ELI R. BELL,

Grievant,

v. **Docket No. 99-CORR-054D**

NORTHERN REGIONAL JAIL
& CORRECTIONAL FACILITY,

Respondent.

ORDER GRANTING DEFAULT

On February 4, 1999, Eli Bell (Grievant) submitted an appeal to level four of the grievance procedure, alleging that Respondent had failed to schedule a level two hearing within the time lines set forth in W. Va. Code § 29-6A-4. He requests that he be granted judgment by default pursuant to the provisions of W. Va. Code § 29-6A-3.

On March 26, 1999, a Level IV hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Wheeling, West Virginia. Grievant represented himself, and Respondent was represented by counsel, Charles Houdyshell. The parties agreed that the undersigned would address the sole issue of whether Respondent is in default, reserving the question of whether the remedy sought by Grievant is contrary to law or clearly wrong. The parties presented oral arguments, waiving written arguments, and this matter became mature for decision at the conclusion of the hearing.

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. On January 4, 1999, Grievant filed a level one grievance, alleging entitlement to back pay as

a result of his promotion to sergeant. A level one conference was held on January 5, 1999, and Grievant received a written decision denying the grievance on the same day.

2. Grievant appealed to level two on January 12, 1999, filing his appeal with Warden Evelyn Seifert's secretary.

3. Grievant's level two appeal was misplaced by Warden Seifert's office. After receiving no notification of a level two meeting, on January 25, 1999, Grievant inquired ofthe warden's office when his level two conference would be held.

4. After Grievant inquired regarding his level two conference, a meeting was scheduled by Warden Seifert for January 26, 1999.

5. During the level two conference on January 26, Grievant mentioned to Warden Seifert that she had not scheduled the meeting in a timely manner.

6. Grievant filed a notification of default with Warden Seifert on February 1, 1999.

7. Grievant received a written level two decision after he filed a notice of default.

Discussion

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 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.

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, the grievant wins and Respondent may request a ruling at Level IV regarding whether the relief requested should be granted. If there was no default, the grievant may proceed to the next level of the grievance procedure. Respondent contends 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. 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 terms of the statute, Grievant bears the burden of establishing such default by a preponderance of the evidence.

The undisputed facts in this case establish that a level two conference was not held until ten working days after Grievant appealed to level two. W.Va. Code § 29-6A-4(b) provides as follows regarding when Respondent must act at Level II:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

Accordingly, Warden Seifert was required to conduct the level two conference within five days of January 12, 1999, “unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud.” While Warden Seifert testified at level four that Grievant's level two appeal had been “misplaced,” she did not explain what steps were taken in order to locate it, or, for that matter, whether or not it ever was located, or where or when it was found.

Excusable neglect may be found where events arise which are outside the defaulting party's

control, and contribute to the failure to act within the specified time limits. See Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). However, simple inadvertence or a mistake regarding the contents of the procedural rule will not suffice to excuse noncompliance with time limits. See White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey v. Workman's Comp. Comm'r, 170 W. Va. 771, 296 S.E. 2d 901 (1982), n.8.

Respondent has provided no evidence to support a finding that it was unable to respond at level two due to excusable neglect or any of the other reasons cited in the statute. In fact, the only defense it has offered is that the level two conference was held within ten days of the Grievant's appeal, so no default finding should be made. Respondent has provided no legal basis for this contention, and it is without merit. Respondent has not shown any legitimate excuse for its untimely response.

Respondent has also alleged that Grievant waived his right to assert a default claim, because he did not raise it until after the level two conference was held. However, this Grievance Board has held that an employee is allowed to raise a default claim, so long as he raises it as soon as he becomes aware of the default and submits the claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 26, 1997), aff'd Harmon v. Fayette County Board of Education, No. 25323, March 12, 1999 (W. Va. S. Ct.). This rule does not prohibit a finding of default in this case. Grievant did, indeed, raise the default issue before and during the level two conference, although he chose to go forward with the level two conference. He filed a written notice of default on February 1, 1999, before he received the level two written decision. Warden Seifert testified at level four that she “believed” she prepared her level two decision the same day as the conference, but she did not know exactly when it was typed or delivered to Grievant. Accordingly, Respondent has failed to establish that the level two response was received before Grievant's notification of default.

Therefore, it is hereby determined Respondent is in default in regard to this grievance regarding back pay, and Respondent must proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2) that the remedy sought is contrary to law or clearly wrong. Accordingly, a Level IV hearing will be scheduled to provide the parties an opportunity to present evidence on the issue of whether the remedy Grievant has obtained by default is clearly wrong or contrary to law.

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. Grievant established, by a preponderance of the evidence, that Respondent failed to schedule a timely Level II conference on this grievance. Respondent failed to demonstrate that such failure was a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud which precluded it from scheduling a timely conference at Level II of the grievance procedure for state employees. Id.

4. Grievant did not waive his right to seek relief by default in this case.

Accordingly, Grievant's request for a determination of default 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. **The parties are directed to confer with each other and inform this office by April 23, 1999, of at least three potential dates upon which they are available for a level four 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 29A-5-4.

Date: April 14, 1999 _____

DENISE M. SPATAFORE

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).