BRYANT SWAYNE,

Grievant,

v. **DOCKET NO. 04-HE-125D**

WEST VIRGINIA STATE

UNIVERSITY,

Respondent.

ORDER DENYING DEFAULT

Grievant Bryant M. Swayne filed a grievance against West Virginia State College (See footnote 1) (WVSU or Respondent) on October 5, 2003, challenging his termination from employment. On March 31, 2004, he filed an appeal with the Grievance Board claiming “default - time lines not met.” A level four hearing was held in the Grievance Board's Charleston office on May 12, 2004, to decide whether or not a default occurred. Grievant was represented by counsel, Sharon M. Mullins, and Respondent was represented by counsel, Elaine L. Skorich, Assistant Attorney General. This matter became mature for decision on May 28, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. On or about September 27, 2003, Grievant was dismissed from employment. He filed a grievance directly at level two of the grievance procedure on or about October 5, 2003.

2. A level two conference was held October 9, 2003, and the grievance was denied by letter dated October 14, 2003, which Grievant received October 16.

3. Grievant appealed to level three on October 17, 2003.

4. Dr. Gregory Epps was designated the level three grievance evaluator. On October 22, 2003,

he mailed a notice to Grievant setting a date for a 'Pre-Hearing Conference" on October 24, 2003.

5. At the conference, the parties agreed to provide to Dr. Epps copies of exhibits they would be using by October 30, 2003. Dr. Epps then stated he would provide copies of everything he received to the parties by November 7.

6. Dr. Epps unilaterally set a level three hearing on November 19, 2003. Grievant made no express waiver of the time limit for holding a level three hearing.

7. A level three hearing was held November 19, December 12 and December 18, 2003. Dr. Epps stated he would have the decision ready for Dr. Carter's signature by January 12, 2004, after the transcript was prepared.

8. When the transcripts were ready, which was later than expected, Grievant notified Dr. Epps that portions were inaccurate. Meetings were then held on February 20 and 26, 2004 to discuss the problems with the transcripts. Dr. Epps indicated at the final meeting the decision would be issued by March 24, 2004. WVSU President Hazo W. Carter approved Dr. Epps' decision denying the grievance on March 23, 2004, and sent it to him that day. 9. Grievant made no express waiver of the time limit for issuing a level three decision, but made no express objection, either.

10. On March 31, 2004, the same day he filed his default notice, Grievant appealed the level three decision to level four.

DISCUSSION

"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." W. Va. Code § 29-6A-3(a). When a grievant asserts 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. 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. W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hosp.*, Docket No. 99-HHR-329D (Sep. 24, 1999). *See Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003D (June 6, 2002)

Grievant's claim of default was non-specific, but at least two time limits were clearly exceeded by the level three Grievance Evaluator. First, the level three hearing was not held within the seven-day time limit prescribed in W. Va. Code § 29-6A-4(c). Second, the level three decision was not issued within five days of the hearing, as required by the same section. Grievant never expressly waived these time limits, but his actions gave the appearance of acquiescence, and he did not timely assert a default occurred.

At the pre-hearing conference, Grievant never once stated an objection to either the conference itself or the dates proposed for submitting exhibits prior to the hearing. Although it was clear at that time a level three hearing would not be held within seven days of the appeal, Grievant did not assert this would cause a default. When the Notice of Hearing was issued, Grievant did not claim a default or otherwise object to the date. At the hearing itself, Grievant did not assert a default.

Although a January date for issuance of the decision was set by Dr. Epps at the level three hearing, Grievant did not object. When this deadline proved impossible to meet due to a problem with the transcripts, Grievant did not claim a default occurred. Grievant first raised the default issue after he received the level three decision. Although his representative argues that Respondent never informed him of the right to claim a default and never told him what the mandatory time limits were, this failure is of no consequence. She provides no authority creating such an obligation, and the times are clearly set out in the Code and are stated on the grievance form itself.

The West Virginia Supreme Court of Appeals has limited the right of an employee to claim a default. It has held that in order to benefit from the "relief by default" provisions in W. Va. Code § 29-6A-3(a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997). In this case, although there were clear violations of the prescribed time limits, Grievant implicitly waived his right to assert a default occurred, and when he did so claim, it was too late to do so.

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." W. Va. Code § 29-6A-3(a). 2. When a grievant asserts 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. 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. W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hosp.*, Docket No. 99-HHR-329D (Sep. 24, 1999). *See Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003D (June 6, 2002)

3. In order to benefit from the "relief by default" provisions in W. Va. Code § 29-6A-3(a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997). Grievant failed to raise the default issue as soon as he was aware of the default.

For the foregoing reasons, this request for relief by default is hereby **DENIED**.

As Grievant has already appealed to level four, the parties are therefore directed to confer with each other and provide this office with four or five dates that all parties are available for a level four hearing on the merits of the case by July 9, 2004. Respondent is directed to forward to the Grievance Board the complete record of the grievance, including transcripts and exhibits, by July 16, 2004.

Date: July 6, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Now West Virginia State University.