BILLY J. CARTER,

Grievant,

v. **Docket No. 99-CORR-147D**

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

ORDER DENYING DEFAULT

On April 10,1999, Billy J. Carter (Grievant) appealed to Level IV of the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., alleging he was entitled to prevail by default in a grievance he filed against his employer, Respondent West Virginia Division of Corrections (DOC). On May 13, 1999, a Level IV hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Elkins, West Virginia. (See footnote 1) That hearing was limited to the question of whether or not a default had occurred and, if so, was the remedy requested contrary to law or clearly wrong. In accordance with a briefing schedule established at the conclusion of the hearing, this matter became mature for decision on May 26, 1999. The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

FINDINGS OF FACT

1. Grievant is employed by Respondent Division of Corrections (DOC) at its Huttonsville Correctional Center.

2. On March 11, 1999, Grievant initiated a grievance seeking reinstatement of pay and benefits lost while receiving Workers' Compensation between October 14, 1994, and March 15, 1995. J Ex A.

3. On March 16, 1999, Grievant's immediate supervisor, Deputy Warden Keith Weese, waived the grievance to Level II because he did not have authority to grant the relief requested.

4. Grievant proceeded to Level II on March 17, 1999. Deputy Warden Weese denied the grievance at Level II, finding that the grievance was not timely filed.

5. Grievant appealed to Level III on March 18, 1999.

6. A Level III hearing was conducted on March 26, 1999, by James J. Ielapi.

7. At the conclusion of the hearing, Mr. Ielapi requested an additional five days to issue the Level III decision, and Grievant consented to that extension of time. Thus, DOC had ten working days to issue a Level III decision.

8. Mr. Ielapi forwarded his recommended decision to DOC Commissioner Paul Kirby on April 5, 1999. J Ex A. He did not provide a copy of his recommended decision to Grievant or his representative. 9. On April 7,1999, Commissioner Kirby issued a Level III decision denying the grievance, providing a copy of his decision to Grievant by certified United States mail. J Ex A.

10. April 9, 1999, was the tenth working day following Grievant's Level III hearing.

11. When Grievant did not receive a Level III decision on April 9, he wrote to the Commissioner of Corrections on April 10, 1999, declaring a default under the state employee grievance statute.

12. Grievant received Commissioner Kirby's Level III decision by certified mail later that same day, April 10, 1999.

DISCUSSION

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board last year. 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 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. Within five days of the receipt of a written notice of the default, the employer may request a hearing before alevel 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): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless DOC is able to demonstrate that the remedy requested is either contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there was no default, Grievant may proceed to the next level of the grievance procedure. DOC contends no default occurred in this matter, as contemplated 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. 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 is claiming he prevailed by default under the statute, he bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources,Docket No. 98-HHR-346D (Nov. 25, 1998). 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).

In this matter, after this grievance was advanced to a hearing at Level III, Grievant consented to a five-day extension of the five-day time limit for issuing a decision specified in W. Va. Code § 29-6A-4(c): “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.” 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. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). Thus,

DOC was obligated to issue a Level III decision on this grievance not later than April 9, 1999, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

DOC contends the statute only requires the employer to "issue" a Level III decision within the applicable time limit. Therefore, when the decision was signed and placed in the mail by Commissioner Kirby on April 7, 1999, the employer completed all actions necessary to meet the statutory time limit. 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 thedecision must be received by the grievant, and this Grievance Board has determined that the controlling event is when the decision is effectively transmitted to the grievant. 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). Thus, the burden is upon Grievant to demonstrate that the Level III decision was not issued on or before April 9, 1999.

Grievant argues that because he did not receive the Level III decision until April 10, 1999, it could not have been placed in the mail on April 7, 1999, as indicated on the Certificate of Service attached to the decision and signed by Commissioner Kirby. See Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §§ 2.1.2 & 2.1.3 (1996). Ordinarily, a Certificate of Service provides prima facie evidence of when and how a document was transmitted. See Four P., Inc. v. Hicks, 181 W. Va. 193, 382 S.E.2d 30 (1989). However, any presumption established by a properly executed Certificate of Service may be overcome by persuasive evidence indicating a contrary set of facts. In regard to when a document is placed in the mail, the postmark on the envelope transmitting the document ordinarily provides the best evidence to establish that date. See Wensell, supra. Grievant did not introduce the postmarked envelope at the Level IV hearing on this issue, and did not recall noting the postmark date when he received Commissioner Kirby's Level III decision. (See footnote 3) In these circumstances, Grievant has failed toestablish by a preponderance of the evidence that DOC was in default by failing to issue a Level III decision on this grievance in a timely manner.

Because no default occurred in this matter, DOC does not have to show that the remedy sought is contrary to law or clearly wrong. Grievant has already appealed the Level III decision to Level IV.

Accordingly, a Level IV hearing will be scheduled to address the merits of this grievance.

In addition to the foregoing discussion, 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. 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." W. Va. Code § 29-6A-3(a).

2. 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. 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. See W. Va. Code § 29- 6A-3(a)(2). 3. 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. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998).

4. In determining whether an agency has issued a decision in compliance with the applicable time limit in the state employee grievance procedure, the controlling event is when the decision is effectively transmitted to the grievant, not when the decision is actually received by the grievant. Harmon v. Div. of Corrections, Docket No. 98-CORR- 284D (Oct. 6, 1998). See W. Va. Code § 29-6A-3(i).

5. Grievant failed to establish that Respondent DOC did not issue a Level III decision on his grievance within the time limit specified in W. Va. Code § 29-6A-4(c), as properly extended by mutual agreement of the parties. See W. Va. Code § 29-6A-3(a)(2).

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is **DENIED**. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order. The representatives of the parties are requested to confer and provide agreed

dates to conduct the Level IV hearing on the merits of this grievance.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 4, 1999

Footnote: 1

Grievant was represented by John Jeffers. DOC was represented by Assistant Attorney General Charles Houdyschell, Jr.

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). As this grievance was initiated on March 11, 1999, it falls under the new statute.

Footnote: 3

Even if the decision was not mailed until April 8 or 9, such mailing would nonetheless constitute timely issuance of the decision as contemplated by W. Va. Code § 29-6A-4(c).