THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JOSEPH HARLESS,

Grievant,

v. Docket No. 07-WVSP-080D

WEST VIRGINIA STATE POLICE,

Respondent.

ORDER GRANTING DEFAULT

Joseph Harless, Grievant, filed a claim of default against his employer, West Virginia State Police ("WVSP") on March 12, 2007, alleging default occurred at Level III of the grievance process. The underlying grievance deals with non-selection. A pre-hearing conference was held on April 18, 2007, and a Level IV hearing scheduled for July 9, 2007, was continued due to the changes at the Grievance Board. A Level IV default hearing was held on September 13, 2007, at the Grievance Board's office in Charleston, to determine if a default had occurred. Grievant represented himself, and Respondent was represented by Virginia Grottendieck Lanham, Assistant Attorney General. This case became mature on October 9, 2007, upon the parties' submissions of 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. Grievant is employed with WVSP as an Information Specialist 1.

2. This grievance was initially filed on February 20, 2007, and the Level I Decision was issued on that same day. 3. Grievant appealed to Level II on February 20, 2007.

4. A Level II conference was held on February 23, 2007, by Lt. G. E. McCabe. On that

same day, Lt. McCabe denied the grievance stating the non-selection issue was not a grievable event.

5. On February 23, 2007, Grievant appealed this grievance to Level III by filing it with Colonel D. L. Lemmon, Superintendent.

6. When no Level III hearing was scheduled, Grievant called the Grievance Board to ask about the required time frame for holding the hearing.

7. By fax dated March 12, 2007, Grievant requested a default hearing with the Grievance Board. Grievant also notified Respondent of his default request by fax the same day.

8. Apparently, after Colonel Lemmon received the default notice, he asked Grievant to meet with him on March 13, 2007. Grievant declined to attend this meeting.

9. On March 13, 2007, Colonel Lemmon gave Grievant a letter dated March 5, 2007, in which he stated he had reviewed the grievance, and the issue of non-selection was not a grievable event. (See footnote 1)

Synopsis

Grievant filed this notice of default when Respondent did not hold his Level III hearing in a timely manner. Respondent agrees that the facts, as given by Grievant, andlisted above in the Findings of Fact, are correct and concurs that a Level III hearing was not held within the required time frame. Respondent asserts default could not occur because Grievant cannot grieve his non-selection. Respondent maintains that because he did not "specifically" allege any violation of any rule, regulation, statute, policy, or an unwritten policy or practice in the hiring of the successful applicant.

At the Level IV default hearing, the undersigned Administrative Law Judge directed Respondent to submit statutory and case law to support this assertion. None was provided in the proposals.

Discussion

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. (See footnote 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); W. Va. Code § 29-6A-3(a).

If a default occurs, Grievant is presumed to have prevailed. W. Va. Code § 29-6A- 3(a)(2); *Carter v. W. Va. Div. of Corr.*, 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 WVSP 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.

Grievant asserts a default occurred because WVSP did not schedule a Level III hearing within the required time frame. 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(b). WVSP admits it did not hold a Level III hearing within the required time lines, but contends this failure should be excused because the grievance is without merit, as the selection of another employee is not a grievable event.

Respondent is incorrect on two points. First, the assertion that this default should not be granted because the grievance does not deal with a grievable event ignores the fact that this rationale is not one of the excuses identified in W. Va. Code § 29-6A-3(a).

Second, there is no support in either the statutes governing the grievance process or the case law for this assertion. W. Va. Code § 29-6A-2(i) defines a grievance as:

> **"Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.**

Grievant's Statement of Grievance clearly states his belief that he was more qualified for the position, and he has applied for this position twice. He notes he was told the first time he applied he was not selected because he did not have enough supervisory experience. Upon his non-selection the second time, he was told that in the interview he emphasized his

supervisory experience too much. Grievant also noted 25% of the questions during the interview were about administrative experience and asserts the successful applicant has either no or limited supervisory experience.

An employee of the agency has the right to grieve his non-selection. Failure to receive a promotion that could result in a 15% pay increase deals with compensation, and Grievant's assertion that he was more qualified than the successful applicant, raises the issue of whether the Division of Personnel's rules and regulations regarding promotion and selection were followed. Additionally, inherent in this Statement of Grievance is the assertion of favoritism.

It is unclear to the undersigned Administrative Law Judge why Respondent believes this grievance does not meet the statutory definition of grievance, as it is clear that is does. The issue of non-selection has been frequently addressed in Grievance Board decisions. Accordingly, Grievant had met his burden of proof, and WVSP has defaulted in this grievance.

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 inthis 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(b).

3. Grievant has proven Respondent failed to hold a Level III hearing in a timely manner.

4. Respondent did not prove its failure to hold the Level III hearing was the result of one of the defenses listed in W. Va. Code § 29-6A-3(a)(2) and did not prove this grievance was non-grievable.

Accordingly, this default is GRANTED. As Respondent has already requested a Level IV default remedy hearing, the parties are directed to send to the Grievance Board five mutually agreed upon dates for this hearing by April 15, 2008.

JANIS I. REYNOLDS

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 21, 2008

Footnote: 1

Colonel Lemmon reached this decision without holding a Level III hearing and without allowing Grievant to present any evidence. While this issue is a moot point because of Grievant's default claim, the undersigned Administrative Law Judge wants to ensure that WVSP understands that lower level hearings are required under the old grievance procedure, and a Level One hearing is required, if requested, under the new grievance procedure.

Footnote: 2

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.