STEPHEN SMITH,

Grievant,

v. Docket No. 01-PEDTA-626D

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

ORDER GRANTING DEFAULT

Grievant, Stephen Smith, filed this grievance against the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about September 3, 2000. The Statement of Grievance reads:

> **Superviosr's (sic) position that was supposedly eliminated has a supervisor in the position.**
>
> **Relief Sought: make whole and complete.**

This grievance was denied at Level I by letter dated September 12, 2000, and denied at Level II by letter dated September 27, 2000. Grievant submitted the grievance to Level III, with a thirty-day waiver for the scheduling of the Level III hearing. On October 23, 2000, a Level III hearing was scheduled for November 3, 2000. Grievant requested a continuance, and this request was granted. No hearing was scheduled, and a Motion for Default was sent to this Grievance Board on January 2, 2002. A default hearing was held in the Grievance Board's Beckley office on February 4, 2002. This issue became mature for decision on February 15, 2002, after receipt of the parties' proposed findings of fact and conclusions of

law. **(See footnote 1)** **After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

Findings of Fact

1. This grievance was filed on or about September 3, 2000, and proceeded through the first two levels in a timely manner. The grievance was denied at Level I and II.

2. Grievant filed to Level III in a timely manner, and accompanied this appeal with an agreement to waive the time frames for the Level III hearing for thirty days.

3. A Notice of Level III Hearing, dated October 23, 2000, was mailed by certified mail to Grievant. This Notice was sent without consulting Grievant for dates.

4. Grievant picked up this Notice on November 1, 2000, but did not open it until later.

5. Grievant did not appear at the scheduled Level III hearing. Respondent's counsel called Grievant at work, and Grievant requested a continuance.

6. This request was verbally granted on November 3, 2000. At this time, the Grievance Evaluator did not ask the parties to submit dates, nor did the parties give dates to the Grievance Evaluator.

7. No subsequent action was taken by either party or the Grievance Evaluator.

8. Grievant was waiting for the Grievance Evaluator to schedule the hearing.

9. The Grievance Evaluator did not schedule this grievance for a second hearing date because he did not receive a specific request for another hearing from the Grievant. The Grievance Evaluator testified, "It is not the Grievance Evaluator'sresponsibility to push prosecution of a grievance that is filed. The responsibility to pursue prosecution of a grievance is the Grievant's responsibility

not the Grievance Evaluator's."

10. On August 30, 2001, a Letter to the Editor written by Grievant appeared in "The Register-Herald" discussing the failure to schedule a Level III hearing in this grievance.

11. Respondent filed a Motion to Dismiss dated August 30, 2001, with the Level III Grievance Evaluator. This Motion set out several reasons why the grievance should be dismissed. This Motion also noted "[t]here is no need to reschedule this matter for hearing except to address the within motion." Resp. Ex. No. 7, at Level IV.

12. By Notice dated September 4, 2001, the Grievance Evaluator scheduled the Motion to Dismiss for hearing on September 13, 2001. This Notice was sent without consulting Grievant for dates.

13. On September 9, 2001, Grievant responded to this notice informing the Grievance Evaluator he would be unavailable the date the hearing had been scheduled, and he gave a list of twelve dates he would be available.

14. By Notice dated September 17, 2001, the Grievance Evaluator rescheduled the Motion to Dismiss for hearing on November 7, 2001. This date was not one given by Grievant, and this Notice was sent without consulting Grievant for dates. The Grievance Evaluator did consult with Respondent's counsel for dates. (See footnote 2) **15. On October 21, 2001, Grievant responded to this notice informing the Grievance Evaluator he would be unavailable the date the hearing had been scheduled, and he gave a list of fourteen dates he could be available.**

16. Another hearing on the Motion to Dismiss has not been scheduled.

17. Grievant filed this request for default with Respondent and the Grievance Board on January 2, 2002.

Discussion

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board in1998. More specifically, W. Va. Code § 29-6A-3(a) was amended, adding the following paragraph relevant to this matter:

> **(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.**

In addition, House Bill 4314 added the following language to 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." Because Grievant is claiming a default occurred under the statute, he bears the burden of establishing such default by a preponderance of the evidence. 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, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless PEDTA 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 of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if PEDTA 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), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. 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 of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there is no default, Grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-4 (c) states in pertinent part about the time frames at Level III:

> **Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.**
>
> **The chief administrator or his or her designee shall hold a hearing in accordance with section six [§§ 29-6A-6] of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.**
>
> **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.**

The facts given by the parties are clear. In November 2000, Grievant requested a continuance, and it was granted. The Level III hearing was never rescheduled. Contrary to Respondent's assertion, the Grievance Evaluator is the individual who is to set hearing dates, not Grievant. The above-cited Code Section does not assign a grievant any responsibility in scheduling the hearing. (See footnote 3) **The Grievance Evaluator pointed out W. Va. Code § 29-6A-4 says he is to hold a hearing, but does not say he is to schedule the hearing. This begs the question: How else is a hearing to be held, if the Grievance Evaluator does not schedule it? While Grievant could have, and indeed probably should have made some contact with the Grievance Evaluator about the scheduling of the grievance, it was still the responsibility of the Grievance Evaluator to either schedule thehearing, ask the parties for available dates, and/or find out if Grievant wanted to withdraw the grievance. A grievance cannot be simply ignored for ten months until Respondent files a Motion to Dismiss. It is also apparent from the Grievance Evaluator's testimony that the grievance would never have been rescheduled unless Grievant made a specific request for another hearing. Accordingly, PEDTA is in default.**

It is noted that Respondent raised multiple arguments. First, Respondent argues Grievant waived all timelines when he submitted his first waiver and asked for a continuance. Respondent points to several cases to support his theory. Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Wilson v. Bd. of Trustees, Docket No. 99-BOT-115D (May 13, 1999). The undersigned Administrative Law Judge notes that in these cases the grievants had agreed to waive the timelines for the decision because a transcript was needed, and the hearing had been lengthy.

In Bowyer the delay was thirty days, and in Wilson it was five months. As stated by the administrative law judge in Bowyer, with an initial agreement to

waive the timelines, the key issue was whether the delay was reasonable. The administrative law judge found a total delay of less than thirty days, with three additional working days, over the mandated five days for rendering a decision after receipt of the transcript in this set of facts was not unreasonable. On the issue of whether there was substantial compliance with the grievance procedure, the administrative law judge found there was.

In Wilson, the total delay was five months, with multiple difficulties in obtaining a transcript. Once the transcript and proposed Findings of Fact and Conclusions of Law were received by the Hearing Examiner, the Decision was written within the required timeframe of five days. Again, the administrative law judge found this delay was reasonable given the length on the record, and the agreement of the parties.

This case does not compare with either Bowyer or Wilson. Here, there was no agreement to extend the time frame beyond the thirty days, no lengthy hearing to transcribe, and no decision to write. It is also clear the Grievance Evaluator had no intention of scheduling a hearing unless he received a specific request from Grievant. The Grievance Evaluator had not informed Grievant he would need such a request, nor had he requested dates. Additionally, the delay of ten months before a hearing on the Motion to Dismiss was scheduled, and a year and two months after the grievance was filed at Level III was unreasonable.

Respondent also complains Grievant did not request a default hearing as soon as he was aware of the default. Given Grievant was waiting for the Grievance Evaluator to schedule the hearing, and given that he did not initiate the default request until after the Grievance Evaluator did not respond to either his first or second set of dates for the Motion to Dismiss, it would appear he did not want to file a request for default. He was patiently waiting for Respondent to schedule his hearing. He finally took action. The cases which speak to a delay in filing usually

deal with the grievant's failure to file until after a negative decision is received. This is not the case here; Grievant has not even received a hearing. 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 grievant is 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 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. 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. Grievant has proven that Respondent failed to schedule this grievance for a timely hearing at Level III after a request for a continuance had been granted. A wait of ten to fourteen months is unreasonable. See Bowyer v. Bd. of Trustees, Docket No. 99- BOT-197D (July 13, 1999); Wilson v. Bd. of Trustees, Docket No. 99-BOT-115D (May 13, 1999).

Accordingly, this default is GRANTED. The parties are directed to give the undersigned Administrative Law Judge dates for the hearing on the issue of whether therequested remedy is contrary to law or clearly wrong. It is noted the brief Statement of Grievance and the Relief Sought do not identify what the Grievant is seeking, and what actions would be necessary to make him whole.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 28, 2002

Footnote: 1

Grievant represented himself and was assisted by former fellow employee, Boyd Lilly. Respondent was represented by its General Counsel, David Abrams.

Footnote: 2

When asked why he did not ask for more dates from Grievant, the Grievance Evaluator's response was, "Why should I?"

Footnote: 3

During the default hearing, Respondent submitted some Level IV documents from some of Grievant's other grievances that appear to indicate these grievances were dismissed after the parties did not submit dates as requested by the administrative law judge. These documents to not apply to this grievance, and this is not what happened at Level III in this grievance.