KATHY PHILLIPS and

BRENDA GOODALL,

Grievants,

v. **DOCKET NO. 02-BEP-045D**

BUREAU OF EMPLOYMENT PROGRAMS/

UNEMPLOYMENT COMPENSATION DIVISION,

Respondent.

ORDER DENYING DEFAULT

Grievants filed a grievance against Respondent on November 15, 2001,alleging they were subject to a hostile work environment. On February 8, 2002, Grievants claimed Respondent had defaulted at level two. A level four hearing on the issue of whether a default occurred was held in the Grievance Board's Charleston office on September 22, 2004. Grievants were represented by counsel, Brent Wolfingbarger, and Respondent was represented by counsel, Christie Utt. This matter became mature for decision at the close of the hearing.

On April 8, 2002, Respondent's prior counsel, Patricia Shipman, filed a lengthy Motion to Dismiss Default Proceedings, in which she asserted Grievants had failed to state a claim in their underlying grievance, and that they lacked standing to pursue the grievance. She asserted that the hostile work environment they complained of was a result of the actions of Grievants' subordinates, and therefor Grievants were to blame for not controlling those actions, rather than their employer. She also argued Grievants failed to allege the hostile work environment constituted a substantial detriment to or interferencewith their job performance, health or safety. Regardless of whether Respondent's assertions are correct, neither issue is relevant to the question of whether a default occurred, as they both address the merits of the underlying grievance. Respondent, even if it believed the grievance is without merit, nevertheless had a duty to respond, even if only to assert the Grievants had no standing or failed to state a claim. Respondent's motion is therefore **DENIED**. (See footnote 1)

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. Grievants filed their grievance with their immediate supervisor, Ed Knapp, on November 15, 2001, met with him, and received a level one response denying their grievance the same day.

2. After receiving the level one response, Grievants took their grievance to Dan Light, Director of the Unemployment Compensation Division.

3. Grievants did not sign their grievance form in the space for filing at level two, and did not enter on the form the date they appealed to level two. They considered their meeting with Mr. Light on November 15, 2001, to be their appeal to level two.

4. Mr. Light told them he could not act on their grievance, in which they sought as relief the reassignment of an employee who had a pending lawsuit against the agency, because of the lawsuit.

5. Mr. Light never scheduled a level two conference. 6. On February 1, 2002, Mr. Light issued a level two decision denying the grievance. Neither Grievant recalls receiving the decision. Mr. Light signed the grievance form in the space for the grievants' signature at level two, and entered the date of decision as “2-1-2 [sic].”

7. Grievants appealed to level three on February 8, 2002, and signed and dated the form in the space for the level three appeal.

8. Grievants also for the first time asserted Respondent was in default at level two on February 8, 2002, and requested the grievance be placed in abeyance until the default issue and the lawsuit could be decided.

9. This matter has been on hold since then, at the Grievants' request.

DISCUSSION

Because Grievants are claiming they prevailed by default under the statute, they bear the burden of establishing such default by a preponderance of the evidence. See W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hosp.*, Docket No. 99-HHR- 329D (Sep. 24, 1999). "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).

Grievants allege that they timely appealed to level two, but no level two conference was ever held and they never received a level two decision. Respondent contends there is no evidence Grievants appealed to level two on a particular date. While it is not disputed Grievants may have met with Mr. Light on November 15, it is disputed that at that time they formally appealed the level one decision. Grievants' only evidence that they appealed to level two on November 15, 2001, is their own testimony. They argue that Mr. Light's testimony could easily have cleared up the time line, but, despite having the burden of proof, they did not call him as a corroborating witness. The Grievance Form itself is uninstructive, bearing no indication Grievants filed it at level two at all, and no indication it was ever received by Respondent on any particular date. Although the original form has not been located, it is evident Grievants signed it, or at least a copy of it, after Mr. Light issued the level two decision and signed the form himself. Grievants could not recall how, if they did not get the decision, they got the grievance form back and knew to appeal to level three.

Almost three years have passed since Grievants purportedly made their level two appeal, so understandably the parties' recollection is murky. However, there is no substantial corroborating evidence that at any time prior to February 8, 2002, Grievants asked about the status of their grievance, requested a level two conference or decision, or asserted Respondent had defaulted. Despite their claim that they never saw the level two decision when it was finally issued, they filed their level three appeal and default claim five days later. That coincidental timing casts significant doubt on their recollections. In any event, if they filed their level two appeal when they said they did, it would have been in default more than two months before they claimed a default. The Grievance Board has determined that such a delay amounts to a defacto waiver of the default provision. “In order to benefit from the "relief by default" provisions in subsection (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). The following conclusions of law support this decision:

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. Because Grievants are claiming they prevailed by default under the statute, they bear the burden of establishing such default by a preponderance of the evidence. See W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hosp.*, Docket No. 99- HHR-329D (Sep. 24, 1999); *Friend v. W. Va. Dep't of Health & Human Res.*, 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 Prog.*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

3. Grievants failed to prove by a preponderance of the evidence that the level two response was untimely.

4. In order to benefit from the "relief by default" provisions in subsection (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).

5. Grievants did not raise the default issue as soon as they were aware of it.

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

This matter is **REMANDED TO LEVEL THREE** for proceedings at that level and **DISMISSED** from the docket of the Grievance Board. Respondent is **ORDERED** to holda hearing in accordance with W. Va. Code § 29-6A-6 within seven days of receiving this Order, or within such time as the parties may mutually agree.

Date: September 28, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The undersigned stated at the hearing that the motion was denied because Grievants did have standing and did state a claim; upon further reflection that ruling is revised as stated above, but with the same outcome.