THOMAS GALYA, et al.,

Grievant,

v. **Docket No. 01-DEP-017D**

DIVISION OF ENVIRONMENTAL

PROTECTION and DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING DEFAULT

Grievants, Thomas Galya, James Pierce, Walter Hudnall, and Larry Alt filed a grievance against their employer, the Division of Environmental Protection ("DEP") at various times in early December 2000. This grievance was denied at Levels I and II in a timely manner. Grievants are at Level IV alleging their employer is in default for failure to respond at Level III in a timely manner, and failure to hold a Level III hearing. The underlying grievance deals with the filling of supervisory positions in regional offices.

Grievants filed a request for default judgement with their employer on January 18, 2001, and later brought this request to Level IV. Upon receipt of the matter, the undersigned Administrative Law Judge joined the Division of Personnel ("DOP") as an indispensable party. A hearing on the issue of default was held on January 31, 2001. This issue became mature for decision on February 23, 2001, the date the parties' proposed findings of fact and conclusions of law were due. (See footnote 1)

Issues and Arguments

Grievants allege a default occurred because DEP failed to schedule a Level III hearing in a timely manner and also failed to issue a Level III Decision in a timely manner. Respondents argue a default did not occur as Grievants had waived the Level III timelines in a written waiver. Grievants' response to this argument was that they had filed a waiver, but intended it to be a waiver for a limited time frame.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge

makes the following Findings of Fact pertinent to this matter.

Findings of Fact

1. These grievances with exactly the same language were originally filed on different dates in early December 2000.

2. Level I and Level II conferences were scheduled, and Level I and Level II Decisions were issued in a timely manner.

3. There were eight other grievances filed with DEP that had exactly the same language, but these other grievances were not as far along in the grievance process. Grievants were aware of the other grievances. See Hager v. Div. of Envtl. Protection/Div. of Personnel, Docket No. 01-DEP-006D (Mar. 29, 2001). 4. DEP asked Grievants to waive the time frames so all the grievances could be heard together.

5. On December 8, 2000, Grievants Galya and Alt wrote they had no objection to extending the deadline for the Level III hearing, so that the anticipated additional grievances filed by fellow employees could be consolidated. Grt. Ex. No. 2, at Level IV.

6. On December 12, 2000, Grievant Pierce wrote he had "no objection to the extension of the five-day timeframe (sic) to hold the Level III conference." He noted there were additional grievances pending, and he authorized the postponement of his hearing until these grievances could all be heard at once. Grt. Ex. No. 1, at Level IV.

7. On December 19, 2000, Grievant Hudnall wrote he did not mind having one hearing for everyone, and he was "happy to go along with the consensus. . . ." Grt. Ex. No. 4, at Level IV.

8. The other similar grievances were filed with DEP on December 14, and DOP on December 18, 2000.

9. The other, later-filing grievants would not agree to a waiver of the Level III timelines to hold a hearing.

10. DEP had difficulty setting the Level III hearing because: 1) of the number of parties involved; 2) they used an independent contractor for the grievance evaluator; and 3) the intervening holidays.

11. In a letter dated January 4, 2001, but not postmarked until January 9, 2001, Deputy Director Huffman denied these grievances and referred Grievants to Level IV,stating DEP was

unable to hear the consolidated grievances within the time frames. (See footnote 2) Grt. Ex. No. 6 at Level IV.

12. Deputy Director Huffman noted the other employees who had filed exactly the same grievance would not agree to a waiver, and without a waiver it was impossible for either him or his designee to conduct a hearing or a meaningful review of any evidence within the time frames. He stated he had no alternative but to deny the grievances. He directed Grievants to file at Level IV with the Grievance Board.

13. On January 18, 2001, after the other, later-filing grievants filed a request for default, Grievants alleged default because of "the lack of an opportunity to present the facts to substantiate our claim(s) in an evidentiary hearing." Grt. Ex. Nos. 3 & 5, at Level IV.

Discussion

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board in 1998. More specifically, W. Va. Code § 29-6A-3(a) was amended, 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. Inmaking 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."

Because Grievants are claiming a default occurred under the statute, they bear the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is

generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

If a default occurs, Grievants are presumed to have prevailed, and are entitled to the relief requested, unless DEP and DOP are able to demonstrate the remedy requested is either contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if DEP demonstrates a default has not occurred or the remedy requested is either contrary to lawor clearly wrong, Grievants will not receive the requested relief. W. Va. Code § 29-6A- 3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there is no default, Grievants may proceed to the next level of the grievance procedure. In this matter, after this grievance was advanced to hearing at Level III, DEP was required to respond in accordance with W. Va. Code § 29-6A-4(c). W. Va. Code § 29-6A- 4(c) provides the following directions regarding when Respondent must act at Level III:

> (c) Level three.
>
> 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.
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> The chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the 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.
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> 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.

The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. See W. Va. Code §29-6A-3(g). Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than “rushing” to judgment. Jackson v.Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). Grievants testified they willingly agreed to an extension in writing, but Grievants maintain this extension was conditional. As revealed by Findings of Fact 5, 6, and 7, Grievants' understanding is not included in the waiver letters, and no time limits are specified. The agreement to extend the timelines was written, and it constituted a valid waiver of the time to hold a hearing under the statutory guidelines. See Duruttya, supra; Houston v. W. Va. Dep't of Tax and Revenue /Div. of Personnel, Docket No. 99-T&R-469D (Feb. 29, 2000); Bowyer v. Bd. of Trustees/ W. Va. Univ., Docket No. 99-BOT-197D (July 13, 1999); Jackson, supra. Although Grievants may have intended to limit the waiver, such intent is not evidenced in the written waivers.

Accordingly, the undersigned concludes Grievants have failed to meet their burden of proof in this default claim. Grievants admit they signed waivers to allow an extension of the statutory time line at Level III, and there were no restrictions on these waivers. This fact prohibits any claim that a default occurred at Level III. Clearly, Grievants agreed in writing to hold the Level III hearing outside the timelines. Pasternak v. Higher Educ. Interim Bd., Docket No. 00-HE-357D (Feb. 6, 2001); Parker v. Dep't of Health and Human Serv. , Docket No. 99-HHR-296D (Nov. 30, 1999).

The above-discussion will be supplemented by the following Conclusions of Law.

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. When grievants assert their employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievants bears the burden of establishing their claim for default by a preponderance of the evidence. Cody v. Div. of Juvenile Serv., Docket No. 99-

DJS- 190D (Aug. 3, 1999); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).

3. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual agreement of the parties. See W. Va. Code § 29-6a-3(g).

4. Grievants agreed, in writing, to waive the timelines for the Level III hearing, and this waiver did not contain any limitations. See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Pasternak v. Higher Educ. Interim Bd., Docket No. 00-HE- 357D (Feb. 6, 2001); Parker v. Dep't of Health and Human Serv. , Docket No. 99-HHR- 296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees/ W. Va. Univ., Docket No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

Accordingly, Grievant's request that a default be entered is **DENIED**, and this grievance is remanded for a Level III hearing on the merits of the case.

_____ **JANIS I. REYNOLDS**

Administrative Law Judge

Dated: March 29, 2001

Footnote: 1

Grievants were represented by Attorney Otis Mann, and Respondent was represented by Senior Attorney General Don Darling. The parties elected not to file these proposals.

Footnote: 2

Deputy Director Huffman also denied the other, later filed grievances on that date.