ROY HARMON,

Grievant,

v. **DOCKET NO. 02-DOH-194D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On June 25, 2002, Roy Harmon filed a claim for relief by default, alleging the Level II time limits were not met in his grievance. A Level IV hearing on Grievant's default claim was held August 27, 2002, at the Grievance Board's Charleston office, where Grievant was represented by Kevin Church and Respondent was represented by Barbara Baxter, Esq. The parties agreed to file their proposed findings of fact and conclusions of law by October 4, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant filed a grievance at Level I on or about May 8, 2002, claiming he should have been awarded a job that he bid on.

2. That same day, Grievant and his representative met for a Level I conference with Art Hodges, Grievant's immediate supervisor. Mr. Hodges told Grievant the matter was “out of his jurisdiction” and Grievant would have to go to Level II, but he would meet withsome other people and then give Grievant a decision. This was the first grievance Mr. Hodges had handled in his 27 years with Respondent.

3. On May 9, 2002, Grievant was sent a letter from Buddy Campbell, Mercer County Highway Administrator, stating in its entirety: “Due to flooding the hearing date for level-1 grievance has been extended by one month.” Grievant's Exhibit No. 2.

4. Grievant asked Mr. Hodges about the letter, and Mr. Hodges did not know anything about it. Mr. Hodges never requested a continuance of the hearing or an extension of the time by which a decision must be rendered.

5. Mr. Hodges was involved in work on flooding in the district, but Grievant was not. On or about May 2, 2002, there was significant flooding in McDowell County, and the Governor declared a state of emergency. For about three weeks after that, Mr. Hodges was working up to 16 hours, seven days per week, on flood relief. After that, he scaled back to only six days per week, from dawn to dusk.

6. After the Level I conference, Mr. Hodges called Christine West, an Administrative Services Manager in the District office about the position over which the grievance was filed. He told her they had already met on the grievance, and she said he had until June 9, 2002 to issue a decision. On May 9, 2002, Ms. West sent a letter to Grievant informing him the job in question had been filled by another applicant. Grievant's Exhibit No. 6.

7. Mr. Hodges met with Grievant and his representative again on June 5, 2002, at about 6:00 a.m. before he went back to McDowell County to work on the flood cleanup. Before he left, he dictated a one-paragraph decision stating, he was “unable to directly help with this occurrence,” and suggesting Grievant appeal to Level II. He met with Grievant again on or about June 7, 2002, and personally handed him the written decision. Grievant's ExhibitNo. 5. Grievant read the decision then, but left it on Mr. Hodges' desk. 8. Mr. Hodges continued working on flood relief up until about July 15, 2002.

9. Grievant did not appeal the Level I decision to Level II, and the Level I decision did not contain clear directions as to how and where and appeal should be filed.

DISCUSSION

On June 24, 2002, Grievant's representative (See footnote 1) filed a notice with Mercer County Highways Administrator William Bennett stating “Mr. Roy Harmon will be filing an appeal from level 1 in which know [sic] relief was found. We fill [sic] Level 1 was delayed, we [started] this Grievance in May. Mr. Harmon will also be filing a Claim for Relief by Default for the grievance filed on 05-08-02 Due to the Elapse of time.” He included a copy of his letter to the Grievance Board of the same date, which states,

> Mr[.] Roy Harmon, District 10 Princeton Interstate will be filing a Claim for Relief by Default For the Grievance he filed on 05-08-02 Due to the Elapse time in Level 2. Mr. Harmon & Floyd Ricks met with Mr Art Hodges [on] 06-05-02 to end level 1. Mr[.] Hodges took the Grievance to Mrs. Cristine West [sic]. We fill [sic] that it should of [sic] went to Mr[.] Bill Bennett, Administrator. We [feel] that Mrs[.] West has delayed this grievance from the start.

Grievant argues that the grievance procedure was violated at Level I because the decision was issued too late, and there was no mutual agreement to waive the time limits. Respondent contends Grievant's claim is that there was a default at Level II, and maintains no Level II appeal has been filed for it to default on. Further, it claims any delays in the proceedings were caused by a flood emergency in the district. Grievant's request for a default decision is somewhat confusing, in that the letter sent to the Grievance Board claims a time lapse at Level II, and the contemporaneous letter sent to Mr. Bennett claims a time lapse at Level I. It became clear at the Level IV hearing that all parties were aware that theevents at issue were those surrounding the Level I conference and decision, and Respondent was prepared to present evidence and argument related to those events.

A grievant seeking to establish that a default occurred in the grievance proceedings bears the burden of establishing the default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). However, in order to benefit from the “relief by default” provision, Grievant must raise the issue as soon as he knows that a default has occurred. *See* Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). This, Grievant did not do.

At Level I, “an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.” W. Va. Code § 29-6A-4(a). Grievant's immediate supervisor received the written grievance on May 8, 2002, but did not issue a written decision until June 7, 2002. Grievant was handed the decision in a meeting with his supervisor on that date, and did not file his notice of default until long after he had received the unfavorable decision. Whether or not Respondent had a viable excuse for its default is irrelevant. While claiming Respondent waited too long to issue its Level I decision, Grievant himself waited too long to claim relief by default.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Grievant bears the burden of establishing default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

2. A default occurs "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, unlessprevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2),

3. At Level I, "an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance." W. Va. Code § 29-6A- 4(a).

4. In order to benefit from the "relief by default" provision, Grievant must raise the issue as soon as he knows that a default has occurred. *See* Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).

5. Grievant's claim for default is untimely, given that he waited until 17 days after he received the untimely Level I response.

6. If a default has occurred, a grievant is presumed to have prevailed on the merits of the grievance, and Respondent 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. Penn-ington v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 01-CORR-011D (Mar. 16, 2001).

For the foregoing reasons, this grievance is hereby **DENIED**. Grievant may proceed to Level II of the grievance procedure by filing his appeal within five days of receiving this decision to the administrator of the grievant's work location, facility, area office or other appropriate subdivision of Respondent.

Date: October 22, 2002 _____ **M. Paul Marteney**

Administrative Law Judge

Footnote: 1

At the lower level, Grievant was represented by Floyd Ricks.