ANNETTA HICKMAN,

Grievant,

v. Docket No. 98-CORR-314D

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

ORDER GRANTING DEFAULT

Annetta Hickman (Grievant) is employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer II, at the Mount Olive Correctional Complex (MOCC). She filed this action on July 30, 1998, alleging that she was wrongly denied a pay increase. This grievance was denied at Level I, on August 13, 1998, by Immediate Supervisor Lieutenant Joseph Wood.

Grievant sent a letter to CORR, dated August 17, 1998, claiming that she had prevailed by default, inasmuch as CORR had failed to issue a written decision on her grievance within six days of its receipt.

On or about August 20, 1998, Grievant appealed her claim of default to Level IV. A Level IV default hearing was scheduled for January 26, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant and her representative, Jack Ferrell (Ferrell) of the Communications Workers of America, arrived for this hearing, but CORR's representative did not. A Show Cause Order, dated January 27, 1999, was issued, ordering that Respondent show cause for its failure to attend theJanuary 26 hearing. This order was received by Respondent on January 28, 1999. Respondent had until February 16, 1999, to respond to this order, but failed to do so.

A telephonic status conference was scheduled for April 7, 1999. At that conference,

Grievant was represented by Ferrell, and Corrections was represented by Assistant Attorney General Leslie K. Tyree. (See footnote 1) The parties declined to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision at the conclusion of the telephonic status conference.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Since 1994, all Correctional Officer Is employed by the Division of Corrections (DOC) have been required to complete an Apprenticeship Training Program (ATP) to be promoted to Correctional Officer II (CO II). Upon promotion to CO II, a pay increase is awarded.

2. Grievant completed the ATP on March 26, 1998.

3. Effective April 1, 1998, DOC adopted Policy Directive 442, which provides that a pay increase or promotion shall not become effective until several agencies and offices have acted. 4. Grievant filed this grievance on July 30, 1998, alleging that she was wrongly denied a pay increase upon completion of the ATP.

5. This grievance was denied at Level I, on August 13, 1998, by Immediate Supervisor Lieutenant Joseph Wood.

6. Grievant sent a letter to CORR, dated August 17, 1998, claiming that she had prevailed by default, inasmuch as CORR had failed to issue a written decision on her grievance within six days of its receipt.

DISCUSSION

On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998. (See footnote 2) That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> **(2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level falls 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, orclearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.**

In addition, House Bill 4314 added the following language to W.Va. Code § 29-6A- 5(a): "the grievance board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

W. Va. Code § 29-6A-4(c) provides as follows regarding when CORR must act at Level I: "[t]he immediate supervisor shall issue a written decision within six days of the receipt of the written grievance."

If a default has occurred, then a grievant is presumed to have prevailed on the merits of the grievance, and CORR may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure. This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340, (Feb. 26, 1993). Because Grievant claims she prevailed by default under the terms of the statute, she bears the burden of establishing such default by a preponderance of the evidence. Patteson v. Dep't of Health & Human Resources/Div. of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998).

A preponderance of the evidence is defined as "evidence which is of greater weightor more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The facts in this matter are undisputed. Grievant filed her grievance at Level I on July 30, 1998, and CORR denied it on August 13, 1998. 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. In computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E. 362 (1911). See also W. Va. R. Civ. P. 6(a). Therefore, July 30, 1998, is excluded.

Accordingly, CORR did not issue a written decision to Grievant at Level I until 10 working days after she filed this grievance.

Thus, it becomes CORR's responsibility to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level I, in compliance with W. Va. Code § 29-6A-4(b), "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

CORR apparently does not contest that a default occurred under the terms of the statute, and presented no evidence that it was prevented from providing a timely response at Level I, as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. In these circumstances, CORR has failed to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level I as a result of sickness, injury, excusable neglect, unavoidable cause or fraud.

Accordingly, it is determined that CORR is in default in this grievance, and it may proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2), that the remedy sought by Grievant is contrary to law or clearly wrong. CORR may request a Level IV hearing, within five days of the receipt of this written notice of default, to present evidence on this issue.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1 1.

If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by W.Va. Code §29-6A-4, unless

prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud, the grievant shall prevail by default. W.Va. Code §29-6A- 3(a)(2).

2. At Level I, the immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. W. Va. Code § 29-6A-4(c).

3. When a grievant asserts that her 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 evidence. Patteson v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998). 4. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

5. Grievant established, by a preponderance of the evidence, that a timely response was not provided to her at Level I.

6. CORR was not prevented, as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud, from providing a required response in a timely manner. See W.Va. Code § 29-6A-3(a)(2).

Accordingly, Grievant's request for a finding of default at Level I under W. Va. Code § 29-6A-3(a)(2) is GRANTED. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated April 14, 1999

Footnote: 1

During this status conference, Mr. Ferrell moved that a default be granted based upon CORR's failure to respond to the Show Cause Order. Under 156 CSR 1-4.3, an administrative law judge has the authority and discretion to control the processing of each grievance, and to take any action deemed consistent with W. Va.

***Code* §§ 18-29-5 and 29-6A-5. However, because such an action is not necessary to a decision in this grievance, Ferrell's motion need not be decided.**

Footnote: 2 ***This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).***