CAROLYN PHILLIPS,

Grievant,

v. **Docket No. 04-HHR-131D**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

ORDER DENYING DEFAULT

On April 12, 2004, Grievant, Carolyn Phillips, filed a motion for default with this Grievance Board, stating her employer, the Department of Health and Human Resources ("HHR"), had defaulted at Level III. The underlying grievance dealt with a five-day suspension. 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 Grievant did not wish to submit proposed findings of fact and conclusions of law, and Respondent presented submissions at hearing. (See footnote 1)

Issues and Arguments

Grievant asserts default occurred when Respondent failed to issue a Level III decision within the required time frame. Respondent agrees it did not issue a Level III decision within the required time frame, but argues this failure was due to excusable neglect and/or unavoidable cause.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Human Resources Specialist, Senior.

2. On October 8, 2003, Grievant filed a grievance over her suspension. The Level III hearing was held in two parts because of the number of witnesses: December 2003, and January 7, 2004.

3. At the end of the Level III hearing, the parties, at the suggestion of the Grievance Evaluator

Eunice Green, agreed to discuss settling the grievance. Grievance Evaluator Green told the parties she would leave the record open for thirty days for these discussions.

4. The parties attempted to talk that day, but were too tired. They did talk on January 13, 2004, but could not reach an agreement.

5. On February 6, 2004, Charlie Young, one of the parties to the settlement negotiations, noted he had not heard anything more from Grievant and the thirty days were drawing to a close. He called Grievant, and she informed him she had not changed her mind and would not accept his tentative offer. Mr. Young then had his secretary call the Grievance Unit to report the failure to reach a settlement.

6. Grievant did not call the Grievance Evaluator to inform her of the outcome of these discussions.

7. During the period between the hearing and the settlement negotiations, Grievance Evaluator Green left HHR's employ.

8. On March 12, 2004, Bonnie Fleming, the Grievance Evaluator now assigned to the case, wrote the parties a Status Statement and informed them she had been assigned the case, Ms. Green was no longer working with the Grievance Unit, and threeof the four tapes of the Level III hearing were inaudible. Accordingly, a decision could not be rendered, and a new hearing would need to be held.

9. On March 15, 2004, Allan Pennington, the paralegal with the Grievance Unit, e-mailed Grievant to tell her the new Level III hearing was scheduled for April 14, 2004.

10. Because Grievant had not received the Status Statement, she responded to this e-mail explaining she had already had a hearing and was "patiently" waiting for the decision. Grt.'s Exh. 1 at Level IV.

11. Mr. Pennington responded that day by e-mail. He told Grievant she should have received the Status Statement, and copied this statement's contents into the e-mail.

12. Grievant testified she filed this default, on or about, March 20, 2004, and the date on the default letter of March 2, 2004, is incorrect. This unsigned letter was not received by the Grievance Board through interdepartmental mail until April 12, 2004. It was unclear who sent his letter to the Grievance Board, as the agency was not listed in the heading or in the cc's at the bottom.

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. 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 HHR 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 HHR did not issue a Level III Decision within the required time frame. Respondent agrees it did not issue a decision within the required time frame, but

was prevented from doing so because of excusable neglect and/or unavoidable cause.

I. Delay in filing

The key issue appears to be the timing of Grievant's default claim. 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). See Malcolm v. Bureau of Employment Programs, Docket No. 03-BEP-313D (Jan. 29, 2004). "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).

Grievant was aware a Level III decision had not been issued, and as she stated, was "patiently" waiting. If Grievant had filed a default claim after the thirty days fornegotiations, and the decision time had passed, in approximately mid-February, then the outcome would be different. Here, Grievant did not file a default claim until she found out a Level III Decision could not be issued because of the inaudible tapes. Given this set of facts, the undersigned Administrative Law Judge cannot find a default occurred.

II. Unavoidable cause

Respondent asserts it could not be in default as it was impossible to render a decision because of the inaudible tapes. The issue is one of unavoidable cause. Black's Law Dictionary defines unavoidable cause as "[a] cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate. . . ." Black's Law Dictionary 792 (abr. 5th ed. 1983). Another source defines unavoidable cause as "[a] cause which reasonable prudence and care could not have prevented, such as death, illness, the mail, etc." http://www.debt-glossary.co.uk/loans-advice/u/u-unavoidable- cause.html (accessed on Feb. 6, 2004).

In this case there is no evidence HHR took other than "reasonable prudence and care" in the taping of this two-day hearing, and the failure of the machine to function properly is a "circumstance" HHR "would not ordinarily anticipate," and a matter outside HHR's control. See Rutherford v. Bureau of Employment Programs, Docket No. 03-BEP- 124D (Feb. 29, 2004). Accordingly, the undersigned Administrative Law Judge finds there is no default due to unavoidable cause. (See footnote 2)

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." W. Va. Code § 29-6A-3(a)(2).

2. 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).

3. The Level III decision was not issued before the expiration of the timelines.

4. "In 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). See Malcolm v. Bureau of Employment Programs, Docket No. 03-BEP-313D (Jan. 29, 2004). "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).

5. Grievant did not raise the issue of default in a timely manner and not until she received notice the decision could not be rendered because of inaudible tapes. 6. Unavoidable cause is defined as "[a] cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate. . . ." Black's Law Dictionary 792 (abr. 5th ed. 1983).

7. Unavoidable cause is found in this set of facts, as HHR could not write a decision due to a

machine malfunction, and the failure of the machine to record the hearing was outside the control of Respondent. See Rutherford v. Bureau of Employment Programs, Docket No. 03-BEP-124D (Feb. 29, 2004).

Accordingly, Grievant's request for default is **DENIED**. Respondent is directed to hold a Level III hearing within the statutory guidelines, and this case is **DISMISSED** from the docket of the Grievance Board.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 30, 2004

Footnote: 1

Grievant represented herself, and HHR was represented by Landon R. Brown, Esq., Senior Assistant Attorney General.

Footnote: 2

Because the default issue is resolved by the prior discussion, the argument concerning excusable neglect will not be addressed.