THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DALLAS BRANCH, JR.,

Grievant,

v. **Docket No. 06-HE-403D**

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

WEST VIRGINIA UNIVERSITY,

Respondent.

ORDER GRANTING DEFAULT

On June 6, 2006, Dr. Dallas Branch. Jr. ("Grievant"), employed by West Virginia University ("WVU") as an Associate Professor of Physical Education and Sports Studies, filed a Notice of Default at level one and level three. Pursuant to *W. Va. Code* § 29-6A-3, WVU requested a hearing on the default issue. The hearing was conducted in the Grievance Board's Westover office on August 31, 2006. Grievant was represented by Alex J. Shook, Esq., of Hamstead, Williams & Shook, PLLC, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. A decision issued on October 12, 2006, denied the claims of default, and remanded the grievance to level three for hearing.

___The undersigned was advised by WVU on October 31, 2006, that a second default claim had been filed by Grievant. Counsel requested a conference call which was conducted that same day. Both parties waived the right to a hearing on the default claim and requested a ruling on their oral presentations made during the conference call.

The following facts are relevant to the pending claim of default at level three.

Findings of Fact

1. A level four ruling remanding the grievance to level three for hearing was issued on October

12, 2006.

2. U.S. Postal Service records establish that the ruling was received by WVU on October 17, 2006.

3. As of October 31, 2006, WVU had not scheduled a level three hearing.

Discussion

Grievant asserts that WVU failed to schedule a level three hearing as ordered in the October 12, 2006 decision. WVU argues that: (1) no level three appeal was ever filed; and, (2) the decision did not order a hearing.

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. *Board v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-329D (Sept. 24, 1999).

W. Va. Code § 29-6A-4(c) requires the level three evaluator to hold a hearing "within seven days of receiving the appeal." In counting the time allowed for an action to be accomplished under the state employee grievance procedure, *W. Va. Code* § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. WVU's argument that a level three appeal has yet to be filed, is specious. While the first default claim was denied because Grievant had filed it at the wrong office, the grievance has now been directed to level three by the Grievance Board. Requiring Grievant to file an appeal form at level three in this case, would be contrary to the legislative intent that the grievance process not become a procedural quagmire, where the merits of the case are forgotten. *See, Spahr v. Preston County Bd. of Edu.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

WVU's claim that the decision did not order a hearing, is also without merit. The October 12, 2006 decision stated that "the claim for default is hereby DENIED, and the grievance REMANDED to level three for hearing." Although a recitation of the statutory provision directing a hearing be scheduled within seven days was not included, clearly a hearing was ordered. WVU's failure to schedule a level three hearing in compliance with the statutory time frame constitutes a default.

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).

2. 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. *Board v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-329D (Sept. 24, 1999). 3. *W. Va. Code* § 29-6A-4(c) requires the level three evaluator to hold a hearing "within seven days of receiving the appeal."

4. WVU's failure to conduct a hearing within seven days of receiving the October 12, 2006, decision remanding the grievance to level three constitutes a default within the meaning of *West Virginia Code* section 29-6A-3(a)(2).

5. WVU has failed to establish that any of the statutory defenses to default apply in this case.

Accordingly, Grievant's request for a determination that default occurred at level three is **GRANTED**. The parties are directed to send to the Grievance Board three mutually agreed upon dates for the default remedy hearing within five days of receiving this Order.

DATE: NOVEMBER 6, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE