ELI BELL,

Grievant,

v. **Docket No. 99-CORR-054D2** (See footnote 1)

DIVISION OF CORRECTIONS/
NORTHERN REGIONAL JAIL
& CORRECTIONAL FACILITY
and DIVISION OF PERSONNEL,

Respondents.

DECISION ON DEFAULT

On February 4, 1999, Eli Bell (Grievant) submitted an appeal to level four of the grievance procedure, requesting relief by default, pursuant to the provisions of W. Va. Code § 29-6A-3. On March 29, 1999, a hearing was conducted before the undersigned administrative law judge for the purpose of determining whether a default had occurred, and, pursuant to agreement of the parties, reserving the question of whether the remedy sought by Grievant was contrary to law or clearly wrong. Subsequent to that hearing, on April 14, 1999, the undersigned issued an "Order Granting Default", finding that a default had occurred at level two of the grievance procedure, and ordered that this matter remain on the Grievance Board docket for further proceedings to determine whether the remedy sought by Grievant was contrary to law or clearly wrong. The Order Granting Default is attached hereto as Appendix A. A hearing regarding the default remedy was scheduled for May 21, 1999. On May 3, 1999, Respondent Division of Corrections (DOC) appealed the Order Granting Default to the Circuit Court of Marshall County. (See footnote 2) Subsequently, a conference call was held on May 14, 1999, in order to determine how to proceed with the case. At that time, DOC, by its counsel Charles Houdyschell, Jr., advised the undersigned that DOC would concede that, in light of the presumption that Grievant had prevailed on the merits of the case, the remedy requested would not be contrary to law or clearly wrong. (See footnote 3) Accordingly, a hearing regarding the default remedy would not be necessary, and Respondent requested that a Decision be issued, granting the

remedy. (See footnote 4)

The following findings of fact are made.

Findings of Fact

1. Grievant appealed a level one decision on his grievance to level two on January 12, 1999.

2. A level two conference was not conducted until January 26, 1999, which was determined to be untimely, pursuant to the provisions of W. Va. Code § 29-6A-3. See Appendix A.

3. Grievant was promoted to sergeant on October 21, 1998, but did not beginreceiving pay commensurate with the promotion until December 1, 1998. (See footnote 5)

Discussion

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. (See footnote 6) This default provision is contained in W. Va. Code § 29-6A-3(a)(2), which provides, in pertinent part:

> 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. 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.

The original grievance alleged that Grievant had been promoted to sergeant on October 21, 1998, but did not begin receiving the sergeant's salary until December 1, 1998.

As discussed above, Respondent concedes that the remedy sought by Grievant, the difference between his prior salary and the sergeant's salary from October 21, 1998, through December 1, 1998, is not contrary to law or clearly wrong. In light of the priorfinding of default, it is presumed that Grievant has prevailed on the merits, and he is, therefore, entitled to the remedy requested.

Conclusions of Law

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2).

2. Respondent Division of Corrections concedes that the remedy sought by Grievant in this case is not contrary to law or clearly wrong.

3. Grievant is entitled to the difference between his salary prior to his promotion and his salary as a sergeant from October 21, 1998, through December 1, 1998.

Accordingly, this grievance is **GRANTED**, and the Division of Corrections is directed to compensate Grievant with back pay for the period discussed herein.

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, and 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 andshould not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 2, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

A "2" has been added to the docket number to distinguish this decision from the "Order Granting Default" previously issued in this matter.

Footnote: 2

The Order Granting Default was not intended to be a final order or decision which would be appealable to circuit court under the provisions of W. Va. Code §§ 29-6A-7 or 29A-5-4.

Footnote: 3

However, DOC wishes to continue to pursue its appeal of the finding of default in this case.

Footnote: 4

The Division of Personnel did not appear or participate in this default matter at level four.

Footnote: 5

The record does not reflect what Grievant's classification was prior to the promotion.

Footnote: 6

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).