JOHN COLLINS and ROGER SOWARDS,

Grievants,

v v.

Docket Nos. 02-DOH-192D & 200D

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/ DIVISION OF

HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Grievants, John Collins and Roger Sowards, are employed by the West Virginia Division of Highways ("DOH"). They filed these grievances on, or about, July 3, 2002, with their district headquarters. (See footnote 1) Their Statement of Grievance states:

> All Grievances conducted by Jim Roberts that were filed by Roger Sowards and John Collins are in Default. Jim Roberts is not a grievance evaluator.
>
> Relief Sought: To be granted any & all Relief Sought in previous grievances conducted by Jim Roberts in my [word illegible].

Grievants asked for this default to be filed with the level vested with the authority to grant the relief requested. DOH requested this Grievance Board to schedule a default hearing on this matter, and a Level IV default hearing was held on August 1, 2002. This case became mature for decision at that time, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievants assert Jim Roberts cannot conduct grievance conferences and write opinions, because he is not the District Manager or Administrator. Since theseconferences were not conducted by the

proper person, the timelines could not have been met, and all decisions in which Mr. Roberts participated must be in default.

Respondent noted the District Engineer, Wilson Braley, who is the administrator for District 2, designated Mr. Roberts to conduct these conferences, and W. Va. Code § 29- 6A4(b) specifically recognizes Mr. Braley's right to designate someone in his place.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Mr. Roberts is an Assistant Services Manager I in District 2. One of the duties assigned to him by the District Engineer, the district's administrator, was to conduct Level II grievance conferences.

2. After Mr. Roberts conducted these conferences, he discussed the information he had received with Mr. Braley, and the two of them decided on the proper Level II response.

3. Mr. Roberts sought assistance from Mr. Braley for two reasons. One, Mr. Braley was far more familiar with grievances and grievance law, and two, the final decision- making authority still resided with Mr. Braley.

4. Mr. Roberts then wrote the Level II decision for Mr. Braley's signature, and Mr. Braley signed it.

Discussion

W. Va. Code § 29-6A-3(a) states:

> (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 theemployer 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.

In addition, 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."

Grievants bear the burden of establishing default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); 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 DOH is 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 ofTax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if DOH demonstrates a default has not occurred because it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A-3(a), Grievants will not receive the requested relief. If there is no default or the default is excused, Grievants may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-4 (b) mandates the following time frames at Level II:

> 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.

(Emphasis Added.)

It is clear from the above-cited Code Section that Grievants' argument must fail. W. Va. Code § 29-6A-4(b) specifically states an administrator can designate someone in his place to hold the conference. Further, the Level II decision was signed by the district administrator. Contrary to Grievants' assertion, there is nothing wrong with this procedure. 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. 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 grievantis contrary to law or clearly wrong." W. Va. Code § 29-6A-3(a). See Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000).

2. When a grievant asserts at Level IV that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Once the grievant establishes a default occurred, the employer may show it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. See W. Va. Code § 29-6A-3(a)(2); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR- 346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999).

3. No default occurred, as the procedure utilized is clearly authorized by W. Va. Code § 29-6A-4(b).

Accordingly, this default is **DENIED**. Since the only issue raised was one of default, and there was no underlying grievance, no further action is warranted in this grievance. If the outcome of this grievance had required any other grievances to be held in abeyance those grievances should now be scheduled for hearing at the appropriate level.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 28, 2002

Footnote: 1

The hearings and decisions on these grievances were consolidated with the permission of the parties.

Footnote: 2

Grievants represented themselves, and Respondent was represented by its Attorney Barbara Baxter.