THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BRENDA GOODALL and

KATHY PHILLIPS,

Grievants,

v. **Docket No. 06-WWV-246**

WORKFORCE WEST VIRGINIA,

Respondent.

D E C I S I O N

Grievants are employed by Workforce West Virginia ("WFWV") (formerly known as the Bureau of Employment Programs). They filed this grievance on November 15, 2001, alleging a hostile work environment had been created for them by three of their supervisees. At this point in time, the grievance is before the Grievance Board on an appeal of a Dismissal Order for failure to pursue that was granted at Level III. The original relief sought was relief from hostile work conditions. (See footnote 1)

A Level IV hearing on the issue was held in the Grievance Board's Charleston office on November 6, 2006, and March 5, 2007. Grievants were represented by counsel, Brent Wolfingbarger, and Respondent was represented by counsel, Christie Utt, Deputy Attorney General. This case became mature for decision on April 2, 2007, after receipt of the parties' proposed findings of fact and conclusions of law.

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

Findings of Fact

1. Grievants are employed as Supervisors with WFWV.

2. In September 2001, Sharon Jaggers-Greene, Peggy Imbler, and Debbie Scaff, supervisees of Grievants, plus one former employee, filed a lawsuit in circuit court alleging sexual harassment against WFWV, and asserting certain employees, including Grievants, had been treated more favorably than they. Grievants believed they had been treated badly by these supervisees since Grievants received a promotion in July of 2001.

3. On November 15, 2001, Grievants filed their grievance with their immediate supervisor, Ed Knapp, alleging a hostile work environment had been created by Sharon Jaggers-Greene, Peggy Imbler, and Debbie Scaff. The relief requested was "relief from the hostile work environment." They received a Level I response denying their grievance the same day.

4. After receiving the Level I response, Grievants took their grievance to Dan Light, then Director of the Unemployment Compensation Division.

5. Grievants did not sign their grievance form in the space for filing at Level II, and did not enter the date they appealed to Level II on the form.

6. Grievants met with Mr. Light some time after the filing of this grievance, but the time when this meeting or meetings occurred are unclear, as the parties cannot remember. In the default Decision issued by Administrative Law Judge Paul Marteney, he stated the parties met on November 15, 2001, and they considered this to be their appeal to Level II. (See footnote 2) 7. Mr. Light never scheduled a formal Level II conference, but the parties did discuss the three employees and their behavior several times. The parties are very unclear when this happened.

8. On January 11, 2002, Ms. Scaff was dismissed for absenteeism.

9. On February 1, 2002, Mr. Light issued a Level II decision denying the grievance.

10. Grievants appealed to Level III on February 8, 2002, and signed and dated the form in the space for the Level III appeal.

11. Also on February 8, 2002, Grievants, for the first time, asserted Respondent was in default at Level II.

12. On February 14, 2002, WFWV requested a default hearing from the Grievance Board.

13. By Notice dated February 27, 2002, the Grievance Board set a default hearing for March 22, 2002.

14. Respondent requested a continuance of the March hearing and by Notice dated March 21,

2002, the Grievance Board set the default hearing for May 7, 2002.

15. By letter dated May 1, 2002, Grievants requested a continuance of the May 2002 hearing and asked the grievance be put in abeyance until a Final Order was entered in the circuit court case discussed in Finding of Fact 2. 16. By order dated May 3, 2002, this request was granted, and the grievance was placed in abeyance with directions to Grievants to notify the undersigned Administrative Law Judge, in writing, by August 9, 2002, of the status of the case.

17. On January 15, 2003, Ms. Jaggers-Greene was dismissed for gross misconduct.

18. No written response was received from Grievants, but the Grievance Board's secretary was verbally informed on September 2, 2003, that the circuit court case was still pending.

19. By letter dated May 6, 2003, the undersigned Administrative Law Judge directed Grievants to notify the undersigned Administrative Law Judge, in writing, by May 15, 2003, of the status of the case, and if the case was ready to proceed to hearing on the default issue to supply five mutually agreeable dates for hearing.

20. By letter dated May 12, 2003, from WFWV Lead Paralegal, Georgia Cisco, the undersigned Administrative Law Judge was informed the circuit court issue had not been resolved, Ms. Cisco had spoken to Grievants, and they wished to have the grievance remain in abeyance.

21. Thereafter, the case was assigned to a new Administrative Law Judge, Jacquelyn Custer. On May 19, 2004, she scheduled a pre-hearing conference for June 3, 2004.

22. On July 27, 2004, Administrative Law Judge Custer rescheduled the pre- hearing conference for August 4, 2004, apparently because Grievants had retained counsel. 23. By Notice dated August 5, 2004, this grievance was scheduled for mediation on August 9, 2004. If the mediation were unsuccessful, the parties were to be prepared to schedule the default hearing afterwards.

24. The mediation was unsuccessful, and by Order dated August 20, 2004, the default hearing was scheduled for September 22, 2004. (See footnote 3)

25. At this default hearing, Grievants had the burden of proof. Mr. Light, who Grievants asserted could resolve the default issues, was not called as a witness by Grievants. Administrative Law Judge Paul Marteney found no evidence that prior to February 8, 2002, Grievants asked about the status of their grievance, requested a Level II conference or decision, or asserted Respondent had defaulted.

26. On September 28, 2004, ALJ Marteney, citing Hanlon v. Logan County Board of Education, 201 W. Va. 305, 496 S.E.2d 447 (1997), noted in his Decision that "[i]n order to benefit from the 'relief by default' provisions [in the statute], the grieved employee must raise the default issue as soon as the employee becomes aware of such default." He held Grievants did not raise the default issue as soon as they were aware of it, as they waitedapproximately 2½ months after filing the grievance to Level II, and until after the Level II Decision was issued.

27. ALJ Marteney denied the request for default and stated, "[t]his matter is REMANDED TO LEVEL THREE for proceedings at that level and DISMISSED from the docket of the Grievance Board. Respondent is ORDERED to hold a 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."

28. In October 2004, Don Pardue, who was then Deputy Executive Director of WFWV, but has since retired, met with Grievants and stated the agency had become aware of some unintentional misinformation given at the Level IV default hearing. At this Level IV Motion hearing, Mr. Pardue did not recall what that information was. Further, no other witness identified what this information was, and who had testified to it at the hearing. (There were assertions, at this Motion hearing, that Mr. Light had defaulted at Level II, but since he was not called as a witness at the default hearing, it is clear he was not the provider of this misinformation.) Mr. Pardue informed Grievants the agency's attorney was going to call their attorney to discuss the matter and see what could be done to correct the situation. (It is unclear whether Ms. Utt called Mr. Wolfingbarger, whether Ms. Utt reached Mr. Wolfingbarger, whether Mr. Wolfingbarger returned Ms. Utt's call, whether Mr. Wolfingbarger called Ms. Utt after receiving this information from his clients, or whether anyone did anything about this conversation, as attorney-client privilege was asserted by both sides.)

29. Pursuant to the directions given by ALJ Marteney, a Level III hearing was scheduled on October 27, 2004. 30. On October 21, 2004, this hearing was continued at the request of Grievants' attorney.

31. By Notice dated October 27, 2004, another Level III hearing was scheduled for January 4, 2005.

32. The law suit discussed in Finding of Fact 2 was dismissed in December 2004.

33. On December 7, 2004, Grievant's attorney requested multiple subpoenas, for the January 4, 2005 hearing.

34. The January 4, 2005 hearing was continued at the request of both parties.

35. On March 17, 2005, Grievants' attorney called Jeff Blaydes, Esq. and followed this conversation with a letter that was faxed to Mr. Blaydes by Grievant Phillips on March 23, 2005. The letter contained Grievants' settlement proposal in the hostile work environment grievance. Grievants' attorney noted Ms. Utt was on extended leave, and because of that fact Grievants' attorney had been "unable to communicate with the Bureau regarding its willingness to voluntarily resolve my clients['] grievances in an amicable fashion along the lines set forth hereinabove." Grievants' attorney noted Mr. Blaydes had represented the agency in other matters and requested Mr. Blaydes to present Grievants' proposal to the agency, and ascertain its interest in resolving these grievances. Grievants' attorney stated he wished to speed up the process, as it has remained in limbo too long. The letter then requested a 10% pay increase for each Grievant, plus interest, from October 1, 2001, for a total amount of approximately $30,000.00. No mention of the relief Grievants have stated they have wanted from the onset of this grievance, the transfer of Ms. Imbler, was mentioned. Mr. Blaydes faxed this letter to Mr. Pardue on March 23, 2005. Nothing in the record indicates what happened to this settlement offer. 36. On June 6, 2005, this grievance was transferred to Senior Attorney General Kelli Talbott due to Ms. Utt's resignation. (See footnote 4)

37. By Notice dated August 2, 2005, another Level III hearing was scheduled on August 22, 2005. Although directed to submit subpoenas requests by the Grievance Evaluator, Grievants did not request anyone to be subpoenaed.

38. By Order dated August 17, 2005, this hearing was continued at Grievants' attorney's request.

39. By Notice dated August 23, 2005, another Level III hearing was scheduled on October 19, 2005. (See footnote 5)

40. A partial Level III hearing was held on October 19, 2005. At the start of this hearing, Hearing Examiner McClung asked if there were any matters that needed to be addressed, and both sides agreed there were not. Grievants' attorney was asked if he wished to make an opening statement, and he did not. Grievants' attorney presented the testimony of Grievant Goodall, and then requested a continuance, as he had other appointments. Respondent strenuously objected to this continuance, but it was granted.

41. The issue about the default hearing and the misinformation was not addressed until the

very end of the hearing, during the arguments about the continuance. Ms. Utt indicated they were all here and should proceed. Grievants' attorney responded, "No. The point is, Mr. Pardue contacted them and said the Bureau was gonna make this right and we weren't gonna have to have a Level III hearing." Ms. Utt's response was, "Butwe have a level hearing _ we have a Level III, and irrespective of all that, we're here and let's do it." Grievants' attorney response was, "We've done it and I have other commitments." October 19, 2005 Trans. at 110.

42. There was no indication in the record that the parties and their attorneys ever discussed the misinformation issue.

43. By Notice dated October 26, 2005, another Level III hearing was scheduled for December 6, 2005.

44. By Order dated October 31, 2005, this hearing was continued at Grievants' attorney's request.

45. By Notice dated December 9, 2005, another Level III hearing was scheduled for January 4, 2006.

46. By Letter dated December 29, 2005, Grievants' attorney notified Ms. Utt, but not Hearing Examiner Jack McClung, that Grievants had decided to waived the Level III hearing and proceed directly to Level IV. (See footnote 6) If Respondent did not agree to this waiver, Mr. Wolfingerbarger attached a list of 26 witnesses and told Respondent to "be prepared to make [these employees]. . . available to testify at the Level III hearing. . . ." (See footnote 7) Additionally,he asked Monna Winkler, Respondent's Grievance Coordinator, to coordinate scheduling a Level IV hearing." (See footnote 8)

47. Grievants' attorney never sent a request or Motion to the Grievance Board requesting to waive the Level III hearing and to have the matter expedited directly to Level IV.

48. On January 23, 2006, the Grievance Board received dates for scheduling the Level IV hearing.

49. By letter dated February 1, 2006, the Grievance Board responded to the submission of dates stating, "[p]lease know that the above referred case is no longer on the docket of the West Virginia State and Education Grievance Board. The default was denied and the case was remanded to Level III."

50. No further action was taken by either party after the Grievance Board's letter indicating the grievance must be heard at Level III before coming to Level IV. (See footnote 9)

51. On May 19, 2006, Respondent filed a Motion to Dismiss with Hearing Examiner McClung. She also mailed a copy to Grievants' Attorney.

52. Mr. McClung received no response from Grievants' attorney in response to the Motion, and on July 12, 2006, approximately 2 months later, he wrote a RecommendedOrder granting the Motion. This Order was approved on July 14, 2006, by Commissioner Ronald Radcliff.

53. On July 21, 2006, Grievants appealed the Dismissal Order to the Grievance Board. The parties were directed by Order dated July 27, 2006, to submit dates for a scheduling conference by August 10, 2006.

54. A pre-hearing conference was held on October 5, 2006, where it was clarified the only issue before the undersigned Administrative Law Judge was the Dismissal Order. The hearing on the Order was scheduled for November 6, 2006.

55. At the November 6, 2006, Level IV hearing, Mr. Light, who was now retired and was currently out-of state, did not respond to the subpoena. The parties agreed much of the information could be done by stipulations and mutually agreed to submit these by November 20, 2006. Grievants' attorney was to send these to Respondent's attorney.

56. On January 5, 2007, Ms. Utt wrote the undersigned stating she had not received any stipulations for review from Mr. Wolfingbarger, and again requested a ruling of her Motion to Dismiss.

57. On January 9, 2007, Mr. Wolfingbarger wrote to the undersigned stating he did not wish to engage "in 'exercises in futility' . . . .which explains why I have not submitted our proposed stipulations regarding Mr. Light's testimony prior to this time." Attached were Grievants' proposed stipulation regarding Mr. Light's testimony. Respondent did not agree to these stipulations, and another Level IV hearing was scheduled and held on March 5, 2007, for the testimony of several witnesses including, Mr. Light. 58. Of the six hearings scheduled as Level III, four were continued at Grievants' attorney request, one was continued by joint motion, and one was the partial hearing conducted on October 19, 2005.

Issues and Arguments

Respondent asserted Grievants have failed to pursue this grievance in a timely manner to its detriment and have raised the issue of laches. Respondent notes several key witnesses have retired,

Grievants want to litigate events that occurred while the grievance was placed in abeyance and continued at their request, and the memory of many events is unclear. (See footnote 10) Respondent also points to the fact Grievants' attorney did not even respond to the Motion to Dismiss until it was granted.

Grievants assert:

1) They are not required to attend a Level III hearing, as it is an "exercise in futility", and "there is no statutory basis that the Grievants must participate in a pointless dog-and- pony show before its self-appointed Hearing Examiner in order to protect their legal rights."

2) "Refusal to provide the Grievants with a Level IV hearing in this matter would deny them their due process rights guaranteed under the fourteenth amendment to United States Constitution and Article III, § 10 of the West Virginia Constitution."

3) The Grievance Board's Procedural Rules "do not provide for the dismissal of a grievance simply because an employee does not desire to waste time, money & effort on an 'exercise in futility' at Level III." 4) "The Grievants have not voluntarily waived their substantive and procedural rights to pursue the grievance to a hearing conducted by an independent Administrative Law Judge employed by the Board."

5) "Due to its actions, the employer is barred from dismissing the grievance because it lacks 'clean hands.'"

This grievance is directly related to another grievance already denied by the Grievance Board, Corley, et al. v. WorkForce West Virginia, Docket No. 06-BEP-079 (November 30, 2006)(in that case some of Grievants' supervisees alleged several employees, including Ms. Imbler, had created a hostile work environment.)(Some factual data for these Findings of Fact, such as the date the lawsuit was dismissed, was obtained from that Level IV Decision.)

Discussion

Typically, as this grievance does not involve a disciplinary matter, Grievants would have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v.

McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92- HHR-486 (May 17, 1993). But, the issue before the undersigned Administrative Law Judgeis Respondent's Motion to Dismiss. Accordingly, the burden of proof is on Respondent to demonstrate the Motion should be affirmed by a preponderance of the evidence.

The undersigned Administrative Law Judge does not recall a prior case at Level IV with a similar set of facts, that is, a Motion to Dismiss for failure to pursue that has been granted at Level III. Certainly cases have been dismissed for failure to pursue, because a grievant failed to respond to several letters, failed to attend a scheduled hearing without proper notice, and/or the Grievance Board received undelivered mail because of an unreported change of address. This case will be decided only on the specific facts demonstrated by the evidence.

However, it should be noted, Grievants' arguments to the contrary, the issue before the undersigned Administrative Law Judge is not whether Grievants are entitled to come directly to Level IV for an expedited hearing; the issue is whether the Motion to Dismiss for failure to pursue should be affirmed.

The issues raised by Grievants will be addressed one at a time although there is some overlap. First, Grievants assert they are not required to attend a Level III hearing, as it is an "exercise in futility", and there is no statutory basis for Grievants to participate in a Level III hearing before having a Level IV hearing. This assertion is incorrect. W. Va. Code § 29-6A-4(e)(2) (See footnote 11) clearly states:

> An employee may grieve a final action of the employer involving a dismissal, demotion or suspension exceeding twenty days directly to the hearing examiner. The expedited grievance shall be in writing and shall befiled within ten days of the date of the final action with the chief administrator and the director of the division of personnel. (Emphasis added).

This grievance, dealing with a hostile work environment, does not meet the standard for an expedited grievance as outlined in the above-cited Code Section. Further, this is the statutory authority utilized by ALJ Marteney to remand this non-disciplinary grievance to Level III after the default issue was decided. Grievants, of course, have the right to file a grievance, but it they do so, they, like all other employees, must follow the statutory mandates.

Second, Grievants assert the refusal to provide them a Level IV hearing denies them their due process rights. Grievants then cite Waite v. Civil Service Commission, 161 W. Va. 154, 241 S. E.2d 154 (1997) as support for this contention. The key issue here is Grievants did not file a Motion for a Level IV hearing, or even write a letter asking for a an expedited hearing. Since no refusal occurred, this argument is without merit. Additionally, it is unclear what due process rights would be violated by requiring Grievants to follow the grievance procedure and have a Level III hearing.

Third, Grievants assert the Grievance Board is without authority to dismiss a grievance "because an employee does not desire to waste time, money & effort on an 'exercise in futility' at Level III." Reading the argument after this assertion reveals Grievants are really saying a Level III Grievance Evaluator does not have the right to dismiss a grievance for failure to pursue, and an administrative law judge at the Grievance Board is without authority to dismiss a grievance without giving notice. Again, Grievants have no statutory right to come directly to Level IV. Next, Grievants cite no authority for their assertion that a Grievance Evaluator cannot dismiss a grievance for failure to pursue. And lastly, Grievants, at this point in time, have received notice and afforded the opportunity to present their defense both in hearing and post-hearing proposals. The undersigned Administrative Law Judge has the authority to affirm the Motion to Dismiss.

Fourth, Grievants aver they have not "voluntarily waived their substantive and procedural rights to pursue the grievance to a hearing conducted by an independent Administrative Law Judge employed by the Board." This argument is a red herring and not on point. There has been no mention of a waiver, voluntary or otherwise. Grievants did not ask to come to Level IV, and no one has asked them to waive a Level IV hearing. The issue is the Motion to Dismiss filed because Respondent avers Grievants have not actively pursued their grievance.

Fifth, Grievants assert Respondent is barred from dismissing the grievance because it lacks "clean hands." On this issue Grievants had the burden of proof, and they have not met this burden. It was never clarified what happened and even, Mr. Pardue, who spoke to Grievants back in October of 2004, does not remember what the "misinformation" was. There is nothing in the record to indicate this issue was pursued by Grievants, and the only time it was raised by Grievants is a year later when Respondent objected to a continuation of the hearing on October 19, 2005.

Without knowing what the misinformation was, who gave it, and what the context of this information was, this assertion cannot be found to have merit, and the undersigned Administrative

Law Judge cannot find Respondent possessed unclean hands. Additionally, a fundamental issue here is what effect this misinformation may have had on the default decision, and this issue was not addressed. The Default Decision held no default was found was because Grievants had not filed the default as soon as theybecame aware of it, and they did not file it until after they received a negative Level II response from Mr. Light. This holding is in keeping with the directions from the West Virginia Supreme Court of Appeals in Hanlon v. Logan County Board of Education, 201 W. Va. 365, 496 S.E.2d 447 (1997), which was quoted by ALJ Marteney in the default Decision, "Long standing case law and procedural requirements in this state mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal," and "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." There is no evidence to indicate ALJ Marteney based his decision on misinformation.

Now to address the matters raised by the Motion to Dismiss. In reviewing the facts, the first issue to notice is this case was filed in November of 2001. The last hearing in this grievance, on the Motion to Dismiss, occurred on March 5, 2007, and a Level III hearing has never been completed. It is also clear the majority of the delays in this grievance were caused by Grievants.

Basically, at the same time Grievants asserted default, they requested the case be placed in abeyance, and that was on May 3, 2002. In the Order granting abeyance, Grievants were directed to inform the administrative law judge by August 9, 2002, of the status of the case. They did not. The administrative law judge wrote again on May 6, 2003, and was informed by Respondent that Grievants still wanted to keep the case in abeyance. No further response was received. This grievance was held in abeyance at therequest of Grievants for two years, because of the lawsuit. Then in short succession, before the lawsuit was concluded, there were a pre-hearing conference, an unsuccessful mediation, a default hearing, and a Decision denying the default. On September 28, 2004, Administrative Law Judge Marteney remanded the grievance, and directed the parties to hold a hearing within the statutory time frames.

It was after this remand, that the delays started again. Hearing after hearing was scheduled, and, with the exception of one Joint Motion to Continue, all these were continued by Grievants. Next,

Grievants, in December of 2006, asserted they were going to Level IV, even though Administrative Law Judge Marteney specifically remanded the case to Level III as required by statute.

It is a grievant's responsibility to file a motion with the Grievance Board to come directly to Level IV. (See footnote 12) As hard as it is to believe, Grievants' attorney never filed this Motion for an expedited hearing after giving this as the reason for another continuance request. When the Grievance Board received dates from WFWV in January 23, 2006, the files were checked, and on February 1, 2006, the parties were clearly informed this grievance had been remanded to Level III some time before. (Because Grievant's attorney never filed a request to come to Level IV, the Grievance Board did not know why the parties were requesting a Level IV hearing, but followed the directions given 1½ years ago by ALJ Marteney.) After that letter, Grievants' attorney did not file a Motion for a Level IV hearing, and, as stated previously, it was up to Grievants to make this Motion, they said they were going to, so, in essence, "the ball was in Grievants' court."

Additionally, another Level III hearing was not scheduled. Respondent indicated it attempted to obtain dates from Grievants' attorney, but received no response. (There were no documents to support this contention.) Then, approximately eight months later, on May 19, 2006, Respondent's filed a Motion to Dismiss with Hearing Examiner McClung, with a copy to Grievants' Attorney.

The most dismaying issue in all of this is that Grievant's attorney did not respond to that very detailed Motion. Without any response from Grievants' attorney indicating he disagreed with the Motion to Dismiss, approximately two months later, on July 12, 2006, Hearing Examiner McClung wrote a Recommended Order granting the Motion. This Order was approved on July 14, 2006, by Commissioner Ronald Radcliff. This Order did create action, and on July 21, 2006, Grievants appealed the Dismissal Order to the Grievance Board.

Clear excuses/reasons for these delays were not directly addressed by Grievants, but can be inferred from Grievants' proposals and actions. First, they requested the grievance be placed in abeyance because of the lawsuit, but then, two years later, went ahead with both mediation and a default hearing without this matter being completed.

Second, Grievants say they delayed because Respondent told them in October 2004, that they were going to work out the default misinformation issue. There was no testimony documenting that anyone talked or wrote to anyone else about this issue after the meeting with Mr. Pardue. What is clear is that the parties scheduled numerous LevelIII hearings after that time. The scheduling of these

hearings does not make sense, if the parties planned to settled the grievance. All that is needed is a conference and a written agreement. While the undersigned Administrative Law Judge does not know what happened with this issue, there is little evidence to support the contention that the parties were actively engaged in settling this issue.

Third, Grievants averred they delayed because they wanted to come to Level IV. Well, if they wanted to come to Level IV, then they should have asked to come to Level IV, and they should have asked back in 2004 after the case was remanded. Since Grievants never filed a request to have an expedited Level IV hearing, this excuse is not valid.

In support of its Motion to Dismiss, Respondent has asserted laches. Laches is a delay which operates prejudicially to another person's rights. Carter v. Carter, 148 S.E. 378 (W. Va. 1929); Bank of Marlinton v. McLaughlin, 1 S.E.2d 251 (W. Va. 1939). Additionally, laches has been defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances caus[es] prejudice to [an] adverse party." Black's Law Dictionary 453 (abr. 5th ed. 1983). The West Virginia Supreme Court of Appeals has held, "[a] party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the expenditure of public funds. Failure to do so constitutes laches." Maynard v. Bd. of Educ. of Wayne County, 178 W. Va. 53, 357 S.E.2d 246, 255 (1987). Additionally the West Virginia Supreme Court of Appeals held that for laches to attach, two elements must be established: 1) lack of due diligence on the part of the party asserting its claim, and 2) prejudice to the opposing party resulting from the delay. Id.; Dollison v. W. Va. Dep't of Employment Sec., Docket No. 89-ES-101 (Nov. 3, 1989). Accordingly, laches requires an element of neglect, and if suchis not found in this case, the Motion to Dismiss cannot be granted. Maynard, supra; Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998); Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994).

Here, Grievants filed this hostile work environment claim in November 2001, and in testimony indicated the hostile work environment began in July 2001, shortly after they were promoted. This period of delay is not unusual in filing this type of grievance; thus, there is no issue of laches involved with the filing, but the delays after that period of time were extensive. The grievance was filed in November of 2001, it was placed in abeyance for two year at Grievants' request, and after the default Decision, Grievants, over a period of three years, requested four continuances out of six scheduled hearings and only attended a portion of one hearing, requesting a continuance after the testimony of

one witness. Grievants requested a continuance of January 4, 2006 hearing so they could file for an expedited hearing to Level IV, but then did not file the Motion to make such a request. When informed by the Grievance Board that the last data we have on this grievance was the remand by ALJ Marteney, Grievants still did not file this Motion and did not respond to Respondent's request for dates for a Level III hearing. Then, after the Motion to Dismiss was filed before Grievance Evaluator McClung, Grievants still made no response. Clearly, the first element of the test is met.

But, a finding Grievants failed to pursue their claim diligently, will not entitle Respondent to relief under the doctrine of laches unless the agency is able to establish prejudice. Maynard, supra. Respondent identified three issues that have operated to prejudice the agency: 1) several key witnesses have retired; 2) the memory of manyevents is unclear; and 3) Grievants want litigate events that occurred while the grievance was placed in abeyance and continued at their request.

Both Mr. Light and Mr. Pardue have retired. They have not thought about work in some time, and no longer have access to the notes they made during this time period. ALJ Marteney found the memory of the witnesses "murky" during the default hearing in September of 2004. Of course, the memory of witnesses does not improve with time, and the witnesses at this Motion hearing did not remember many things, such as what the misinformation was, when events occurred, and what was said. Additionally, Mr. Light and Mr. Pardue could neither confirm nor deny statements made by Grievants.

Further, the partial Level III hearing and Level IV Motion hearing demonstrated Grievants wish to include many years of events that have occurred since they filed their grievance. Respondent has not been responsible for the delays in this grievance, and it would be extremely unfair to penalize Respondent by allowing five years of testimony to bolster their case, especially since Grievants seem to remember many events so well and in such detail, while Respondent's witnesses do not.

Respondent has established it has been prejudiced in its ability to present a proper defense against the grievance by the delay of five years created by Grievants, and laches will apply to this set of facts. See Cart v. W. Va. Dep't of Veterans Affairs, Docket Nos. 88-VA-070/071/180 (Aug. 3, 1989); Gary v. W. Va. Div. of Human Serv., Docket No. 89-DHS-299 (Dec. 27, 1990).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a grievance concerning a Motion to Dismiss brought by Respondent, the burden of proof

will rest with Respondent.

2. Pursuant to W. Va. Code § 29-6A-4(e)(2), a grievance dealing with a hostile work environment does not meet the requirements for an expedited filing to Level IV.

3. Laches is a delay which operates prejudicially to another person's rights. Carter v. Carter, 148 S.E. 378 (W. Va. 1929); Bank of Marlinton v. McLaughlin, 1 S.E.2d 251 (W. Va. 1939).

4. Laches has been defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances caus[es] prejudice to [an] adverse party." Black's Law Dictionary 453 (abr. 5th ed. 1983).

5. "A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the expenditure of public funds. Failure to do so constitutes laches." Maynard v. Bd. of Educ. of Wayne County, 178 W. Va. 53, 357 S.E.2d 246, 255 (1987).

6. For laches to attach, two elements must be established: 1) lack of due diligence on the part of the party asserting its claim, and 2) prejudice to the opposing party resulting from the delay. Id.; Dollison v. W. Va. Dep't of Employment Sec., Docket No. 89-ES-101 (Nov. 3, 1989).

7. Laches requires an element of neglect, and if such is not found in this case, the Motion to Dismiss cannot be granted. Maynard, supra; Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998); Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994). 8. The specific facts of this grievance demonstrate Grievants have failed to actively pursue their grievance for many years.

9. Respondent has established both a lack of due diligence on the part of Grievants, and that they have been prejudiced by this delay. Maynard, supra.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Janis I. Reynolds

Acting Chief Administrative Law Judge

Date: August 30, 2007

Footnote: 1

Two of the supervisees have been terminated, and currently the relief sought is transfer of the remaining employee.

Footnote: 2

Grievant Goodall testified at Level III that they had met with Mr. Light, but he never scheduled a Level II conference. The 2004 default Decision, based on testimony at that hearing found the parties had met, and the stipulations submitted by Grievant's attorney dated January 9, 2007, stated Grievants had met several times with Mr. Light to discussthe situation.

Footnote: 3

Respondent notes the mediation was unsuccessful because Grievants requested monetary relief in this hostile work environment grievance. The undersigned Administrative Law Judge notes this relief is similar to "pain and suffering" damages. In Snodgrass v. Kanawha County Board of Education, Docket No. 97-20-007 (June 30, 1998), the Grievance Board held that while an administrative law judge may "provide such relief as is deemed fair and equitable" pursuant to W. Va. Code § 18-29-5b, the Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make a grievant whole. It has not utilized this Code Section to award "tort-like" damages for pain and suffering. Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 225, 227 n.11, 455 S.E.2d 781 (1995). The same reasoning would apply to state cases.

Footnote: 4

Apparently Ms. Utt returned to work shortly thereafter.

Footnote: 5

This Notice was sent to Grievants' attorney by certified mail, but was returned as unclaimed. On September 13, 2005, the Notice was faxed to Grievants' attorney.

Footnote: 6

As this grievance does not deal with a severe disciplinary action, Grievants are not entitled to an expedited hearing. W. Va. Code § 29-6A-4.

Footnote: 7

It is unclear to the undersigned Administrative Law Judge how Grievants' attorney could expect these witnesses to be

made available, as he had not previously requested subpoenas, did not request them from the Hearing Examiner, and the time frame for requesting them had passed.

Footnote: 8

A grievant's request for an expedited, Level IV hearing, must be made by the grievant or his representative to the Grievance Board. The decision whether to grant this request rests with the Grievance Board, where the grievance issues foes not meet the statutory requirements.

Footnote: 9

Respondent, in its proposals, indicated it had tried to obtain dates to reschedule the Level III hearing, but did not receive information from Grievants' attorney.

Footnote: 10

This fact was made abundantly clear by Grievants' proposed stipulations. These stipulations disagreed with some of Grievant Goodall's testimony given at the October 19, 2005 partial hearing.

Footnote: 11

While this Code Section was repealed by the enactment of the new grievance procedure, this current grievance was filed under the old grievance statute, and pursuant to Executive Order No. 2-07, May 8, 2007, is to be resolved under the old procedure under which it was filed.

Footnote: 12

Typically, these Motions are denied.