ALBERT ADAMS,

Grievant,

v. **Docket No. 00-DOH-383D**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Grievant, Albert Adams, filed a motion for default judgment, with his employer, Division of Highways ("DOH") in the above-styled grievance on December 12, 2000, in accordance with W. Va. Code § 29-6A-3(a)(2)(1998). Respondent requested a Level IV hearing on Grievant's demand for default. A hearing on this matter was held in this Board's Charleston, West Virginia office on February 22, 2001, and became mature for decision at that time. Grievant represented himself, and DOH was represented by Jennifer Francis from DOH's Legal Division. The underlying grievance dealt with events and arguments surrounding Grievant's transfer. (See footnote 1)

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. This grievance was filed at Level I on October 10, 2000.

2. A Level I conference was held shortly thereafter with Grievant's supervisor, Danny Ellis, and a timely Level I Decision denying the grievance was issued on October 16, 2000. There was no appeal paragraph on this Decision. 3. Grievant appealed to Level II on October 23, 2000.

4. There were several discussions between Grievant and Mr. Ellis about scheduling the Level II conference, which would be with Commissioner Samuel Beverage. 5. Mr. Ellis scheduled the conference within the time limits on October 30, 2000. Resp. Ex. No. 1, at Level IV.

6. Grievant sent Mr. Ellis an e-mail on October 26, 2000, stating he could not appear on this

date as he was to attend a national conference in Atlanta from October 28 to late on November 1, 2000. Id.

7. In this same e-mail, Grievant stated, "per our conversation of this morning and agreement[,] we can set a mutual date during the week of November 6th. Please advise me on the time and date. . . ." Id.

8. Mr. Ellis e-mailed Grievant on that same date reporting "the meeting is set for Monday Nov. 6, at 8:00 in Sam's office." Id.

9. Grievant's response on that same date was e-mailed shortly thereafter. His response was "Thanks". Id.

10. The conference was held on November 6, 2000. Mr. Ellis was present during this Level II conference.

11. November 7 and 10, 2000 were state holidays, and November 11 and 12, 2000 were Saturday and Sunday.

12. Commissioner Beverage timely issued his Decision denying the grievance on November 14, 2000. 13. Commissioner Beverage's Decision did not have an appeal paragraph attached. Grt. Ex. No. 1, at Level II.

14. Grievant was unclear where to file his appeal to Level III. (See footnote 2) He filed his appeal to DOH's Level III Hearing Examiner, Brenda Craig Ellis, but the date of this filing is unknown as the copy of the grievance form submitted by Grievant is illegible. Grievant had, however, appealed to Level III at least a week before November 30, 2000, because by November 30, 2000, Grievant had made discovery requests and had received a reply from DOH. (See footnote 3)

15. On December 7, 2000, Grievant filed a request for default judgement with Hearing Examiner Ellis.

16. On December 14, 2000, DOH requested a Level IV hearing on Grievant's request for relief by default.

Issues and Arguments

Grievant raised many concerns at his Level IV default hearing, most of which were not default issues. (See footnote 4) The issues raised by Grievant which can be addressed are: 1)whether the Decisions were issued in a timely manner; 2) whether the Decisions were so deficient in content so

as to not qualify as Decisions; thus, no Decisions were issued and a default occurred through this failure; 3) whether Grievant had waived the timelines; and 4) whether the failure to attach appeal paragraphs created a default.

Respondent noted many of the issues raised by Grievant were not germane to the issue of default, but responded to each of Grievant's allegations nevertheless. Respondent also maintained 1) the Decisions were issued in a timely manner; 2) detailed Findings of Fact and Conclusions of Law are not required until after the Level III hearing; thus, the Level I and Level II Decisions are sufficient and clear; 3) Grievant had waived the timelines for the Level II conference; and 4) the failure to include the appeal paragraph did not prejudice Grievant as he appealed to Level III in a timely manner.

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."

When the employer requests a hearing at Level IV on a default claim, the burden of proof is upon the employer/respondent claiming no default has occurred, or asserting an affirmative defense, to prove the same by a preponderance of the evidence, due to the presumption set forth in W. Va.

Code § 29-6A-3(a) that the grievant has prevailed on the merits. Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 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.

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested. Of course, if DOH demonstrates a default has not occurred or the remedy requested is either contrary to law or clearly wrong, Grievant 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, Grievant may proceed to the next level of the grievance procedure. DOH denies a default occurred, as contemplated under the terms of the statute.

In this matter, after this grievance was advanced to a conference at Level II, DOH was required to respond in accordance with W. Va. Code § 29-6A-4(b) which provides:

> b) Level two.
>
> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the Grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that “days” means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). Thus, DOH was obligated to issue a Level II decision on this grievance not later than Wednesday November 15, 2000, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

Although Grievant testified the Decision was not issued in a timely manner, it is clear that it was as the Level II Decision was issued on November 14, 2000, before the statutory due date of

November 25, 2000.

Grievant's next issue focused on the fact he did not receive the appeal paragraph.

W. Va. Code § 29-6A-3(i) states:

> Decisions rendered at all levels of the grievance procedure shall be dated, in writing setting forth the decision or decisions and the reasons for the decision, and 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.

However, the default provisions are triggered by the failure of the Grievance Evaluator to respond and to "issue a written decision upon the appeal within five days of the conference." W. Va. Code § 29-6A-4(b) (emphasis added). See Martin v. Randolph Bd. of Educ., 195 W.Va. 297, 465 S.E.2d 399 (1995); Gillum v. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-387D (Dec. 2, 1998). The question presented here is whether the failure to include the appeal paragraph resulted in the decision not being "a decision", and whether Respondent substantially complied with the statutory requirements. This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya, supra, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable. Thus, given this set of facts, the undersigned Administrative LawJudge finds Respondent substantially complied with the statutory requirements. (See footnote 5) Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

Grievant's next argument is that the content of the Level I and Level II Decisions was insufficient as they did not contain Findings of Fact and Conclusions of Law. He then reasons that since they did not contain Findings of Fact and Conclusions of Law, no "real" Decisions were issued, and so a default has occurred. What is required at Level I and Level II is that the Decisions be in writing.

Findings of Fact and Conclusions of Law are not required until after an evidentiary hearing, which in the State grievance procedure is at Level III. W. Va. Code § 29-6A-6(g).

Grievant also argued he did not waive the timelines to hold the Level II conference. This argument is against the evidence presented by the parties. Grievant testified he and Mr. Ellis discussed when to hold the Level II conference, and Mr. Ellis noted Commissioner Beverage was very busy. Grievant then complained Mr. Ellis scheduled the Level II conference on October 30, when he believes Mr. Ellis knew Grievant would be out of town. This allegation is really not an issue. Mr. Ellis scheduled the Level II conference in a timely manner, and Grievant could not attend. The parties then mutually agreed to holdthe conference on November 6, 2000, after Grievant's return. This agreement is memorialized by the e-mail message referred to in Finding of Fact 7, which states, "per our conversation of this morning and agreement[,] we can set a mutual date during the week of November 6th. Please advise me on the time and date. . . ." (Emphasis Added.) Clearly, Grievant agreed in writing to hold the Level II conference 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. When the employer requests a hearing at Level IV on a default claim, the burden of proof is upon the employer/respondent claiming no default has occurred, or asserting an affirmative defense, to prove the same by a preponderance of the evidence, due to the presumption set forth in W. Va. Code § 29-6A-3(a) that the grievant has prevailed on the merits. Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998).

2. The Level I and Level II Decisions were issued in a timely manner pursuant to statute.

3. Failure to include the appeal paragraph with the decision will not automatically result in a finding of default. See Morrison v. Div. of Labor, Docket No. 99- LABOR-146D (June 18, 1999).

4. Grievant agreed in writing to waive the timelines for the Level II conference. 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). 5. Findings of Fact and Conclusions of Law are not required until after an evidentiary hearing, which in the State grievance procedure is at

Level III. W. Va. Code § 29-6A-6(g).

6. Respondent substantially complied with the statutory provisions.

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 13, 2001

Footnote: 1

Grievant has amended and added to his grievance at each stage of the procedure. This issue was discussed at the default hearing, but is not resolved by this order as it is not a default issue.

Footnote: 2

Grievant discussed this issue at length during the default hearing. He was upset because his Level II conference was with Commissioner Beverage, and he believed this was incorrect. It is noted Commissioner Beverage was the correct individual in the chain of command to conduct Grievant's Level II conference, as Commissioner Beverage was Grievant's supervisor's supervisor.

Footnote: 3

November 23 and 24, 2000, were state holidays, and November 18, 19, 25, and 26, 2000, were Saturdays and Sundays.

Footnote: 4

These issues and arguments raised by Grievant include: 1) his supervisor attending the Level II conference; 2) the Level II conference being conducted byCommissioner Beverage (See note 2 supra.); 3) failure of DOH to provide documents for the Level III hearing; and 4) Whistle Blowing issues.

Footnote: 5

It should be noted that by Respondent's actions, the date from which Grievant could file his grievance to Level III was increased, and the time for filing would not begin to run until Grievant received the appeal paragraph. Morrison, supra. Additionally, although Grievant did not receive the appeal information, he still knew in a timely manner that his grievance was denied at Level II, and that if he wished to contest that decision he must appeal to Level III. Grievant filed his appeal to Level III in a timely manner. "[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment." Syl. Pt. 4, Burns v. Goff, 164 W. Va. 301, 262 S.E.2d 772 (1980).