WARREN SHIRKEY,

Grievant,

v. **Docket No. 04-DOH-153D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER GRANTING DEFAULT

On April 21, 2004, Grievant, Warren Shirkey, filed a motion for default with this Grievance Board, stating his employer, the Division of Highway ("DOH"), had defaulted on two grievances when it failed to issue Level III decisions within the required time frames. The underlying grievances dealt with a discrimination, favoritism, and harassment claim and a disciplinary action. A Level IV default hearing was held June 22, 2004, at the Grievance Board's Charleston office. This case became mature for decision on that day as the parties did not wish to submit proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the limited record, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 2)

Findings of Fact

1. Grievant is employed as a Transportation Worker 2.

2. On or about September 12, 2001, Grievant filed a grievance alleging discrimination, favoritism, and harassment. This grievance was filed at Level III onDecember 12, 2001, and a Level III hearing was held on September 26, 2002. Grievant was asked if he would agree to waive the timelines, and the expected decision would be issued sometime in mid-November of 2002, but it could be later. Grievant agreed to this extension of the time frames.

3. On or about June 1, 2002, Grievant filed a grievance on a disciplinary action. This grievance was filed at Level III on August 9, 2002, and a Level III hearing was held on November 7, 2002. Grievant was asked if he would agree to waive the timelines, and the expected decision would be

issued around the end of January 31, 2003, but it could be later. Grievant agreed to this extension of the time frames.

4. Prior to filing this grievance, Grievant frequently called his then attorney and the Grievance Evaluator's office to ask when he would receive his Level III decisions.

5. On April 21, 2004, Grievant filed for default on both grievances. (See footnote 3)

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

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). A preponderance of the evidence is generallyrecognized 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. (See footnote 4) Id.

If a default occurs, Grievant is presumed to have prevailed. 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 DOH can demonstrate a default has not occurred, or can demonstrate 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).

W. Va. Code § 29-6A-3(a) provides, in pertinent 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. 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.

Grievant asserts a default occurred because DOH did not issue Level III decisions within the agreed upon time frames. Grievant concedes he agreed to waive the statutory timelines, but complains he did not agree to delays of this length (approximately one year, five months, in the first one; and one year, three months in the second one). The question here becomes how long is a reasonable time to wait.

In general, “[a] right or privilege given by statute may be waived or surrendered, in whole or in part, by the party to whom or for whose benefit it is given.” Smith v. Bell, 129 W. Va. 749, 41 S.E.2d 695 (1947). Although some statutes forbid waiver of the protections they afford, W. Va. Code § 29-6A-3(a)(2) is not such a statute. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. See W. Va. Code § 29-6A-3(g). Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Huston v. W. Va. Dep't of Tax and Revenue and Div. of Personnel, Docket No. 99-T&R 469D (Feb. 29, 2000); Parker v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-296D (Nov. 30, 1999). This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. Jacksonv. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). The West Virginia Supreme Court of Appeals upheld this interpretation in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), in which a default claim was denied after Grievant had agreed to delay a level two hearing.

Although the agreement to extend the timelines in this case was not written, it is on the record, and Grievant clearly agreed to the extension during a formal, recorded hearing. See Bowyer v. Bd. of Trustees/ W. Va. Univ., Docket No. 99-BOT-197D (July 13, 1999). This agreement is sufficient to constitute a valid waiver of the time to issue a decision under the statute, and it is sufficient for substantial compliance. Parker v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-296D

(Nov. 30, 1999); Bowyer, supra; Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

It is noted that the time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. Jackson, supra; Gaskins v. W. Va. Dep't of Health, Docket No. 90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. See, e.g., Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). Such principles have similarly been applied in evaluating default cases. Harmon v. Div. of Corr., Docket No. 98-CORR-284D (Oct. 6, 1998). In order to prevail in a claim of estoppel, a party must show that there was a representation made, or information given, by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. Ara v. Erie Insurance Co., 182 W. Va. 266, 387 S.E.2d 320 (1989). The Grievance Board has previously held the doctrine of estoppel would bar a grievant from claiming a default occurred in this situation, and a grievant's agreement to allow an extension of the statutory time lines prohibits any claim that a default occurred at that level. Plumley v. Dep't of Envtl. Protection, Docket No. 00-DNR-091D (Mar. 6, 2000); Parker, supra; Lambert, supra.

However, with this unique set of facts Grievant's argument is persuasive. Certainly, Grievance Evaluator Brenda Craig Ellis relied upon Grievant's agreement to waive the timelines for issuing the Level III Decisions. In reliance upon Grievant's agreement in this regard, Respondent delayed issuing the decision beyond the statutory time limitation of five days and beyond the tentative dates set for issuance. The real questions are how long of a delay is reasonable, and is a grievant forever barred from limiting his/her waiver. Black's Law Dictionary defines reasonable as "[f]air, proper, just, moderate, suitable under the circumstances. . . . Not immoderate or excessive." Black's Law Dictionary 656 (abr. 5th ed. 1983). The undersigned Administrative Law Judge concludes, with this specific set of facts, that DOH defaulted in both grievances by its clearly excessive and unreasonable delay in issuing the Level III decisions.

Consistent with the foregoing discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. 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). 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.

2. "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).

3. A Level III decision must be issued within five working days of the date of the Level III hearing. W. Va. Code § 29-6A-4(a).

4. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual agreement of the parties. See W. Va. Code § 29-6A-3(g).

5. With this unique set of facts, the Level III decisions were not issued within a reasonable time of the agreed upon waiver.

Accordingly, Grievant's request for default is **GRANTED**, and the parties are to give the Grievance Board five mutually agreeable dates to schedule the second part of the default process, whether the relief sought by the prevailing Grievant is contrary to law or clearly wrong.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 30, 2004

Footnote: 1

Grievant represented himself, and Respondent DOH was represented by Barbara Baxter, Esq.

Footnote: 2

After Grievant had submitted certain documents into the record, he then wrote the undersigned Administrative Law Judge to request a portion of these documents not be considered. This request was granted.

Footnote: 3

Information was sent to the Grievance Board dated after Grievant had filed his default indicating there was a problem

with the tape, but the decisions would be issued shortly.

Footnote: 4

While W. Va. Code § 29-6A-3(a)(2) does not specify a time within which one must file a notice of default, the Supreme Court of Appeals of West Virginia has held that, "[i]n order to benefit from the 'relief by default' provisions contained in W. Va. Code § 18-29-3(a) (1992) (Reprisal. Vol. 1994), a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon and Chiles v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). "However, this Grievance Board has held that an employee is allowed to raise a default claim, so long as he raises it as soon as he becomes aware of the default and submits the claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 26, 1997), aff'd Harmon v. Fayette County Board of Education, No. 25323, March 12, 1999 (W. Va. S. Ct.)." Bell v. Northern Reg'l Jail and Corr. Facility, Docket No. 99-CORR-054D (Apr. 14, 1999).