JOHN S. TOTH,

Grievant,

v. Docket No. 98-CORR-436D

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER GRANTING DEFAULT

John S. Toth (Grievant) is employed by the West Virginia Division of Corrections (Corrections), as a Correctional Officer, holding the rank of Lieutenant, (See footnote 1) at the Anthony Correctional Center (ACC). He filed this action on September 11, 1998, alleging that he was wrongly suspended for 15 days, and that his suspension was in retaliation for his activity as a union steward at ACC. This grievance was denied at Level I, on September 18, 1998, by Immediate Supervisor D. M. Taylor. This grievance was denied at Level II, on October 1, 1998, by ACC Warden Scott W. Patterson. This grievance was appealed to Level III on October 5, 1998. That appeal was received by CORR on October 8, 1998.

Grievant sent a letter to CORR, dated October 21, 1998, claiming that he had prevailed by default, inasmuch as CORR had failed to hold a hearing on his grievance within seven days of its receipt of his appeal to Level III.

On October 30, 1998, Grievant appealed his claim of default to Level IV. A Level IV default hearing was scheduled for January 6, 1999, before the undersignedAdministrative Law Judge, at the Grievance Board's Beckley office. Grievant and his representative, Jack Ferrell (Ferrell) of the Communications Workers of America, arrived for this hearing, but CORR's representative did not. A Show Cause Order was issued, on January 7, 1999, ordering CORR to show good cause for its failure to attend the Level IV default hearing. CORR did so, and

another hearing was scheduled for February 2, 1999. At that hearing, Grievant was represented by Ferrell, and Corrections was represented by Assistant Attorney General Leslie K. Tyree. 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 default hearing.

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. Grievant was suspended for 15 days without pay for alleged horseplay, refusal to cooperate in an investigation, and discrimination.

2. Grievant appealed to Level III, by certified mail, on October 5, 1998. CORR received Grievant's appeal to Level III on October 8, 1998.

3. By letter dated October 9, 1998, CORR designated Mike Coleman (Coleman) to hear this grievance at Level III.

4. On October 20, 1998, Coleman left a telephone message, requesting a return call, with Ferrell.

5. Grievant sent a letter to CORR, dated October 21, 1998, raising his claim of default.

6. On October 23, 1998, Coleman again left a telephone message, requestinga return call, with Ferrell. Ferrell's secretary recorded Coleman's message as "[d]esperately needs to talk to you today."

7. Coleman reached Ferrell by telephone on October 23, 1998. Ferrell informed Coleman that Grievant had raised a claim of default.

8. By letter dated October 26, 1998, Coleman informed Grievant that, because Grievant had raised a default claim, no hearing would be scheduled at Level III.

9. By letter dated November 6, 1998, Coleman informed Grievant that a Level III hearing had been scheduled for November 12, 1998, at ACC.

10. Coleman's letter to Grievant of November 6, 1998, was returned due to insufficient postage.

11. On November 12, 1998, Coleman conducted the Level III hearing at ACC. Grievant was on duty at ACC, and was summoned to the hearing. Grievant, having raised a claim of

default, did not participate in the hearing.

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 fallsto 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, or clearly 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 III:

> **The chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal.**
>
> **The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.**

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. CORR argues that no default occurred under the terms of the statute. 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. ofDirectors, 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 he prevailed by default under the terms of the statute, he 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 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). 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 appealed his grievance to Level III on October 5, 1998, and CORR received Grievant's appeal on October 8, 1998. CORR made no written response to Grievant's appeal until October 26, 1998. No Level III hearing was scheduled by CORR until November 6, 1998, and none was held until November 12, 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. October 12, 1998, was Columbus Day, November 3, 1998, was Election Day, and November 11, 1998, was Veterans Day. All three were official holidays.

In computing the time period in which an act is to be done, the day on which theappeal 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, October 8, 1998, is excluded.

Accordingly, Grievant made his default claim to CORR eight working days after CORR's receipt of his appeal to Level III; CORR made its first telephone contact with Grievant's

representative ten working days after its receipt of his appeal to Level III; CORR made its first written contact with Grievant 11 working days after CORR's receipt of his appeal to Level III, and CORR did not hold Grievant's Level III hearing until 22 working days after he filed his appeal at Level III. CORR failed to hold a hearing within seven working days of its receipt of Grievant's appeal to Level III.

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 III, 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 argues that Coleman's failure to contact Grievant by telephone constituted excusable neglect on its part. The undersigned disagrees.

The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon its interpretation under the Federal Rules of Civil Procedure. "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied." Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997), quoting Bailey v. Workman's Comp. Comm'r, 170 W. Va. 771, 296 S.E.2d 901 (1982), quoting 4A Charles A. Wright &Arthur R. Miller, Federal Practice and Procedure § 1165 (1969).

Coleman testified, at Level IV, that he was familiar with the time limits, set forth in the W. Va. Code, regarding grievances. He testified that, upon being designated as the Commissioner's representative to hear Grievant's grievance at Level III, he "immediately" tried to telephone Grievant and Ferrell. However, Coleman could not recall when he tried to telephone Grievant or Ferrell, with the exception of his successful call of October 23, 1998. (See footnote 3) **He did not recall his secretary receiving telephone calls on October 15 and October 19, testified to by Ferrell, in which Ferrell sought to schedule a Level III hearing. Coleman testified that, in hindsight, he should have written a letter to Grievant scheduling the hearing.**

Grievant testified that he has an answering machine with caller identification at his home, and that he was never telephoned by CORR or Coleman regarding the scheduling of his Level

III hearing. Grievant pointed out that, as an employee of CORR at ACC, CORR would have had little difficulty contacting him there. The undersigned notes that, during the Level III hearing ultimately held by CORR at ACC, Coleman had no difficulty contacting Grievant immediately and summoning him to the hearing. It is also noted that telephone messages to Ferrell are recorded on message slips by his secretary.

Grievant did not allege bad faith on CORR's part. However, CORR failed to establish a reasonable basis for noncompliance with the seven day time frame specified by W.Va. Code § 29-6A-4(c), inasmuch as it did not hold Grievant's Level III hearing until22 days after its receipt of his appeal to Level III, and failed to provide a credible explanation of Coleman's failure to contact either Grievant or his representative regarding Grievant's Level III hearing.

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 III 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 III, the chief administrator or his or her designee shall hold a hearing within seven days of receiving an appeal. The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five

days of the Level III hearing. W.Va. Code § 29-6A-4(c). 3. 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 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 Grievant at Level III.

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 III 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 February 22, 1998

Footnote: 1

1 See Toth v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-344D (Feb. 2, 1999).

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).

Footnote: 3

3 At the Level IV default hearing, Grievant presented two telephone message slips, completed by Ferrell's secretary, reflecting Coleman's attempts to telephone Ferrell on October 20, 1998 (the last day CORR could have conducted a Level III hearing within the statute's seven day time frame), and on October 23, 1998.