PAMELA HAYES,

Grievant,

v. DOCKET NO. 01-DEP-580D

W. VA. DEPARTMENT OF ENVIRONMENTAL PROTECTION/DIVISION OF WASTE MANAGEMENT,

Respondent.

ORDER GRANTING DEFAULT

Grievant filed a request for determination of default at level IV on or about November 15, 2001. A Level IV hearing was held on December 17, 2001 at the Grievance Board's Charleston Office to determine whether a default occurred. Grievant was represented by Paul M. Stroebel, Esq. and Shirley Skaggs, Esq. represented Respondent. The parties agreed to submit their proposed findings of fact and conclusions of law by January 10, 2002, whereupon the matter became mature for decision. Based on the evidence adduced at the hearing, I make the following findings:

FINDINGS OF FACT

1. On August 10, 1998, Grievant filed a grievance challenging a pending demotion on the grounds of gender discrimination. [Grievant's Exhibit No. 1] The grievance proceeded through Levels I and II and was scheduled for a Level III hearing on October 27, 1998. 2. A similar grievance filed by another employee, Betty Ashley, was also scheduled to be heard that day, prior to Grievant's case. Grievant was a witness in that hearing. At the conclusion of the hearing, in an off-the-record discussion, it was determined there was not enough time left to start Grievant's hearing.

3. Grievant was asked whether she would consent to submit her case for a decision based on the record developed for Ms. Ashley's grievance. Grievant agreed to this procedure. This agreement was made off the record, btu all parties and the Grievance Evaluator were aware of the terms.

4. On February 19, 1999, Grievance Evaluator Jack McClung issued a recommended decision in the Ashley case that the grievance be denied. This decision was adopted by DEP Director Michael P. Miano on March 3, 1999. This decision was not delivered to Grievant.

5. Grievant's grievance was not combined with the Ashley case.

6. On May 10, 2001, Rex Burford, Senior Assistant Attorney General, again brought the matter

to the attention of Mr. McClung, and by letter dated July 26, 2001 Grievant's attorney affirmed this second request that a decision be issued based on the Ashley record.

7. On August 27, 2001, Mr. McClung sent to Jeff Schoolcraft, an employee of the W.Va. Division of Environmental Protection, an Order dismissing Grievant's grievance, on the grounds that it was identical to the Ashley grievance, which was denied. There is no evidence that this Order was adopted by Mr. Miano as a disposition of the case at Level III, and the Order was never mailed or otherwise transmitted to Grievant.

8. No Level III Decision has been issued in this matter. 9. By letter dated November 15, 2001, Grievant filed a “Notice of Grievant's Default Claim” with this Grievance Board.

10. Although Grievant acknowledged in her notice of default letter that in April, 1999, “there was a delay enacted due to the attorney representing the State, Rex Burford's, tragic loss of his son in a car accident,” there is no evidence that Grievant waived the statutory time in which a Level III decision was to be rendered, either immediately following the Ashley hearing or when the decision was requested for the second time.

DISCUSSION

Grievant, requesting a determination at Level IV that a default has occurred in a lower level of the grievance procedure, bears the burden of proving that a default occurred. Grievant alleges her Level III decision was not issued within the time required by W. Va. Code § 29-6A-4(c), which states in part: “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 has not only proven a decision was not rendered within that time, but the evidence suggests that no decision has been rendered at all. West Virginia Code § 29-6A- 6(g) requires that “[e]very decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law,” and section 29-6A-4(c) requires that “[t]he 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.” In addition, an inference may be drawn from the Level III Decision in the Ashley case that Evaluator McClung's Level III decisions were unofficial recommendations that must be adopted bythe director of the department. Given these requirements, the dismissal order by the Grievance Evaluator, mailed to an unidentified party in Respondent's offices and never adopted by Respondent nor delivered to Grievant, cannot, in this case, qualify as a Level III Decision.

When a grievant makes a showing that a default has occurred, the respondent may attempt to prove that it has an excuse for not meeting the required time limit. W. Va. Code § 29-6A-3(a)(2) states in part: “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.” Respondent presented no evidence to prove that it was prevented from making the response for any reason.

Respondent's proposed findings of fact and conclusions of law filed in this matter present detailed factual findings on the underlying grievance and, rather than arguing one of the statutory excuses, attempts to show that the remedy requested is contrary to law or clearly wrong. Having been notified at the beginning of the Level IV hearing that the only issue to be considered at this point is whether a default occurred, and that if a default occurred Respondent would be able to request a hearing on the remedy, these arguments are premature.

The following conclusions of law supplement the above discussion:

CONCLUSIONS OF LAW

1. Grievant, requesting a determination at Level IV that a default has occurred in a lower level of the grievance procedure, bears the burden of proving that a default occurred. 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).

2. “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.” W. Va. Code § 29-6A-4(c). “Every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law.” W. Va. Code § 29-6A-6(g). No Level III decision has been issued in this case.

3. Grievant has met her burden of proving a default occurred at Level III.

4. Once the grievant establishes that a default occurred, the employer may show that 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). Board, et al. v. W. Va. Dep't of Health and Human Resources/Lakin Hospital, Docket No. 99-HHR-329D (Sep. 24, 1999).

5. Respondent has not shown that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud.

Accordingly, Grievant's request of a determination of default is **GRANTED**. Respondent is hereby given **NOTICE OF DEFAULT** and is hereby **ORDERED** to presume the employee prevailed on the merits of the grievance. Pursuant to W. Va. Code § 29-6A-3(a)(2), **Respondent may, within five days of the receipt of this notice, 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.** If no hearing is timely requested, the relief requested will be granted based on the presumption that Grievant prevailed.

Dated: January 25, 2002 _____

M. Paul Marteney

Administrative Law Judge