TONY PENNINGTON,

Grievant,

v.

Docket No. 01-CORR-011D

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER GRANTING DEFAULT

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 claims a default by CORR at Level II.

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. The parties were given until February 8, 2001, to submit additional evidence and argument, (See footnote 1) and this default claim became mature for decision on that date. The following Findings ofFact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by CORR as a Correctional Officer with the rank of corporal at ACC.
2. Grievant filed his grievance on November 15, 2000.
3. After three continuances, Grievant's Level II hearing was held on December 27, 2000.
4. ACC denied this grievance at Level II, by a letter dated January 4, 2001, postmarked

January 5, 2001, and received by Grievant the next day.

5. On January 9, 2001, Grievant appealed his default claim to Level IV.

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature 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 falls 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, orclearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

In addition, it added the following language to W.Va. Code § 29-6A-5(a): “the grievance board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure.”

Grievant alleges that he should have been promoted to sergeant, and claims he prevailed by default at Level II, because CORR failed to comply with Level II time lines. CORR did not specify whether its alleged failure to timely respond at Level II was the result of sickness, injury, excusable neglect, unavoidable cause, or fraud.

At Level II, the administrator or his or her designee shall hold a conference within five days of receiving an appeal. The administrator or his or her designee shall issue a written decision upon the appeal within five days of the Level II conference. W. Va. Code § 29-6A-4(b).

If a default has occurred, a grievant is presumed to have prevailed on the merits of the grievance, and CORR may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, the grievant may proceed to the next level of the grievance procedure. The 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 claims he prevailed by default under the terms of the statute, he bears the burden of establishing such default by a preponderance of the evidence. Spencer v. Dep't of Health & Human Resources/Welch Emergency Hospital, Docket No. 99-HHR-113D (June 2, 1999).

A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The facts in this matter are undisputed. Grievant had his Level II conference on December 27, 2000. ACC denied his grievance at Level II, by a letter dated January 4, 2001, postmarked January 5, 2001, and received by Grievant the next day.

In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday, or official holidays. Therefore, Saturday, December 30, and Sunday, December 31, 2000, are excluded, as is January 1, 2001, an official holiday.

This Grievance Board has traditionally relied upon the postmark date in determining when a decision was transmitted to a grievant. See Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Wensell v. W. Va. Regional Jail & Correctional Facility Authority, Docket No. 98-RJA-490D (Jan. 25, 1999). Accordingly, CORR did not issue Grievant's Level II decision until six work days after he filed his grievance at Level II. Thus, it becomes CORR's responsibility to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level II in compliance with W. Va. Code § 29-6A-4(a) "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud" as provided by W. Va. Code § 29-6A-3(a)(2).

However, CORR did not present any evidence or advance any argument at Level IV to excuse its failure to provide Grievant a timely decision at Level II. Accordingly, CORR has failed to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level I as a result of sickness, injury, excusable neglect, unavoidable cause or fraud.

Therefore, it is determined that CORR is in default in regard to this grievance, and may proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2) that the remedy sought by Grievant is contrary to law or clearly wrong. CORR may request a Level IV hearing, within five days of the receipt of this Order Granting Default, to present evidence and/or argument on this issue.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by W. Va. Code §29-6A-4, unless prevented from doing so directly as a result of sickness, injury, excusable neglect,unavoidable cause or fraud, the grievant shall prevail by default. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a Level IV hearing examiner for the purpose of showing that the remedy received by the prevailing party is contrary to law or clearly wrong. W. Va. Code §29-6A-3(a)(2).

2. At Level II, the administrator or his or her designee shall hold a conference

within five days of receiving an appeal. The administrator or his or her designee shall issue a written decision upon the appeal within five days of the Level II conference. W. Va. Code § 29-6A-4(b).

3. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), he must establish such default by a preponderance of evidence. Once 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. Spencer v. Dep't of Health & Human Resources/Welch Emergency Hospital, Docket No. 99-HHR-113D (June 2, 1999).

4. Grievant established, by a preponderance of the evidence, that a timely response was not provided by CORR/ACC at Level II.

5. CORR/ACC failed to establish, by a preponderance of the evidence, that it was prevented from providing a timely response at Level II by sickness, injury, excusable neglect, unavoidable cause or fraud.

Accordingly, Grievant's request for a finding of default at Level II under W. Va. Code § 29-6A-3(a)(2) is **GRANTED,** and Respondent may proceed to show that the remedysought by Grievant is contrary to law or clearly wrong. Respondent may request a Level IV hearing, within five days of the receipt of this Order Granting Default, to present evidence and/or argument on this issue. If Respondent does not request such a hearing, an order will be entered granting the relief requested.

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ANDREW MAIER

Administrative Law Judge

Dated: February 13, 2001

Footnote: 1 *Both parties agreed that CORR would have until this date to submit an affidavit from a witness at ACC. This affidavit was not submitted.*