EDWARD T. WENSELL,

Grievant,

v. **Docket No. 98-RJA-490D**

WEST VIRGINIA REGIONAL JAIL &

CORRECTIONAL FACILITY AUTHORITY,

Respondent.

ORDER DENYING GRIEVANT'S MOTION FOR DEFAULT JUDGMENT

On November 5, 1998, Grievant Edward T. Wensell, employed by Respondent, Regional Jail & Correctional Facility Authority (RJ&CFA) as First Sergeant at the Eastern Regional Jail (ERJ), filed a complaint alleging discrimination when Sergeant Benjamin Shreve was promoted to the position of Acting Lieutenant. Acting Lieutenant Benjamin Shreve issued a level one decision on November 9, 1998, stating that he lacked the authority to resolve the grievance. ERJ Administrator Edward J. Rudloff denied the grievance at level two, and the matter was advanced to level three, where an administrative hearing was held on November 20, 1998. On December 7, 1998, Grievant filed a claim of default at level four, stating that he had not received a level three decision as of that date.

A level four hearing was conducted on January 11, 1999, solely for the purpose of determining whether a default had occurred at level three. Grievant appeared pro se, and Respondent was represented by Chad Cardinal, Assistant Attorney General. Both parties presented evidence in support of their position and the matter became mature for decision at the conclusion of the hearing.

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 1) 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 failsto 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 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." See also W. Va. Code §18-29-5.

W. Va. Code §29-6A-4(c) provides that "[t]he chief administrator or his designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of such hearing." Respondent did not challenge whether Grievant could pursue his allegation of default at level four. If a default has occurred, then the grievant prevails, and Respondent may request a ruling at level four regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure. Further, the Supreme Court of Appeals of West Virginia has held, in the context of the default provision in the education employees grievance procedure: (See footnote 2) "[i]n order to benefit from the 'relief by default' provisions contained in W. Va.Code §18-29-3(a)(1992)(Repl. Vol. 1994), a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." Syl. Pt. 4, Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Thus, a grievant may come to level four asking for a ruling on the lower level procedural issue of whether a default has occurred, in order to know how to proceed with his grievance.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. (See footnote 3) Harmon v. Division of Corrections, Docket No. 98-CORR-284 (remand order, Oct. 6, 1998). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not."

Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant stated that he eventually received a level three decision on December 16 or 17, 1998, and presented an envelope from Respondent, addressed to him, postmarked December 15, 1998. Grievant argues that the envelope establishes the decision was mailed well beyond the five days in which Respondent was required to issue the decision, and therefore, he prevails by default.

In response, Respondent offered the testimony of Melissa Young, Office Assistant II. Ms. Young stated that Todd Chafin, the level three hearing officer, gave her the decision to mail the same day it was dated, November 25, 1998. She clearly recalledplacing the document in the Statehouse mailroom on that same date. A photocopy of a postage label from the mailroom date stamped November 25, 1998, was placed into evidence to support this testimony. Ms. Young admitted that she had incorrectly addressed the envelope to Grievant's previous home address in Gerrardstown, West Virginia. Grievant had moved to Inwood, West Virginia in July 1998, and a change of address form was in his personnel file; however, Ms. Young stated that it was behind another document and she did not notice it at the time. When she learned that she had sent the decision to the wrong address, a second copy was mailed on December 15, 1998.

The photocopied postmark of November 25, 1998, does not include an address label, and is not supportive of Respondent's claim. However, the returned envelope from the first mailing, establishes that the decision was mailed, albeit to the wrong address, by at least November 30, 1998. (See footnote 4) W. Va. Code §29-6A-2(c) defines “days” as “working days exclusive of Saturday, Sunday or official holidays.” W. Va. Code §29-6A-4(c) requires the chief administrator or his designee to “issue a written decision affirming, modifying or reversing the level two decision within five days of such hearing.” W. Va. Code §29-6A-3(I) states that the decision is to “be transmitted to the grievant and any representative named in the grievance within the time prescribed.” The grievance procedure does not speak to when the decision must be received by a grievant. Harmon, supra. In the present matter, excluding two holidays and two weekend days, even if the decision is not considered issued until November 30, 1998, it was transmitted to the Grievant within five working days following the hearing.

Unfortunately, the decision was mailed to Grievant's previous address, further delaying delivery to him. Ms. Young admitted that Grievant's new address was in his personnel file but she had not seen it because it was behind another document. Grievant does not assert that Ms. Young's action was an intentional delay, and it appears that she corrected her mistake on the day it was brought to her attention. While such errors are annoying to the individuals involved, they do reasonably occur and are considered excusable. Because the decision must be issued, but not necessarily received by the Grievant within five days, Respondent was in compliance with the statutory timelines, and no default occurred.

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 four, and the parties are directed to advise this office by February 5, 1999, of atleast three mutually agreed upon dates on which to schedule an evidentiary hearing. The Grievance Board does not consider this Order to be a final order or decision which is appealable to circuit court under the provisions of W. Va. Code §§29-6A-7 or 29-5-4.

DATE: January 25, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

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: 2

The education employees grievance procedure provides as follows regarding default at W. Va. Code §18-29-3(a): 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 directlyas a result of sickness or illness, the grievant shall prevail by default. Within five days of such 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 that presumption. If the

examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

Footnote: 3

If the respondent is the party appealing to level four, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no default occurred, due to the presumption set forth in W. Va. Code §29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

Footnote: 4

The returned envelope was postmarked November 30, 1998. Mr. Chafin suggested that November 26 and 27 were Thanksgiving holidays, November 28 and 29 were Saturday and Sunday, and that the decision may not have been sent to the U.S. Post Office until the following Monday, November 30, 1998.