ADAM HOLLEY,

Grievant,

v.

DOCKET NO. 05-DMV-158D

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF

MOTOR VEHICLES,

Respondent.

ORDER DENYING DEFAULT

Grievant, Adam Holley, employed by the Division of Motor Vehicles ("DMV" or "Agency"), filed this default claim with the Grievance Board on May 16, 2005, asserting DMV failed to hold a Level III hearing in a timely manner. The underlying grievance dealt with a request for a merit increase. A Level IV default hearing was held June 6, 2005, at the Grievance Board's Charleston office. This case became mature for decision on that day, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts default occurred when Respondent failed to hold a Level III hearing within the required time frame. (See footnote 2) Respondent has recited multiple arguments to refute the allegation of default. One, Respondent maintains that since Grievant Holley joined a group grievance in progress, and the other Grievants agreed to waive the time frames, he could not dictate the Level III hearing date. Two, Respondent notes the Grievance Board had not yet remanded this grievance to Level III following mediation, and until the grievance was returned the lower level proceedings were stayed. Three, Respondent avers therewere problems with Grievant Holley being a member of the group grievance, and DMV had filed a motion to remove Grievant Holley from the group grievance.

Four, Respondent reports Grievant Holley has now filed his own separate grievance on the merit pay issue.

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

Findings of Fact

1. Grievant Holley is employed as an attorney by DMV. He deals with personnel matters and frequently answers questions from supervisors and employees about grievances.

2. A group grievance was filed in November of 2004, dealing with performance evaluations and merit increases. This grievance was styled Witt v. Division of Motor Vehicles, and Grievant Witt was one of two representatives. This grievance was denied at Levels I and II, and Grievants, who did not include Grievant Holley at that time, requested a Level III hearing on February 4, 2005. A Level III hearing was set in March 2005, by Jack McClung, an independent Hearing Examiner. DMV chose to hire an independent Hearing Examiner because of the number of Grievants involved.

3. Grievant Holley may have talked to some of the supervisors or other Grievants involved in this grievance in his capacity as counsel for DMV during 2004.

4. On March 15, 2005, Respondent requested the Grievance Board mediate the matter, and Grievants agreed. Grievant Holley was not a party to the grievance at that time.

5. By Order dated March 17, 2005, Mr. McClung continued the Level III hearing until mediation was concluded. This Order stated that if mediation was not satisfactory thegrievance would be rescheduled, "to a date satisfactory to the grievants, intervenors, and the Division of Motors Vehicles."

6. On April 12, 2005, after discussion with his supervisor, Jill Dunn, Grievant Holley joined this group grievance while it was at the mediation stage. Although Grievant joined this grievance, he represented himself.

7. Mediation was scheduled by the Grievance Board for April 21, 2005, but DMV refused to mediate if Grievant Holley were involved. The Agency believed there could be issues relating to Grievant Holley's prior work with the other Grievants and supervisors, and some attorney-client issues that should not be discussed in front of the other Grievants.

8. Grievant Holley agreed not to participate in the mediation, but all parties agreed he would

still be allowed to accept the settlement agreement or continue with his own grievance, whatever he chose.

9. On April 21, 2005, the rest of the Grievants had a mediation session, and a partial settlement agreement was reached.

10. On April 25, 2005, Respondent notified the Grievance Board that it wished to withdraw from mediation by Notice dated April 25, 2005.

11. By letter dated April 26, 2005, and faxed April 27, 2005, Grievant Holley informed Mr. McClung he was a grievant in the Witt case, requested a fairly lengthy list of documents, asked for eleven subpoenas, and stated he would not waive the statutory time frames.

12. On April 27, 2005, Mr. McClung had a phone conference with Respondent's attorney, Grievant Holley and Grievant Witt. Mr. McClung wanted the parties to grant an extension of the time frames. When Grievant Holley refused, Mr. McClung was notpleased, as he would have difficulty fitting this hearing into his schedule. The number of Grievants had grown to approximately 46.

13. At Grievant's insistence, the hearing was scheduled for May 3, 2005.

14. Overnight, Grievant Witt thought about Mr. McClung's request for an extension and his displeasure about Grievant Holley's refusal to agree to an extension. Of her own accord, on April 28, 2005, she initiated a phone conference and agreed to extend the time frames to hold the Level III hearing. Grievant Holley was not included in this discussion. The Level III hearing was rescheduled for May 23, 2005.

15. On April 28, 2005, DMV filed a Motion to Remove Grievant Holley from the group grievance. DMV did not feel it would be appropriate to discuss issues that only pertained to him at the group grievance. Grievant did not file a response to this Motion.

16. On May 6, 2005, the Grievance Board remanded this grievance to Level III for hearing and dismissed the case from its docket.

17. On May 10, 2005, Mr. McClung granted DMV's Motion to Remove Grievant Holley as a party from the group grievance.

18. On May 5, 2005, Grievant Holley filed a "Claim for Relief by Default" with the Grievance Board.

19. On May 20, 2005, Grievant Holley filed a separate grievance on the merit increase issue. This grievance has been denied at Level I. In this Decision, Ms. Dunn stated she believed Grievant

Holley should receive a 10% merit increase, but was without the authority to order this relief. Upon review of this Level I Decision, Commissioner Douglas Stump suggested Ms. Dunn amend her letter to reflect the correct amount of relief she could recommend. Grievant Holley had received a raise earlier, and pursuant toDivision of Personnel rules would not be entitled to a full 10%. Contrary to Grievant Holley's assertion, there was no other attempt by the Commissioner to change the Level I Decision, than to conform with Division of Personnel Rules.

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 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.

If a default occurs, Grievant Holley 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 DMV 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, Grievantwill 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.

At the Level IV default hearing, Grievant Holley asserted a default occurred because DMV did not hold a Level III hearing within the time frames. He counts this time frame from the April 25, 2004 Notice to Withdraw, and asserts DMV had until May 3, 2005, to hold the Level III hearing. Since the Agency did not hold the hearing by that time, he maintains DMV is in default. The pertinent issues raised by the parties will be discussed one at a time.

I. Jurisdiction

This case was not remanded to DMV for disposition until DMV received notice of the administrative law judge's Remand Order dated May 6, 2005. Until that time, DMV did not have jurisdiction over the case. Further, Mr. McClung's Order stayed the proceedings. Mr. McClung's Order was written when Grievant Holley was not a party to the case, and statedthat if mediation was not successful, the grievance would be rescheduled "to a date satisfactory to the grievants, intervenors, and the Division of Motors Vehicles."

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. This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than “rushing” to judgment. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). Here, the majority of Grievants, as represented by Grievant Witt, elected to extend the time frames and schedule the hearing at a later date. No default has occurred with this set of facts.

II. Group grievance

Grievant Holley joined this group grievance after it had been heard at Level II and was already scheduled for mediation. As a recently-installed member, he then sought to control when the Level III hearing would be held, even though he was only one of many Grievants and had requested quite a

lengthy list of documents for discovery.

While group grievance hearings can be lengthy and complex, they have been found to be an effective tool for dealing with numerous grievances dealing with the same issue. This type of approach has resulted in uniformity of decisions and an effective use of judicial time. This Grievance Board has not addressed this specific issue before, whether one grievant can control the scheduling, but the undersigned Administrative Law Judge finds that Grievant Holley, as a Johnny-come-lately to the group grievance, had no right to dictate to the rest of the Grievants when a hearing would be held, especially since the timeframes the parties were talking about were less than a month away, and he had requested numerous documents.

On the issue of Grievant Holley's removal from the grievance, the undersigned Administrative Law Judge makes no finding on that matter, as it is not a default issue.

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 hearing must be scheduled within seven working days of the date of receipt of the Level III appeal. W. Va. Code § 29-6A-4(a).

3. 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). See Gayla v. Div. of Envt'l Protection, Docket No. 01-DEP-017D (Mar. 29, 2001).

4. Grievant Witt's agreement to waive the timelines for the Level III hearing was within her rights and duties as representative of the other Grievants. Adams v. Div. of Highways, Docket No. 00-DOH-383D (Mar. 13, 2001); Pasternak v. Higher Educ. Interim Bd., Docket No. 00-HE-357D (Feb. 6, 2001); Parker v. Dep't of Health and Human Serv. , Docket No. 99-DMV-296D (Nov. 30, 1999).

5. Within a group grievance, a later filing grievant cannot dictate or overrule the other grievants on scheduling. Accordingly, Grievant Holley 's request that a default be entered is **DENIED**, and this grievance is remanded. Grievant Holley is directed to inform DMV, in writing, within five days of

receipt of this Order whether he wishes to proceed to a Level III hearing or to proceed at Level II in his separately filed grievance.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: June 29, 2005

Footnote: 1 *Grievant Holley, an attorney, represented himself, and DMV was represented by Janet James, Esq., Assistant Attorney General.*

Footnote: 2 *Grievant Holley asserted a number of issues that will not be addressed, as they did not relate to the issue of default.*