JOHN ROBINSON,

Grievant,

v.

DOCKET NO. 02-CORR-197D

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

ORDER DENYING DEFAULT

Grievant, John Robinson filed a motion for default at level four on July 8, 2002, against his employer, the West Virginia Division of Corrections ("Corrections"), claiming it defaulted on his grievance at level two. A hearing was held on the default issue in the Grievance Board's Beckley, West Virginia, office, on August 20, 2002. Grievant was represented by Dennis Brackman, and Corrections was represented by Heather Connelly, Esq., Assistant Attorney General. This matter became mature for decision at the close of the hearing.

The material facts in this matter are not in dispute, and are set forth in the following findings.

FINDINGS OF FACT

1. Grievant is employed by Corrections at the Anthony Correctional Facility. He filed a grievance against Corrections on June 18, 2002, and received a level one response on June 19, 2002. 2. On June 20, 2002, Grievant placed his level two appeal in the Warden's mail box, located in the administrative area of the institution. The Warden's mailbox is locked, and the only individuals with keys are the Deputy Warden and the Warden's secretary.

3. All of the administrative staff (approximately 6 individuals) have locked mailboxes. The reason the mailboxes are locked are because of the nature of the institution, and the confidential and sensitive materials which are transmitted.

4. June 20, 2002 was an official West Virginia holiday.

5. June 21, 2002, was a Friday. The Warden, Deputy Warden, and Warden's secretary were all off on annual leave that day. It is unknown who the Warden's designee was during his absence that day.

6. The Warden's secretary, Margaret Fraley, designated a new Office Assistant as her designee. Ms. Fraley did not give her designee the key to the Warden's mailbox.

7. Ms. Fraley returned to work on Monday, June 24, 2002, opened the Warden's mailbox, and stamped in the mail, which was her usual practice. She stamped in Grievant's appeal on June 24, 2002.

8. Warden Scott Patterson notified Grievant that a level two conference had been scheduled for July 1, 2002.

9. Grievant's level two conference was held on July 1, 2002.

DISCUSSION

The issue of default in grievances filed by state employees is within the jurisdiction of the Grievance Board. W. Va. Code § 29-6A-3 states the following:

> (a)(1) A grievance must be filed within the times specified in section four [§ 29-6A-4] of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.
>
> (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 a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dept. of Health and Human Resources, Docket No.

98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*.

This Grievance Board has clarified in its procedural rules the method by which parties may seek default and subsequent relief with the Board at 156 C.S.R. 1.5.1.

> 5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file theclaim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether the relief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

Grievant claims he has prevailed by default because Corrections failed to schedule a level two hearing on his grievance within the statutory time frames. Specifically, with regard to proceedings at level two under the grievance procedure for state employees, W. Va. Code § 29-6A-4(b) provides as follows:

> 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.

There is no dispute that Grievant's appeal was stamped received by Ms. Fraley on Monday, June 24, 2002. The level two conference was scheduled and held on July 1, 2002, five working days from the date of the receipt of the appeal. However, Grievant asserts that his appeal should have been received on Friday, June 21, 2002, which would make the July 1, 2002, conference date late by one day, resulting in a default.

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" meansworking days exclusive of Saturday, Sunday or official holidays. Thursday, June 20, 2002, was West Virginia, an official holiday. In computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W.Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E.2d 362 (1911). See also W.Va. R. Civ. P. 6(a).

As June 20, 2002, was an official holiday and no recognized state action can occur, the fact that Grievant dropped his grievance into the Warden's mailbox on that day becomes irrelevant in counting the days for a response. Because that day must be skipped, Grievant did not actually submit his grievance appeal to the Warden until Friday, June 21, 2002, and that day is also not counted. The Warden's secretary received the appeal the next Monday, June 24, 2002, and the level two conference was held within the five-day statutory time period.

CONCLUSIONS OF LAW

1. "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." W. Va. Code § 29-6A-3(a). 2. W. Va. Code § 29-6A-4(b) provides as follows:

> 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.

3. 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. Thursday, June 20, 2002, was West Virginia, an official holiday. In computing the time period in which an act is to be done, the day on which the appeal was

submitted is excluded. See W.Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E.2d 362 (1911). See also W.Va. R. Civ. P. 6(a).

4. Grievant has failed to establish by a preponderance of the evidence that a default occurred in Corrections' handling of his level two appeal.

Accordingly, this default is **DENIED**. This grievance is remanded to Level II of the grievance procedure.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 5, 2002