WILLIAM CAYTON,

Grievant,

v. **Docket No. 02-DOH-098D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On April 10, 2002, the Division of Highways ("DOH") requested a hearing on Grievant William Cayton's notification to DOH dated April 5, 2002, of an alleged default at level three. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on September 26, 2002, on Grievant's claim of default. Grievant was represented by counsel, Bernard R. Mauser, and DOH was represented by counsel, Barbara L. Baxter. The parties elected not to file written arguments, so the default issue became mature for consideration at the conclusion of that hearing.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. On March 14, 2001, Grievant filed a grievance regarding a reassignment/demotion. 2. After denials at levels one and two, a level three hearing was held on January 31, 2002, before Jack McClung, a hearing evaluator for DOH.

3. At the conclusion of the level three hearing, the following discussion took place:

> HEARING EXAMINER: . . . We cannot even get a transcript to give us an opportunity to review the evidence, so we have to routinely ask for a waiver of the five-day time requirement.

[GRIEVANT'S PRIOR ATTORNEY] (See footnote 1) : Mr. Cayton?

[GRIEVANT]: Judge, I know mine has been drug on here for almost a year. I'd just like to get it over with and --

HEARING EXAMINER: Well, we can get it over with, but all I'm asking is I don't --

[RESPONDENT'S COUNSEL]: In Mr. McClung's defense, it's usually a two-week turnaround time from the time --

HEARING EXAMINER: For the transcript even before it gets to me. I usually try to get them out within 30 days after I receive the transcript depending on my work. Sometimes I can beat it, sometimes I don't, you know.

[DOH COUNSEL]: And with findings of fact and conclusions of law, that may even push it back further.

* * *

[GRIEVANT'S COUNSEL]: . . . I do agree with Mr. McClung . . . there's no way in the world he's going to get a transcript done in five days, review the evidence, and get a decision. Now, if he had complete turnaround time, I don't think he can get a decision out to me in five days.

HEARING EXAMINER: You're right. Well, I could get one out but you probably wouldn't like it because I wouldn't have a change [sic] to review anything.

[GRIEVANT'S COUNSEL]: So it's your decision to waive --

[GRIEVANT]: Mr. McClung, you've been awful nice. Thirty days, that's okay.

HEARING EXAMINER: Well, I appreciate it. Then you agree to the waiver of the five-day statutory limit on the requirement of the decision being rendered?

[GRIEVANT]: Yes, sir, I'll agree to it.

* * *

HEARING EXAMINER: And if you decide you want to file any written argument or memoranda in support of your position, that's fine; if you don't, that's fine. You know, it's up to you.

* * *

[DOH COUNSEL]: Is there a certain date that you would want those by?

HEARING EXAMINER: That's something -- if you decide to do that, I'd say within 30 days after receipt of the transcript.

[DOH COUNSEL]: Okay.

[GRIEVANT'S COUNSEL]: That's fine.

4. The transcript of the level three hearing was completed and mailed to the parties and Mr. McClung on February 14, 2002.

5. Neither party notified Mr. McClung as to whether or not they wanted to file findings of fact and conclusions of law after the level three hearing. 6. Grievant filed a notice of default with DOH on April 5, 2002.

7. Mr. McClung's recommended decision was completed and transmitted to the DOH Commissioner's office on April 8, 2002.

8. The recommended decision was adopted by the Commissioner and transmitted to Grievant on April 9, 2002.

Discussion

The default provision for state employees 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 burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidencewhich 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.

At level three, W. Va. Code § 29-6A-4(c) provides that a written decision must be issued within five days of the hearing. In the instant case, Grievant contends that, when asking for an extension of the five-day statutory deadline, Mr. McClung asked if the decision could be issued thirty days after he received the transcript. Since Grievant received his transcript on February 15, 2002, he believes the decision should have been issued within thirty days of that date. Conversely, Respondent contends that there was no clear thirty-day deadline for issuance of the level three decision, especially in light of the potential for filing of briefs by the parties, who never contacted Mr. McClung after the transcript was issued. DOH argues that “thirty days” was only mentioned by Mr. McClung as his “usual” turnaround time, but was not stated as a firm, agreed-upon deadline.

This Grievance Board has held on numerous occasions that an agreement to extend the timelines

for issuance of a decision is binding upon the parties when made during a formal, recorded hearing and constitutes a valid waiver of the statutory requirement. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). The time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. Jackson, supra; Gaskins v. W. Va. Dep't of Health, Docket No.90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. See, e.g., Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. Ara v. Erie Insurance Co., 182 W. Va. 266, 387 S.E.2d 320 (1989).

Additionally, there is the question of whether or not Grievant actually waived his right to receive his decision within the statutory timeframe. The concept of an actual waiver of one's established rights implies a voluntary act. Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998).

Clearly, Respondent relied upon Grievant's representations during the level three hearing that Mr. McClung would be released from the statutory five-day timeframe for issuing his decision. In addition, although Mr. McClung mentioned that he usually "tried" to issue his decisions within thirty days of receipt of the transcript, he specifically stated that on some occasions he was able to do so and at other times he could not, depending on his workload. Accordingly, the thirty-day "deadline" was not agreed upon, and it is clear from the transcript that Mr. McClung made no commitments as to an exact timeframe within which he would issue the decision. Moreover, Grievant's counsel went to greatlengths to explain the consequences of Grievant's waiver of his statutory right, which Grievant did in a knowing and informed manner, making the waiver unquestionably voluntary. Therefore, a finding of default would be inappropriate under these circumstances, as Grievant must be estopped

from making such a claim.

Because the lower level proceedings have concluded, this matter will now proceed to a level four hearing on the merits of the grievance. In accordance with the foregoing, the following conclusions of law are made.

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. 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." W. Va. Code § 29-6A-3(a).

2. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

3. The level three hearing evaluator is required to issue a written decision within five days of the hearing. W. Va. Code § 29-6A-4(c)

4. The parties may agree to an extension of the statutory time limits for issuance of a decision, which constitutes a valid waiver of the statutory requirements. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999);Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

5. Grievant voluntarily agreed to waive the five-day statutory deadline for issuance of the level three decision in this grievance.

Accordingly, Grievant's request for a finding of default is **DENIED**, and this grievance will proceed to a level four hearing on the merits. **The parties are directed to confer with one another and provide three mutually agreeable dates for the hearing by OCTOBER 31, 2002.**

Date: October 21, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant changed attorneys after he appealed to level four.