WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CONNIE SPRADLING,

Grievant,

v. **Docket No. 07-TD-348D**

DEPARTMENT OF REVENUE,

STATE TAX DEPARTMENT,

Respondent.

ORDER DENYING DEFAULT

On June 29, 2007, Connie Spradling ("Grievant") filed with the Grievance Board a claim that default had occurred at level three of the grievance procedure. Due to legislative changes affecting the grievance process and the Grievance Board, a hearing was not held regarding the default issue until January 22, 2008. Grievant appeared at that hearing *pro se*, and Respondent appeared by counsel, A.M. "Fenway" Pollack, Assistant Attorney General. After the hearing conducted by Acting Chief Administrative Law Judge Janis Reynolds, the parties elected not to submit post-hearing proposals.

Due to the retirement of Judge Reynolds, this matter was reassigned to the undersigned on April 19, 2008.

Synopsis

Grievant alleged a default occurred when a the level three decision was faxed to her office on the fifth working day after the hearing. Pursuant to grievance statute and case precedent, a decision is

considered timely issued if placed in the mail, or otherwise transmitted, to the grievant on or before the final day for issuance. Therefore, no default occurred under these circumstances.

Findings of Fact

1. Grievant is employed by the Department of Revenue as a Tax Audit Clerk Senior.
2. On April 19, 2007, Grievant initiated a grievance regarding her salary. This grievance proceeded through levels one and two without incident.
3. A level three hearing was held on June 12, 2007, before David L. Stiles, Grievance Evaluator.
4. Mr. Stiles completed a written level three decision on June 19, 2007, and faxed it to Grievant's office at 2:14 p.m. The cover page for the fax transmission contained Grievant's name, and the message section stated “Confidential” in bold, capital letters.
5. Grievant did not check her “fax slot”, where employees in her office receive their faxed documents, on June 19, 2007.
6. June 20, 2007, was a legal holiday, and Grievant was not in the office.
7. The faxed level three decision was in Grievant's slot on June 21, 2007. She did not know who in her office received the fax or when.
8. A copy of the level three decision was mailed to Grievant by certified U.S. Mail from Mr. Stiles' office on June 21, 2007. However, due to a typographical error in the address, it was returned to Mr. Stiles' office. After it was mailed again with the correct address, Grievant received it on July 12, 2007.

Discussion

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).

"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). (See footnote 1) If a default occurs, the grievant is presumed to have prevailed on the merits. *Id.; 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). If the employer can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the time lines 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).

At level three, the statute requires the chief administrator, or his or her designee, to hold a hearing within seven working days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the level two decision within five working days of the hearing. W. Va. Code § 29-6A-2(c). Grievant contends that the facsimile transmission on June 19, 2007, the fifth working day after the hearing, did not comply with the statutory requirements. She also argues that, because the faxed decision did not contain appeal information, it was not a “complete” decision, also resulting in default.

In *Adams v. Dep't of Transp.*, Docket No. 00-DOH-383D (Mar. 13, 2001), the grievant similarly alleged that the failure to include appeal information resulted in the decision not being "a decision." It was held in that case that, as had been similarly held in *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999), failure to include the appeal paragraph with the decision does not automatically result in a finding of default, if the employer otherwise substantially complied with the statutory requirements.

Surprisingly, the issue of whether a facsimile transmission constitutes proper issuance of a grievance decision has not previously been addressed by the Grievance Board. W. Va. Code § 29-6A-3(i) provides that the decision is to be “transmitted to the grievant and any representative named in the grievance within the time prescribed.” The statute makes no reference to when the decision must be received by the grievant, and the Grievance Board has determined that the controlling event is when the decision is effectively transmitted to the grievant. *Board v. W. Va. Dep't of Health & Human* Res.,Docket No. 99-HHR-329D (Sept. 24, 1999); Wensell *v. W. Va. Regional Jail & Correctional Auth.*, Docket No. 98-RJA-490D (Jan. 25, 1999)*; Gillum v. Dep't of Transp.*, Docket No.

98-DOH-387D (Dec. 2, 1998); *Harmon v. Div. of Corrections*, Docket No. 98-CORR-284D (Oct. 6, 1998). Therefore, the question here is whether the June 19 fax constituted an “issued” and “transmitted” decision, as contemplated by the statute.

The Grievance Board has repeatedly held that placement of grievance documents in the state's interdepartmental mail system constitutes statutory compliance. *See Criner v. Dep't of Transp*., Docket No. 06-DOH-269D (Jan. 24, 2007); *Smith v. Dep't of Transp.*, Docket No. 05-DOH-002D (Mar. 7, 2005); *Sauchuck v. Parkways Economic Dev't & Tourism Auth.*, Docket No. 99-PEDTA-297D (Dec. 14, 1999); *Gillum, supra*; *Harmon, supra*.
In addition, in a case where a level three evaluator placed a decision in the U.S. mail after 7:00 p.m. on the final day for issuance, even with no postmark for verification, it was held that the employer complied with its statutory obligation. *Marascio v. Dep't of Transp.*, Docket No. 06-DOH-207D (Aug. 21, 2006). In that case, the administrative law judge noted that the Grievance Board has previously held that a decision is timely issued if placed in the mail on or before the date by which the decision is required to be made. *Cain, et al. v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-402DEF (Dec. 16, 2005), *citing Stover v. Raleigh County Bd. of Educ.*, 02-41-179 (Sept. 19, 2002).

The Miriam-Webster Online Dictionary defines “transmit” as “to send or convey from one person or place to another.” As Respondent argues in this case, a fax transmission accomplishes an immediate conveyance of a document to the recipient. The verification of the exact time and date of the “transmission” is contained on the document itself,establishing that Mr. Stiles did, indeed, transmit the decision to Grievant on the fifth working day after the hearing. (See footnote 2) Accordingly, Grievant has failed to prove that a default occurred.

The following conclusions of law are appropriate in this matter.

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. 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).

3. At level three, the chief administrator, or his or her designee, must hold a hearing within seven working days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the level two decision within five working days of the hearing. W. Va. Code § 29-6A-2(c).

4. A decision is timely issued if placed in the mail on or before the date by which the decision is required to be made. *Marascio v. Dep't of Transp.*, Docket No. 06-DOH- 207D (Aug. 21, 2006)*; Cain, et al. v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-402DEF (Dec. 16, 2005);*Stover v. Raleigh County Bd. of Educ.*, 02-41-179 (Sept. 19, 2002).

5. Respondent effectively transmitted the level three decision to Grievant by sending it by facsimile on the fifth working day after the level three hearing.

Accordingly, Grievant's request for judgment by default is **DENIED**. The parties are directed to confer with one another and, within seven days of receipt of this Order, provide the Grievance Board with at least five mutually agreeable dates for a hearing on the merits of this grievance.

Date: May 12, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

Although Mr. Stiles testified and was cross-examined by Grievant, he was never asked why the decision was not put in the mail until June 21, and this was not explained at the default hearing.