RICHARD FIKE, et al.

Grievants,

v. **Docket No. 02-HEPC-302D**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

ORDER DENYING DEFAULT

Grievants, Richard Fike, Garry Buchanan, and Victoria Watkins, employed by West Virginia University (WVU or Respondent) as Campus Service Workers assigned to the Mountainlair, filed a level one grievance on June 7. 2002, in which they alleged a requirement to submit medical verification for absences is arbitrary and capricious. For relief, Grievants request that all letters pertaining to medical verification be removed from their files, and for WVU to cease this practice.

The grievance was denied at level one and a level two conference was conducted on July 30, 2002. Grievants Watkins and Buchanan received the level two response sometime after August 5, 2002, but Grievant Fike and WVEA representative Mary Snelson did not receive a response, prompting a claim of default on August 12, 2002. (See footnote 1) Receiving no response, Grievants filed a second notice of default on August 20, 2002, after which WVU conducted a default hearing. A decision issued on September 12, 2002, concluded that no default had occurred, and Grievants appealed to level four on September 20, 2002. The parties, represented by Ms. Snelson and Samuel R. Spatafore, Esq., Assistant Attorney General, respectively, agreed that the matter could be decided on the record,supplemented with proposed findings of fact and conclusions of law submitted on November 18, 2002.

Findings of Fact

1. Grievant Fike is employed by WVU as a Campus Service Worker I, and Grievant Watkins and Buchanan as Campus Service Workers II. All are assigned to the Mountainlair.

2. Grievants filed a level one grievance on June 7, 2002, challenging the requirement that medical verification must be submitted for absences.

3. A level one response was issued on June 19, 2002, and the matter was appealed to level

two on June 24, 2002.

4. A level two conference was conducted on July 30, 2002, by Robert Campione, Associate Director for Student Affairs Auxiliary Facilities.

5. Mr. Campione prepared a level two response, dated August 5, 2002. The document was sent to Grievants by campus mail, and Ms. Snelson by U. S. Mail, on August 2, 2002. (See footnote 2)

6. Grievant Fike and Ms. Snelson never received the level two decision.

7. Ms. Snelson filed a notice of default with WVU on August 12, 2002.

Discussion

Both parties agree the default provision applicable here is found in W. Va. Code § 29-6A-3(a), which 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.

The grievant has occurred has the burden of proving such default by a preponderance of the evidence. Donellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); Olson v. Bd. of Trustees/W. Va. Univ., Docket No. 95-BOT-081D (Mar. 17, 2000); Thacker v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-400 (June 24, 1999). Once it has been determined that the employer has defaulted in processing a grievance, it is presumed that the grievant has prevailed upon the merits of the case unless the employer shows, by clear and convincing evidence, that the remedy requested is contrary to law or clearly wrong. Akers v. Higher Ed. Interim Governing Bd./Bluefield State College, Docket No. 01-HE-039D (May 3, 2001); Skeens v. Lincoln County Bd. of

Educ., Docket No. 99-22-171 (Aug. 31, 1999). This inquiry includes the employer's assertion that any remedy would be clearly wrong because no default, in fact, occurred at the lower level. Rhodes v. Randolph County Bd. of Educ.,Docket No. 00-42-233D (Jan. 17, 2001); Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000).

W. Va. Code § 29-6A-4 establishes the time lines for processing grievances at each level, and provides the following relating to 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.

Grievants do not assert that the level two decision was not timely issued, but that Grievant Fike and representative Snelson did not receive a copy of the decision. Mr. Campione testified at a hearing conducted by WVU on the default claim, that he prepared the written level two response, and that on August 2, 2002, his secretary placed the Grievants' documents in the campus mail system, and Ms. Snelson's copy in the U.S. Mail system. (See footnote 3)

The Grievance Board has ruled a number of times that based upon the wording of W. Va. Code § 29-6A-3, the grievance procedure statute does not require a grievant to receive his or her decision within five days. Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sept. 27, 2002). The controlling event for purposes of claiming a default is the date the decision is effectively transmitted to thegrievant, not the date it was received. Snyder v. Marion County Bd. of Educ., Docket No. 00-24-263D (Oct. 23, 2000). Specifically, the apparent loss of the item in the mail is a matter outside the control of the employer. Dilley v. W. Va. Div. of Corrections, Docket No. 00-CORR-008D (Aug. 18, 2000).

Because it is not disputed that the decision was timely issued and transmitted, no default occurred in this matter.

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. The grievant asserting that a default has occurred has the burden of proving such default by

a preponderance of the evidence. Donellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002);Olson v. Bd. of Trustees/W. Va. Univ., Docket No. 95-BOT-081D (Mar. 17, 2000); Thacker v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-400 (June 24, 1999).

2. If a grievance evaluator required to respond to a grievance at any level fails to make a required response in a timely manner, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud, the grievant shall prevail by default. W. Va. Code § 29-6A-3.

3. At level two, the administrator of the grievants' work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, 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. W. Va. Code § 29-6A-4. 4. Grievants failed to prove by a preponderance of the evidence that a default occurred at level two.

Accordingly, Grievants' request for a finding of default is **DENIED**. This matter is hereby **ORDERED REMANDED TO LEVEL III** of the grievance procedure for proper adjudication. This matter is further **ORDERED DISMISSED** and **STRICKEN** from the docket of the Grievance Board.

Date: December 3, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Of course, only Grievant Fike has standing to pursue a default claim since the remaining Grievants received a decision.

Footnote: 2

The decision was dated for the fifth day following the conference; however, to ensure that it was timely issued, it was mailed on August 2.

Footnote: 3

Grievants raise issues regarding inter-campus mail when an entire crew shares an open slot in their work room, and whether Respondent properly conducted a default hearing. However, the limited issue to be addressed at this time is whether WVU defaulted by not providing all of the individuals a copy of the decision.