**ALLEN J. CODY,**

**Grievant,**

**v v.**

**Docket No. 99-DJS-190D**

**DIVISION OF JUVENILE SERVICES,**

**Respondent.**

**D E F A U L T O R D E R**

Grievant, Allen J. Cody, employed by the Division of Juvenile Services (Respondent) as a Recreation Specialist at the West Virginia Industrial Home for Youth (WVIHY), initiated a grievance, apparently at level two, on March 10, 1999, in which he alleged, "[s]ince my return as Rec.Spec. I have been harassed by my supervisor; Ms. Plumley. And for the second complaint, I have been working out of my classification and forced to do duties not pertaining to my job description." For relief, Grievant requested "[b]ack pay and interest for working out of classification; and the harassment seized [sic]." The grievance was denied by decision dated March 22, 1999, although the date was evidently an error since Grievant appealed to level three on March 21, 1999. An evidentiary hearing was conducted at level three on April 29, 1999, and a decision was subsequently issued on May 13, 1999. Grievant filed a claim for default with the Grievance Board on May 12, 1999, and a hearing on that issue was conducted on June 13, 1999, at which time Grievant was represented by Jack Ferrell of CWA, and Respondent was represented by C. Scott McKinney, Assistant Attorney General. The matter became mature for decision on July 23, 1999, the date by which Grievant's representative was to advise the undersigned whether there was a discrepancy between the level three transcript and tapes of the hearing. The following findings of fact pertinent to the resolution of this default claim have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the level four hearing.

Findings of Fact

1. Grievant is employed by the Division of Juvenile Services as a Recreation Specialist at the

WVIHY.

2. Grievant initiated these proceedings at level two on March 10, 1999.

3. The grievance was denied at level two on or about March 21, 1999, and Grievant advanced his appeal to level three on the same date.

4. An evidentiary hearing was conducted at level three on April 29, 1999.

5. At the conclusion of the hearing, Grievant's representative twice agreed that a decision could be issued within five days of the hearing evaluator's receipt of the transcript.

6. The hearing evaluator received the transcript on May 11, 1999.

7. On May 12, 1999, Grievant filed a claim for default with his employer and the Grievance Board.

8. A level three decision was issued by the hearing evaluator on May 13, 1999.

9. By letter dated May 17, 1999, and received by Grievant on that date, Deputy Director Ivin Lee notified Grievant that the recommended decision was accepted, and his grievance denied.

Discussion

W. Va. Code §29-6A-3(a) provides in pertinent part:(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.

If a default occurs, the grievant wins and Respondent may request a ruling at level four 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. 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 three decision was not issued until ten workings days after the level three hearing. W. Va. Code §29-6A-4(c) requires that a level three decision be issued within five days of the hearing.

Grievant argues that the statutory language is mandatory, and that Respondent's delay clearly constitutes a default. Respondent denies that a default occurred because atthe conclusion of the hearing Grievant's representative agreed that a decision could be issued within five days of the hearing evaluator's receipt of the transcript. The evaluator represented in his decision that the transcript was received on May 11, 1999.

Grievant and his representative assert that they did not agree, or did not remember agreeing, to waive the time lines, and/or, that they were not advised that production of the transcript would require longer than the five working days in which the decision was to be issued.

The level three transcript states in pertinent part:

HEARING EVALUATOR WRIGHT: I usually like to give _ make a decision in a case within five days of my receipt of the transcript of the proceeding. Is that agreeable to you, Mr. Ferrell?

MR. FERRELL: Yes, sir. I'd also like to have a copy of the Third Level transcript.

[Following some discussion with the court reporter regarding her anticipated date of completion.]

HEARING EVALUATOR WRIGHT: Well, let's just say five working days from my receipt of the transcript.

MR. FERRELL: That will be fine.

The level three transcript was produced by a certified court reporter and is accepted as an accurate account of the level three proceedings. Mr. Ferrell requested, and Respondent was directed to provide him with, copies of the tapes of the proceedings, for comparison. Although it appears their production may have taken longer than anticipated at hearing, as of the date of this order, Mr. Ferrell has not advised the undersigned of anydiscrepancies. Any misconceptions that the transcript would be produced and the decision issued within five days of the hearing, is inconsistent with the conversation cited above.

Both the grievance evaluator's decision and Ms. Lee's letter were issued within five workings days of the evaluator's receipt of the transcript. Therefore, it is determined that Respondent did not default in producing a level three decision, and a level four hearing will be scheduled to provide the parties an opportunity to present evidence on the merits of the grievance.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

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." 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.

3. Grievant has failed to prove that Respondent did not issue a level three decision within the agreed upon time lines.

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. The parties are directed to confer with each other and inform this office byAugust 13, 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: August 3, 1999 _____ SUE KELLER

SENIOR ADMINISTRATIVE LAW J UDGE