SARAH RANKIN,

Grievant,

v. **Docket No. 02-BEP-106D**

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS,

Respondent.

O R D E R G R A N T I N G D E F A U L T

Grievant, Sarah Rankin, employed by the West Virginia Bureau of Employment Programs (BEP or Respondent) filed a level one grievance on March 23, 2001, challenging a ten day suspension. The hearing evaluators at both levels one and two advised Grievant that they lacked the authority to grant the requested relief. A level three hearing was conducted on August 15 and September 6, 2001, and January 31 and February 11, 2002. Grievant notified BEP Commissioner Robert Smith by letter dated April 18, 2002, that she had not yet received a decision, and that BEP had defaulted. BEP filed an appeal to level four on the same date. A hearing was conducted in the Grievance Board's Westover office on June 25, 2002, at which time Grievant was represented by Kevin Church of AFSCME, and BEP was represent by Kelli D. Talbott, Deputy Attorney General. Both parties waived the opportunity to submit post-hearing proposals, and the matter became mature for decision upon receipt of the level three transcript on July 3, 2002.

The following facts are derived from the record in its entirety.

Findings of Fact

1. Grievant has been employed by BEP as an Employment Counselor II at all times pertinent to this grievance. 2. By letter dated March 14, 2001, BEP Commissioner Robert J. Smith notified Grievant that she was suspended, without pay, for a period of ten days.

3. Grievant filed a grievance seeking revocation of the disciplinary action.

4. A level three hearing was concluded on February 11, 2002, and proposed findings of fact and conclusions of law were scheduled to be due on March 25, 2002. At the hearing evaluator's request, Grievant agreed to extend the time lines for the decision to ten days.

5. The grievance evaluator produced a recommended decision dated April 8, 2002, for Commissioner Smith's review.

6. By letter dated April 17, 2002, Commissioner Smith notified Grievant's representative that he adopted the recommended decision, and denied the grievance.

Discussion

The default provision for state employees is found in W. Va. Code § 29-6(a)-4, which provides in part:

(1) A grievance shall be filed within the times specified in section four [§ 29-6A-4]of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other causenecessitating the grievant to take personal leave from his or her employment.

(2) Any assertion by the employer that the filing of the grievance at level one was untimely must 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.

The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred. Luzadder v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-025D (Apr. 8, 2002); Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 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 the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse, or that Grievant agreed to waive the time lines. If no valid response is offered by Respondent, a subsequent hearing may be scheduled to determine whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-4(c) provides:

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.

Grievant asserts that proposed findings of fact and conclusions of law were due on March 25, 2002, making the decision due on or before April 8, 2002. Respondent argues that the process was timely completed as the recommended decision was issued on April 8, and the final decision was issued seven working days later. The level three transcript establishes that a waiver was agreed to by Grievant:

Evaluator DeBolt: Let me put on the record what I understand to be the result of an off-the-record discussion held just a few minutes ago. That is, it is my understanding that it is agreed that I will be given ten days following the delivery of a transcript to this proceeding to me within which to make a decision. Ms. Talbott, I ask you if that's agreeable with you.

Ms. Talbott: It is.

Evaluator DeBolt: Mr. Church?

Mr. Church: Yes, sir.

When requesting or agreeing to a waiver, it is imperative that the parties define the limitations of the agreement precisely. In the present matter, the evaluator requested ten days from receipt of the transcript. In fact, he produced a recommended decision ten days after receiving the parties' proposed findings of fact and conclusions of law. Grievant does not challenge that the evaluator misstated his request, but asserts there was no intent in this agreement to allow the Commissioner additional time to issue a decision. The evidence in this matter establishes that Grievant agreed to extend the period in which the level three decision was due to ten days after receipt of proposed findings and conclusions, and Respondent failed to issue the decision within the extended time frame. Therefore, Grievant has proven that Respondent defaulted, and Respondent has not established that the delay was due to sickness, injury, excusable neglect, unavoidable cause or fraud. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Luzadder v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-025D (Apr. 8, 2002); Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 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.

2. At level three of the grievance procedure, the statutory time lines require that a decision be issued within five days of the hearing.

3. If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to sickness, injury, excusable neglect, unavoidable cause or fraud, or that Grievant agreed to waive the time lines.

4. A grievant may waive the statutory time lines set forth in W. Va. Code § 18- 29-4. Bowyer v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-197D (July 13, 1999); Wilson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-115D (Mar. 13, 1999). Grievant herein extended the time lines for a level three decision to ten days following the hearing evaluator's receipt of proposed findings of fact and conclusions of law filed by the parties. 5. Grievant has proven that Respondent failed to issue a level three decision within the extended time frame, and Respondent failed to establish that the delay was the direct result of sickness, injury, excusable neglect, unavoidable cause or fraud.

Accordingly, Grievant's claim of default is **GRANTED**, and the parties are instructed to contact the Grievance Board by no later than July 31, 2002, with at least three dates to schedule a hearing to determine whether the requested relief is contrary to law or clearly wrong.

DATE: July 17, 2002 _____ Sue Keller

_____ Senior Administrative Law Judge