward an appeal of his own decision to the next level; therefore, he could not be found to have missed a statutory time line by not doing so, and no default could occur. Respondent argued it was Grievant's responsibility under W. Va. Code § 29-6A-4 to file her appeal to Level III, not Mr. Marton's, and that as the Level II grievance evaluator, it would be inappropriate and a conflict of interest for Mr. Marton to file the appeal for Grievant.

W. Va. Code § 29-6A-4(c) provides as follows regarding the appeal to Level III of the Level II decision:

> 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 personnel director of the state civil service commission by the grievant.

Grievant testified she was not sure of the procedures. She stated Mr. Marton assisted her in rewriting the grievance, and that her supervisor had submitted the appeal to Level II for her, after she signed the grievance form. She pointed out that the instructions for filing a grievance which are included with the grievance form are not as detailed as the statute, and do not clearly state that it is the Grievant who is to file theappeal to Level III. She stated she did not have a copy of the grievance statute, and relied upon the instruction sheet, and upon the statement in the Level II decision.

Respondent is correct. A default occurs when an employer or its agents do not comply with the time periods set forth in the grievance procedure. Mr. Marton timely held the Level II conference, and timely responded to the grievance. However, his decision is not in compliance with the requirements

of the grievance procedure. W. Va. Code § 29- 6A-3(i) requires that:

> Decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted to the grievant and any representative named in the grievance within the time prescribed. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

The language used in this statute makes it clear that the inclusion of the name of the individual at the next level to whom appeal may be made is not optional. It says "the decision shall include" this information. While Grievant, who is not a lawyer, did not specifically state that the statute requires the decision to contain the appeal information, she did make it clear that the language included by Mr. Marton in the decision confused her, and she did not understand it was her responsibility to appeal to Level III. This is sufficient to fairly raise the issue of the effect of the failure to include the appeal information.

Mr. Marton's Level II decision does not include the name of the individual at the next level to whom appeal may be made. Instead, it says Mr. Marton "will forward this on to the next grievance level." While Mr. Marton testified he meant by this language that he would forward his grievance file on to the next level, it is understandable that Grievant would believe he was going to file her appeal to Level III. It is the failure to include the appeal information, and the inclusion of misleading language about the process, which led to Grievant's confusion. Respondent, however, did not address this error. This Grievance Board has previously addressed the issue of whether a decision which did not include the appeal language was a valid decision. In Morrison v. Division of Labor, Docket No. 99-LABOR-146D (June 18, 1999), an Order Denying Default was entered. In that case, the appeal language was not included in the Level II decision. This error was immediately corrected, and a second decision with the appeal language included, was sent out two days after the first decision. This second decision, however, was issued one day late. The Administrative Law Judge found in Morrison that Respondent had substantially complied with the statutory requirements, and no default occurred. Conclusion of Law Number 1 states, "[f]ailure to include the appeal paragraph with the decision, when this error was due to oversight and was corrected within one day will not result in a finding of default."

The circumstances in this case are obviously somewhat different from those in Morrison, as the failure to include the appeal language was never corrected. However, there is no evidence of malice

or bad faith on Mr. Marton's part. He simply failed to include the appeal language. He did, nonetheless, respond to the grievance itself, which solves the primary concern of the default provisions: getting the grievant a timely response to the substantive issues raised by the grievance. In fact, a default occurs when “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,” . . .. The response was timely made, and a default did not occur.

This is not to say that Mr. Marton's action should be condoned. As noted above, inclusion of the appeal language in grievance decisions is mandatory. Anyone who is a grievance evaluator should know that this language is required, and should make sure that his or her decision always makes it clear how the grievant may proceed. This language is intended to assist the grievant, who in many instances is not an attorney, and to make it clear what the next step is. Mr. Marton's decision did the exact opposite. The following findings of fact are based upon the record developed at the Level IV hearing.

Findings of Fact

1. On May 22, 2000, Grievant, Sandra Deel, filed a grievance against her employer the Bureau of Employment Programs, asserting she was misclassified.

2. Grievant's supervisor, Dana Browning, responded to her grievance at Level I on May 30, 2000, stating he agreed Grievant was misclassified, but he was unable to grant the relief requested. He further stated, “I am referring your grievance to Mr. Pat Hanna who will handle the next level in the grievance process.” Grievant signed the grievance form to appeal to Level II on June 15, 2000, and Mr. Browning forwarded it for her to his supervisor, Pat Hanna. Mr. Hanna determined that Tim Marton, Director of Management Information Systems, should be the Level II grievance evaluator, and forwarded the grievance to him.

3. Mr. Marton met with Grievant, and timely provided a written response to the grievance on June 27, 2000. Mr. Marton's written response was:

> Though it would appear that you perform functions that are listed for a Database Administrator II (DBA-II), I believe that you require more than the “limited supervision” that is expected of a DBA-II. Since I do not observe you in your daily routine, I must rely on your immediate supervisor's opinion and accept that you are performing as a DBA-II. Furthermore, since I do not have the authority to grant the remedy you seek, I will forward this on to the next grievance level.

The response did not tell Grievant how to appeal to Level III.

4. Grievant did not appeal to Level III. She believed Mr. Marton would do this for her because his letter stated he would, and because a co-worker had told her he had taken her classification grievance to the Division of Personnel on her behalf after the Level II conference. Mr. Marton did not forward an appeal to Level III on Grievant's behalf.

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." W. Va. Code § 29-6A-3(a).

2. The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998).

3. Mr. Marton responded to the grievance at Level II in a timely manner. His failure to file Grievant's appeal to Level III, regardless of what he told her he would do, is not a default as defined by statute.

Accordingly, Grievant's request that a default be entered is **DENIED**. This grievance should be, and the same hereby is, **ORDERED REMANDED TO LEVEL III** of the grievance procedure for education employees for hearing and decision. This grievance is **ORDERED DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD

Administrative Law Judge

Dated: November 17, 2000

Footnote: 1

Grievant stated that Mr. Browning's response was untimely, although she was not claiming a default for this reason. The grievance was filed on May 22, 2000. Mr. Browning was required to respond to the grievance within six working days. Saturdays, Sundays, and holidays are not counted. W. Va. Code § 29-6A-2(c). May 27 was a Saturday; May 28 was a Sunday; and May 29 was a state holiday. None of those days was a working day. Mr. Browning responded on the fifth working day after the grievance was filed, which was a timely response.

Footnote: 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 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).