PETER SAUCHUCK,

Grievant,

v. **Docket No. 99-PEDTA-297D**

PARKWAYS ECONOMIC DEVELOPMENT

AND TOURISM AUTHORITY,

Respondent.

ORDER DENYING DEFAULT

On or about May 27, 1999, Grievant Peter Sauchuck filed a grievance against Respondent Parkways Economic Development and Tourism Authority ("Parkways"), alleging differential treatment regarding his wages and benefits. Grievant's supervisor responded on June 4, 1999, denying the grievance at Level I. Grievant appealed to Level II on June 8, 1999. A Level II conference was held on June 16, 1999, with Grievant, his representative, Boyd Lilly, his second level supervisor, Rick Deeds, and Carrie Roache, Director of Human Resources, in attendance. On or about July 19, 1999, Grievant notified Respondent it was in default. Respondent appealed the default claim to Level IV on July 22, 1999.

After a continuance for good cause shown, a Level IV hearing was held on November 5, 1999, solely for the purpose of determining whether a default had occurred at Level II. Grievant was represented by Boyd Lilly and Richard Patterson,and Respondent was represented by A. David Abrams, Esquire. This matter became mature for decision upon receipt of the last of the parties' written arguments, on December 2, 1999.

The default provision for state employees is found in W. Va. Code § 29-6A- 3(a), which 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.

Grievant's claim of default is based upon his assertion that the Level II decision was not issued and transmitted to him within five days of the Level II conference. 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. Respondent argued it attempted, in good faith, to comply with the procedural requirements of the grievance procedure, and if Grievant did not receive the Level II decision in a timely fashion, it should be excused from the default claim, as this failure was due to excusable neglect.

The burden of proof is upon the Respondent claiming no default has occurred, or asserting the affirmative defense of excusable neglect, to prove the same by a preponderance of the evidence, 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, Docket No. 97-BOD-483 (May 14, 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. Dep't 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's claim of default is based upon his assertion that the Level II decision was not issued and transmitted to him within five working days of the Level II conference, as he claims he did not receive the decision until after the default notice was given. The default provisions are triggered by the failure to "issue a written decision upon the appeal within five days of the conference." W. Va. Code § 29-6A- 4(b) (emphasis added). W. Va. Code § 29-6A-3(i) states that the decision is to be "transmitted" to the grievant within the timelines set forth in the statute. The grievance procedure does not speak to when the decision must be received by a grievant. Grievant did not have to receive the Level II decision within five days; it hadto be issued and transmitted to him within five days. Harmon v. Division of Corrections, Order, Docket No. 98-CORR-284 (Oct. 6, 1998). In this case, the

burden is upon Respondent to demonstrate that the Level II decision was issued and transmitted to Grievant by no later than June 24, 1999.

Mr. Deeds testified he typed the Level II decision on his computer on June 17, 1999. He testified he placed the written decision in a pink interdepartmental envelope, sealed it with tape, and put Grievant's name on it. He stated he then took this envelope to the main mailroom at Beckley South, and deposited it in the mailbox for the utility shop, between 4:00 and 6:00 p.m., on June 17, 1999.

Grievant works in the utility shop, in the same complex as Mr. Deeds, about 150 feet away. Grievant has a mailbox in the utility shop, but not in the main mailroom. About 12 people work in the utility shop. Someone from the utility shop goes to the main mailroom to pick up the mail for that section, and it is then distributed to the employees' boxes in the utility shop. Mr. Deeds stated any Parkways employee would have access to the mailrooms.

Mr. Deeds explained that the interdepartmental mail is for the purpose of sending and receiving work related correspondence. He testified that Parkways' interdepartmental mail is reliable, although occasionally a piece of mail is lost. It was his experience, however, that when a piece of mail is lost, it usually shows up in another employee's mailbox eventually. He stated it is his practice to use interdepartmental mail to transmit grievance decisions, and he has used interdepartmental mail to forward Level I or II decisions in 25 to 30 grievances, ormore, without a problem. He stated grievants likewise use interdepartmental mail to forward grievance forms to him, and it is also used to distribute pay checks to employees. He explained that in order to have a piece of mail sent certified, he has to fill out all the paperwork, and it then goes to the Charleston headquarters to be sent out.

Mr. Deeds acknowledged that it was his responsibility to see that a grievant receives his decision. However, he stated he has never before received a complaint from an employee that he has not received his response through the interdepartmental mail, and he did not check with Grievant to make sure he received the decision, as it is not his practice to do so.

Mr. Deeds stated he learned on July 22, 1999, from Parkways' attorney, that Grievant was claiming default. Even though the default claim does not identify the basis for the claim, Mr. Deeds stated the attorney asked him to make two copies of his Level II decision to send to Grievant, sending one by certified mail, and one by interdepartmental mail, and he did so. Although Grievant questioned how Mr. Deeds knew the default claim was based upon an assertion that Grievant did not receive the Level II decision, there is no indication that it was Mr. Deeds who suggested Grievant did not receive

the decision. Grievant received the decision by certified mail on July 29, 1999. It appears that he also received the second transmittal of the decision by interdepartmental mail.

The determination of whether the decision was timely issued is entirely dependent upon the credibility of Mr. Deeds. The undersigned finds Mr. Deeds to bea credible witness. In assessing the credibility of witnesses,

> some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). Mr. Deeds' testimony was straightforward. He explained what he did with the decision, and did not change his story. He frankly acknowledged that interdepartmental mail is reliable, and if a piece of mail is lost, it normally shows up at some point. He explained he had responded to many grievances, and responded to this one the same way he always does, and this was the only time there has been a problem.

His testimony was further supported by information printed from his computer which showed the decision was modified on June 17, 1999. While Grievant presented testimony that on some computers, this date can be manually changed, there was no evidence that this had been done here, and Mr. Deeds' testimony that he did not know how to make such manual adjustments was very credible.

Finally, Mr. Deeds' testimony is plausible. Mail gets lost. This mail could have been dropped and lost, or placed in the wrong mailbox and discarded by an uncaring employee. Further, Grievant did not testify, so the undersigned cannot evaluate hiscredibility on the issue of whether he received the decision.

The undersigned concludes Respondent has proven Mr. Deeds wrote the Level II decision and placed it in interdepartmental mail to Grievant on June 17, 1999. It was issued and transmitted in a timely manner. The statute does not require the grievance evaluator to make sure the grievant receives the decision, however, it surely would not hurt either party to make such contact.

Grievant did not argue it was improper to use interdepartmental mail to transmit the decision, and

in fact, agreed that Parkways' interdepartmental mail was reliable. Thus, as the decision was timely issued and transmitted, the statutory defense of excusable neglect need not be addressed.

The following findings of fact are derived from the record developed at the Level IV hearing.

Findings of Fact

1. This grievance was filed on or about May 27, 1999, by Grievant Peter Sauchuck against Respondent Parkways Economic Development and Tourism Authority ("Parkways"). Grievant's supervisor responded on June 4, 1999, denying the grievance at Level I.

2. Grievant appealed to Level II on June 8, 1999. A Level II conference was held on June 16, 1999, with Grievant, his representative, Boyd Lilly, his second level supervisor, Rick Deeds, Facilities Manager, and Carrie Roache, Director of Human Resources, in attendance.

3. Mr. Deeds typed the Level II decision on June 17, 1999. He placed itin an interdepartmental mail envelope addressed to Grievant, and deposited it in the interdepartmental mailbox for the utility shop in the main mailroom at Beckley South on that same date.

4. Grievant has a mailbox at the utility shop. Mail deposited in the utility shop mailbox is picked up and distributed to individual mailboxes in the utility shop.

5. Mr. Deeds' practice is to use interdepartmental mail to deliver grievance decisions. He also receives grievances via interdepartmental mail. He has never had a problem with interdepartmental mail before.

In addition, 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. Once a grievance progresses to Level II, a Level II conference must be held by the administrator or his designee within five working days of the receipt of the appeal, and a written decision must be issued and transmitted to the grievant within five working days of the Level II conference. W. Va. Code § 29-6A-4(b).

3. The burden of proof is on a respondent appealing a claim of default to Level IV to prove no default occurred, or that it has a statutory excuse for noncompliance with the statutory timelines. See Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998). 4. Respondent proved the Level II response was issued and transmitted to Grievant within five working days of the Level II conference, as is required by the grievance procedure for state employees.

Accordingly, the default claim is **DENIED**. This matter should be, and the same hereby is, **ORDERED REMANDED TO LEVEL III** of the grievance procedure for state employees for proper adjudication. This matter is **ORDERED DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 14, 1999