MICHAEL WAGONER,

Grievant,

v. **Docket No. 98-CORR-365**

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Michael Wagoner (Grievant) is employed by the West Virginia Division of Corrections (Corrections), as a Correctional Officer at the Mount Olive Correctional Complex (MOCC). He filed this action on August 5, 1998, alleging he was subjected to discrimination when he was denied $300.00 in relocation expense reimbursement by Corrections. This grievance was denied at Level I, by Correctional Magistrate Joseph B. Coy, on August 5, 1998. This grievance was denied at Level II, by Associate Warden of Administration Linda Coleman, on August 18, 1998. On September 15, 1998, this grievance was denied at Level III by Commissioner William K. Davis.

A Level IV hearing was held on November 9, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by Lieutenant Steve Berryman, and Corrections was represented by Assistant Attorney General Charles Houdyschell, Jr. The parties were given until December 11, 1998, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision at that time. The following Findings of Fact pertinent toresolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by Corrections as a Correctional Officer at the Mount Olive Correctional Complex.

2. Corrections received Grievant's appeal to Level III on August 18, 1998.

3. Corrections scheduled a Level III hearing on Grievant's appeal for September 8, 1998.

4. September 8, 1998, is fourteen working days after August 18, 1998.

5. At Grievant's request, his Level III hearing was postponed one day, to September 9, 1998, to accommodate his representative's work schedule. (See footnote 1)

6. Corrections' chief administrator or his designee failed to hold a hearing within seven days of the receipt of Grievant's appeal.

7. Corrections issued its Level III decision on September 14, 1998, which Grievant received on September 17, 1998.

8. On September 21, 1998, Grievant sent a memo to this Grievance Board, and to the West Virginia Division of Personnel, alleging two instances of default at Level III, and appealing his Level III decision to Level IV.

9. No employees were hired on the West Virginia Penitentiary (WVP) payroll after July 1, 1994, when the MOCC payroll was established. 10. Grievant was hired to work at MOCC on July 11, 1994, on the MOCC payroll. He was temporarily assigned to WVP at Moundsville until MOCC opened in March, 1995.

11. Grievant, and other officers assigned to WVP pending MOCC's opening, received a one-time payment of $500.00 to defray living expenses.

12. At least 30 Correctional Officers received a $300.00 relocation expense reimbursement to defray the cost of moving from the Moundsville area to the Mount Olive area.

13. To be eligible for the $300.00 relocation expense reimbursement, a Correctional Officer must have been an employee of WVP transferring to MOCC.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. 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.

Grievant alleges that he was subjected to discrimination when he was denied $300.00 in relocation expense reimbursement by Corrections, claiming that other similarly situated officers received such reimbursement, and that some employees applied for andwere paid the relocation expense reimbursement after a deadline set by Corrections. Grievant further alleges that he prevailed by default at Level III, because Corrections failed to hold a hearing on his appeal within seven days, and because Corrections failed to issue a decision within five days of that hearing.

Corrections responds that Grievant was never an employee of West Virginia Penitentiary, and so cannot be paid relocation expenses because he never transferred from there to MOCC, and that, while some employees may have been paid the relocation expense reimbursement after the deadline, "two wrongs don't make a right." Corrections further responds that Grievant's Level III decision was issued in a timely manner.

DEFAULT

Grievant alleges that he prevailed by default at Level III, because Corrections failed to hold a hearing on his appeal within seven days. The issue of default in a grievance filed by a state employee has only recently come within the jurisdiction of the Grievance Board. 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, excusableneglect, 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 Corrections 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 Corrections 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. Corrections argues that no default occurred under the terms of the statute. The 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. ofDirectors, 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 and Human Resources/Division of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998).

The facts in this matter are undisputed. Corrections received Grievant's appeal to Level III on August 18, 1998. Corrections scheduled a hearing on Grievant's appeal for September 8, 1998, although the hearing was delayed one day at Grievant's request. Corrections then issued its Level III decision on September 14, 1998, which Grievant received on September 17, 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. September 7, 1998, was Labor Day, an official holiday. 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, August 18, 1998, is excluded.

When the day on which the appeal was submitted, Labor Day, and the day's delay requested by Grievant are excluded, Corrections did not hold Grievant's hearing until fourteen work days after he filed his appeal at Level III. However, Grievant must raise his default claim “as soon as” he or his representative becomes aware of it. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). This Grievance Board has held that a grievant may not assert a claim of default under W. Va. Code § 18A-29-3(a) one month after a decision has been received, Harmon & Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 26, 1997), but has also held that a state employee grievant properly raised a claim of default under W. Va. Code § 29-6A-3(a)(2) “as soon as” she became aware of it when she claimed default on the first working day following the untimely issuance of a decision. Williamson v. W. Va. Dep't of Tax and Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998).

Applying the holdings in Hanlon, Harmon & Chiles, and Williamson to the facts of this grievance, the undersigned concludes that a state employee grievant, raising a claim of default based upon a respondent's alleged failure to respond to his grievance by conducting a timely hearing, must raise such a claim no later than the conclusion of that hearing. A grievant is, of course, free to raise the claim earlier, should he become aware of it earlier, and to decline, based upon such a claim of default, to participate in any such hearing.

Grievant did not claim that Corrections failed to timely conduct a hearing before or during his Level III hearing, but only did so five days after his Level III decision was issued. Because Grievant presented no evidence to show that he became aware of Corrections' alleged default only at a later time, it is reasonable to conclude that he became aware of the late scheduling of his hearing when Corrections notified him of the date for that hearing. Because Grievant failed to raise his claim of default in a timely manner, it must be denied.

As noted above, Corrections argued at Level IV that its Level III decision was issued in a timely manner. This is correct. Following the Level III hearing on September 9, 1998,Corrections issued its decision on September 14, 1998, which Grievant received on September 17, 1998. Thus, the decision was issued three working days after the hearing, although it was not received by Grievant for six working days. The date the decision was issued controls. Harmon v. Div. of Corrections/Mt.

Olive Correctional Complex, Docket No. 98-CORR-284 (Oct. 6, 1998). See Wadbrook v. W. Va. Bd. of Directors, Docket No. 93- BOD-214 (Aug. 31, 1993). Grievant's contention that the Level III decision was not issued timely must fail.

DISCRIMINATION

Grievant alleges that he was subjected to discrimination when he was denied $300.00 in relocation expense reimbursement by Corrections, claiming that other similarly situated officers received such reimbursement, and that some employees applied for and were paid the relocation expense reimbursement after a deadline set by Corrections.

Corrections responds that Grievant was never an employee of West Virginia Penitentiary, and so cannot be paid relocation expenses because he never transferred from there to MOCC, and that, while some employees may have been paid the relocation expense reimbursement after the deadline, “two wrongs don't make a right.”

W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." To establish a prima facie case of discrimination, Grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in amanner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case of discrimination. He has not shown that he is similarly situated, in a pertinent way, to one or more other employee(s). The 30 Correctional Officers who received the relocation expense reimbursement were employees on the payroll of WVP who were transferred upon its closing to Mount Olive, whereas Grievant was, at all times, an employee on

the payroll of Mount Olive.

Although Grievant also argued that two other officers on the MOCC payroll received the relocation reimbursement, he failed to establish this by a preponderance of the evidence. Grievant further argued that some employees applied for and were paid the relocation expense reimbursement after a deadline set by Corrections. Corrections appeared to concede that this might have taken place. However, this concession does not help Grievant, because Corrections' error, if it occurred, does not necessarily constitute discrimination, Ritchie v. W. Va. Div. of Corrections/Huttonsville Correctional Center,Docket No. 98-CORR-105 (Nov. 30, 1998); Ritchie v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996), nor is Corrections obliged to commit further mistakes with Grievant. See Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 956, 460 S.E.2d 702 (1995).

Corrections established that Grievant was hired to work at Mount Olive and was, at all times, on Mount Olive's payroll, although temporarily assigned to WVP. Senate Bill No. 1009, which authorized the relocation reimbursements, provided them for “correctional staff transferring from the West Virginia penitentiary to the Mt. Olive correctional complex[.]” Grievant failed to cite any statute, policy or regulation which would prohibit Corrections from using his assignment to the Mount Olive payroll to determine that Grievant did not transfer from WVP to Mount Olive.

The record further revealed that Grievant knew, when he was hired, that he would be assigned to MOCC. While he was temporarily assigned to WVP, he was paid a one- time payment of $500.00 to defray his living expenses in Moundsville. As an officer newly hired, to work at MOCC, he simply was not in the same position as those who were hired to work at WVP and faced the expenses of relocating from Moundsville to Mount Olive.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

2. 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).

3. 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. Within five days of the receipt of a written notice of the default, the employer may request a Level IV hearing for the purpose of showing that the remedy received by the prevailing party is contrary to law or clearly wrong. W.Va. Code §29-6A-3(a)(2).

4. 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).

5. 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. 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. Patteson v. Dep't of Health and Human Resources/Division of Personnel, Docket No. 98-HHR-326 (Oct. 6,1998).

6. Grievant established, by a preponderance of the evidence, that a timely hearing was not provided to Grievant at Level III.

7. A state employee grievant, raising a claim of default based upon a respondent's alleged failure to respond to his grievance by conducting a timely hearing, must raise such a claim no later than the conclusion of that hearing.

8. Grievant failed to raise his claim of default in a timely manner.

9. To establish a prima facie case of discrimination, Grievant must show:(a) that he is similarly situated, in a pertinent way, to one or more other employee(s); (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and, (c) that such differences were unrelated to actual job responsibilities of the grievant

and/or the other employee(s) and were not agreed to by the grievant in writing. Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

10. Grievant failed to establish a prima facie case of discrimination.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: January 4, 1999

Footnote: 1 *As Corrections did not claim that Grievant's request for one day's delay of his Level III hearing constituted a waiver of the statutory time lines, and because a determination of this issue is not necessary to a decision in this grievance, it will not be discussed further.*

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).*