JIMMY LITTLE,

Grievant,

v. **Docket No. 04-DEP-128D**

DEPARTMENT OF ENVIRONMENTAL PROTECTION/SPECIAL RECLAMATION DIVISION,

Respondent.

ORDER DENYING DEFAULT

This default proceeding arises out of a grievance filed by Jimmy Little ("Grievant") against his employer, the West Virginia Department of Environmental Protection/Special Reclamation Unit ("DEP"), on February 17, 2004. After Grievant claimed that defaults had occurred at Levels I and II in the underlying grievance, DEP requested a Level IV hearing pursuant to West Virginia Code section 29-6A-3(a)(2) and 65 C.S.R. § 156-1-5. DEP's request was served on April 7, 2004, and received at the Charleston office of the West Virginia Education and State Employees Grievance Board ("Grievance Board") on April 8, 2004. A Level IV default hearing was held on May 10, 2004, at the Grievance Board's Beckley office. The purpose of the hearing was to afford Grievant an opportunity to substantiate, by a preponderance of the evidence, his claims that there had been defaults by DEP at Levels I and II during the processing of his February 17 grievance. (See footnote 1) Grievant was represented by Bill Little ("Representative Little") and DEP was represented by Assistant Attorney General Ronald Reece. At the conclusion of the Level IV hearing, this case was submitted for decision.

Discussion

Grievant submitted a written grievance form, dated March 29, 2004, in which he alleged defaults by DEP in processing his February 17 grievance. Specifically, he asserted as follows:

> **Supervisor Roger Greene [sic] and Acting Assistant Director Charles J. Miller has [sic] failed to follow the "Grievance Procedure for State Employees" by not supplying/forwarding the Level I & II Grievance Decisions to my grievance representative (Bill Little) within the prescribed time limits."**

Grievant relies upon a restatement of West Virginia Code section 29-6A-3(i) found in "An Employee's Guide to the Grievance Procedure for State Employees" (See footnote 2) for the propositions that 1) DEP was required to provide Representative Little with a copy of the grievance decisions at Levels I and II, respectively, and 2) the decision at Level II was required to include an appeal paragraph advising Grievant of his right to appeal an adverse decision to the next level.

West Virginia Code section 29-6A-3(i) requires that "[d]ecisions rendered at all levels of the grievance procedure shall be dated, in writing setting forth the decision or decisions and the reasons for the decision, and transmitted to the grievant and any representative named in the grievance within the time prescribed." It further requires that "[i]f the grievant is denied the relief sought, the decision shall include the name of theindividual at the next level to whom appeal may be made." The statute does not set forth any specific sanctions for failing to include the appeal paragraph or for failing to provide a copy of the issued decision to a grievant's representative.

There are, however, express statutory provisions specifying the consequences of a default. Where a "grievance evaluator required to respond to a grievance at any level fails to made a required response in the [statutory] time limits" the grievant is entitled to a presumption that the grievant "prevailed on the merits" in the underlying grievance. W. Va. Code § 29-6A-3(a)(2).

In this case, Grievant requests that "[w]ritten reprimands . . . be placed in the personnel files of Supervisor Roger Greene [sic] and Acting Assistant Director Charles J. Miller for wilful insubordination/job performance in not following the 'Grievance Procedure for State Employees.'" The relief requested by Grievant in this case suggests that, perhaps, he might have been trying to initiate a new grievance. Regardless of his intention, Grievant alleged defaults and DEP exercised its right to request a Level IV hearing at which the burden was upon Grievant to prove that one or more defaults occurred.

There is no dispute that there were some procedural irregularities in the underlying

grievance. Specifically, DEP acknowledges 1) that DEP failed to forward the Level I (See footnote 3) and Level II decisions to Representative Little, and 2) that the initial Level II decision did not contain a paragraph advising Grievant of his right to appeal to a higher level. In both of these respects DEP failed to comply with requirements of West Virginia Code section 29-6A-3(i). However, the grievance evaluators at Levels I and II did "respond" by issuing decisions that were provided to Grievant within the statutory time frames. As discussed more fully below, in light of the fact that Grievant received a timely decision, DEP's failure to send a copy of a grievance decision to Representative Little does not rise to the level of a default.

Omission of the appeal paragraph from the Level II decision was corrected by issuance of an amended decision. (See footnote 4) The amended decision did not contain any substantive alterations. Upon receipt of the initial decision, which was issued in a timely manner, Grievant was in possession of all of the material information regarding the disposition of his grievance at Level II. In light of the fact that DEP issued a timely decision, Grievant cannot prevail on his claim of default at Level II.

Despite the admitted errors regarding distribution of the decisions and the initial omission of the appeal paragraph, DEP substantially complied with the requirements of the grievance procedures. This is sufficient. No default has been proven.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1. Grievant is employed in the Special Reclamation Unit of DEP.

2. On Tuesday, February 17, 2004, Grievant filed a grievance alleging problems in his Employee Performance Appraisal ("EPA") and requesting access to an updated employee handbook. 3. Grievant was regularly scheduled to be off on Thursday, February 19, and Friday, February 20, 2004.

4. When scheduling the Level I conference, Grievant's immediate supervisor informed Representative Little that the conference would not be scheduled on one of Grievant's regularly scheduled days off.

5. Grievant and Representative Little met with Grievant's immediate supervisor for an

informal conference on Monday, February 23, 2004.

6. This informal conference took place within three days **(See footnote 5)** **after the grievance was received by DEP.**

7. On February 26, 2004, Grievant's immediate supervisor issued a written decision granting the grievance as it related to the request for access to an updated employee handbook but denying the grievance as it related to Grievant's EPA.

8. The written decision at Level I was forwarded to Grievant at his home address.

9. DEP neglected to forward a copy of the Level I decision to Representative Little.

10. Grievant received the Level I decision on March 1, 2004.

11. There is nothing on the face of the Level I grievance decision to suggest that a copy was forwarded to Representative Little.

12. Grievant appealed to Level II on Monday, March 8, 2004.

13. The weekend fell on March 13 and 14, 2004. 14. A Level II conference was conducted on Monday, March 15, 2004.

15. A written Level II decision was issued on Thursday, March 18, 2004.

16. The Level II decision was forwarded to Grievant but DEP neglected to send a copy to Representative Little.

17. Thereafter, on March 24, 2004, DEP issued a revised Level II decision. The purpose of the revision was to add a paragraph advising Grievant of his appeal rights because DEP had neglected to include such paragraph in the original March 18 decision.

18. Grievant received a copy of the revised Level II on March 26, 2004.

19. Again, DEP failed to forward a copy of the revised Level II decision to Representative Little.

20. Grievant submitted a new grievance form, dated March 29, 2004, claiming defaults at Levels I and II in connection with his February 17 grievance.

21. Grievant did not raise a claim of default at Level I until he submitted the March 29 grievance form. This was after both the initial and amended Level II decisions had been issued and received by Grievant.

22. DEP received Grievant's default claim on April 2, 2004.

23. DEP timely requested a Level IV default hearing, which was conducted on May 10,

2004.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

Conclusions of Law

1. West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that "[t]he grievant prevails by default if a grievance evaluator required to respond to agrievance 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."

2. None of the noted exceptions set forth in the above-quoted provisions of West Virginia Code section 29-6A-3(a)(2) apply to this case.

3. The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002).

4. 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).

5. The statutory deadlines for processing grievances are measured in working days, which do not include "Saturday, Sunday or official holidays." W. Va. Code § 29-6A- 2(c).

6. The requirement of measuring the deadlines for processing grievances by counting working days must be read in conjunction with West Virginia Code section 29-6A- 3(o), which directs, in pertinent part, that "[g]rievances shall be processed during regular working hours."

7. West Virginia Code section 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure.

Alleged Level I Default

8. With respect to Level I, West Virginia Code section 29-6A-4 provides, in pertinent part, as follows:

Within ten days following the occurrence of the event upon which the grievance

> **is based . . . the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.**

9. The Supreme Court of Appeals of West Virginia has held that grievants are required to assert a claim of default "during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." Syl. pt. 4, *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997).

10. Grievant knew or should have known that DEP did not send Representative Little a copy of the Level I decision on March 1, 2004, which is the date Grievant acknowledged receiving the Level I decision.

11. Grievant's allegations relating to DEP's failure to send Representative Little a copy of the Level I decision were not raised until March 29, 2004, which was well after Grievant had received the adverse decision from Level II. Thus his claim of a default at Level I is untimely and will not be addressed further. (See footnote 6)

Alleged Level II Default: Timeliness

12. With respect to an appeal to Level II from an adverse decision at Level I, West Virginia Code section 29-6A-4(b) requires that "[t]he administrator or his designee shall hold a conference within five days of receipt of the appeal and issue a written decision upon the appeal within five days of the conference."

13. Utilizing the statutory directions (See footnote 7) **for determining when the five-day period expired, it is clear that the Level II conference was timely held.** (See footnote 8)

14. The initial Level II decision was timely in that it was issued within five days after the Level II conference, as required by West Virginia Code section 29-6A-4(b).

Alleged Level II Default: Omission of

Appeal Paragraph and Issuance of Amended Decision

15. The initial issuance of the Level II decision comports with the time requirements of West Virginia Code section 29-6A-4(b) despite the fact that it did not contain the appeal paragraph required under West Virginia Code section 29-6A-3(i).

16. West Virginia Code section 29-6A-3(i) does not identify any particular consequence

for failing to include the appeal paragraph in a grievance decision.

17. Omission of the appeal paragraph is not fatal to the validity of the grievance decision. "[T]he default provisions are triggered by the failure of the Grievance Evaluator to respond and to 'issue a written decision upon the appeal within five days of the conference.'" *Adams v. Div. of Highways*, Docket No. 00-DOH-383D (March 13, 2001)(quoting W. Va. Code § 29-6A-4(b))(emphasis in original). 18. The omission was remedied through issuance of the amended decision and Grievant was not foreclosed from pursuing an appeal to Level III. (See footnote 9)

19. Issuance of the amended Level II decision did not alter the timeliness of the original Level II decision, which fully and properly advised Grievant of the Level II grievance evaluator's decision and the basis therefor.

20. Substantial compliance with the grievance procedures, absent a showing of bad faith on the part of the employer, is sufficient for a finding that the employer satisfied the grievance statutes. *Adams v. Div. of Highways*, Docket No. 00-DOH-383D (March 13, 2001)(citing *Spahr v. Preston County Bd. of Educ*., 393 S.E.2d 739 (W. Va. 1990) and *Duruttya v. Board of Educ*., 382 S.E.2d 40 (W. Va. 1989). (See footnote 10)

21. There have been no allegations nor any showing of bad faith on the part of DEP.

22. Grievant failed to prove that there was a default at Level II within the meaning of West Virginia Code section 29-6A-3(a)(2).

Alleged Level II Default: Failing to

Provide a Copy of Level II Decision to Representative

23. There is no statutorily-mandated sanction for failing to forward a copy of the Level II decision to a named representative.

24. To the extent that the default provisions were intended to encourage the prompt disposition of employee grievances, DEP's oversight in failing to sendRepresentative Little a copy of the Level II grievance decision cannot be said to have undermined the statutory purpose in light of the fact that Grievant received a copy.

26. Grievant has failed to cite any legal authority that supports his proposition that DEP's failure to send Representative Little a copy of the Level II grievance decision is the legal equivalent of a default, as that term is used within West Virginia Code section 29-6A-3(a)(2),

where the decision was issued within the statutorily-mandated time period and was provided to Grievant.

27. Grievant has failed to prove a default at Level II.

Relief Requested

28. Grievant's failure to raise the default issue at Level I in a timely manner and Grievant's failure to prove that a default occurred at Level II obviates any need to address the fact that the relief requested by Grievant in this case*, i.e.*, that the grievance evaluators from Levels I and II receive written reprimands, is unavailable in any event. The consequences of a default, which are expressly set forth in West Virginia Code section 29- 6A-3(a)(2), do not include any disciplinary action against other employees. If a default occurs, the grievant is presumed to have prevailed on the merits. W. Va. Code § 29-6A- 3(a)(2). The Grievance Board lacks authority to impose disciplinary actions on other employees in any event. *Goff v. Div. of Highways*, Docket No. 03-DOH-048 (April 7, 2003).

Based upon the foregoing, Grievant's request that a default be entered is DENIED. Grievant may, if he so desires, pursue the underlying grievance by filing an appeal to Level III.

Dated: May 24, 2004

Jacquelyn I. Custer

Administrative Law Judge

Footnote: 1

The merits of the underlying grievance are not at issue herein.

Footnote: 2

This is a document published by the West Virginia Division of Personnel as an aid to employees in understanding the grievance procedures. It is not legal authority. However, it did provide Grievant an indirect method of citing to a pertinent statute.

Footnote: 3

Grievant did not claim a default at Level I until after an adverse Level II decision had been issued. As discussed more fully below, this claim is untimely.

Footnote: 4

Issuance of the amended Level II decision actually inured to Grievant's benefit because it enlarged his time for filing an appeal to Level III.

Footnote: 5

The day it was filed is not counted. The days Grievant was regularly scheduled off are not counted. Weekend days are not counted.

Footnote: 6

Even if timely raised, Grievant would not have prevailed on this claim of a default at Level I. The informal conference was held within three working days of receiving the grievance and the decision was issued within six working days after receipt of the grievance. Grievant's regularly scheduled days off should not be counted as "working days" for purposes of calculating whether a default has occurred. W. Va. Code § 29-6A-3(o)("Grievances shall be processed during regular working hours.")

Footnote: 7

W. Va. Code § 29-6A-2(c).

Footnote: 8

The grievance was filed on March 8, 2004. The intervening weekend fell on March 13 and 14. The conference was held on March 15, 2004. The initial decision was issued on March 18, 2004.

Footnote: 9

Grievant has not filed an appeal to Level III.

Footnote: 10

The Supreme Court of Appeals of West Virginia has spoken disparagingly of "procedural irregularities which needlessly interfere with a disposition on the merits[.]"