TONY PENNINGTON,

Grievant,

v.

Docket No. 01-CORR-011D

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

DEFAULT DECISION

Tony Pennington (Grievant) is employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer with the rank of corporal at the Anthony Correctional Center (ACC). He grieves CORR's failure to promote him to the rank of sergeant. Grievant claimed a default by CORR at Level II.

By letter dated January 9, 2001, Grievant appealed his default claim to Level IV. A Level IV Default hearing was held on February 2, 2001, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by John S. Toth, and CORR was represented by Leslie Tyree, Esq. An Order Granting Default, Pennington v. W. Va. Div. of Corrections/Anthony Correctional Center,Docket No. 01-CORR-011D, was issued by the undersigned Administrative Law Judge on February 13, 2001.

As noted in that Order, CORR, within five days of the receipt of that written Order Granting Default, could have requested a Level IV hearing to present evidence that the remedy sought by Grievant, promotion to sergeant with all back pay, was contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2). CORR received the Order Granting Default in this grievance on or about February 15, 2001, assuming that inter-office mail took two days to deliver it from the Grievance Board's

Charleston office to the Capitol Complex. CORR did not request such a hearing, See Hickman v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 98-CORR-314D2 (May 19, 1999), and this second-stage default claim first became mature for decision at the close of business on February 23, 2001. (See footnote 1) By letter of February 23, 2001, Grievant wrote that CORR had not asked for a Level IV hearing during the five day period set forth in W. Va. Code § 29-6A-3(a)(2), and requested that an Decision issue awarding the relief he sought.

However, by letter of February 26, 2001, from CORR's counsel to Jack Ferrell of the Communications Workers of America, CORR's counsel claimed that she had contacted the undersigned to request a hearing to show that the remedy sought by Grievant was contrary to law or clearly wrong. (See footnote 2) Although the undersigned had not been contacted by CORR'scounsel, in the interest of fairness and full disclosure this default claim was placed in abeyance and, by letter of March 8, 2001, the undersigned gave CORR five days to request a hearing on the issue of whether it had timely requested the above-described hearing. CORR received this letter on March 9, 2001, as evidenced by a return receipt card signed by Susanna Hall and stamped with that date. Accordingly, this second-stage default claim became finally mature for decision at the close of business on March 16, 2001. (See footnote 3)

By letter of March 12, 2001, CORR requested a hearing to show that the remedy sought by Grievant was contrary to law or clearly wrong, but did not request a hearing on the issue of whether it had timely requested such a hearing. CORR failed to request a Level IV hearing to show that the remedy sought by Grievant was contrary to law or clearly wrong within the five day period set forth in W. Va. Code § 29-6A-3(a)(2), which ended on February 23, 2001, but instead requested such a hearing 11 working days (17 calendar days) later.

Therefore, it is determined that Grievant has prevailed by default in this grievance. Because it has been presumed, in accordance with W. Va. Code § 29-6A-3(a)(2), that Grievant prevailed on the merits of his grievance, this grievance is **GRANTED**, and Respondent CORR is Ordered to promote Grievant to the rank of sergeant, effective November 15, 2000, with all back pay, with interest, and seniority he would have received as a sergeant. 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. Any 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, and should 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.

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ANDREW MAIER

Administrative Law Judge

Dated: March 16, 2001

Footnote: 1

Saturday, February 17, Sunday, February 18, and Monday, February 19, 2001, a state holiday, were not counted in this computation.

Footnote: 2 *Although this letter stated that it had been copied to the undersigned, no such copy was ever received from CORR, as explained in a certified letter to the parties dated March 8, 2001.*

Footnote: 3 *Saturday, March 10, and Sunday, March 11, 2001, were not counted in this computation.*