DON STUTLER,

Grievant,

v. **DOCKET NO. 02-DOH-250D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Don Stutler (Grievant) filed a grievance on or about July 26, 2002, claiming a Craftworker I position had been improperly filled by his employer, the Division of Highways (Respondent). Grievant seeks instatement into the position. On August 19, 2002, Grievant asserted Respondent had defaulted at level two, and both Grievant and Respondent requested a level four hearing to determine whether a default had occurred. In addition, Respondent requested, if it is determined a default did occur, a hearing to determine whether the relief requested is contrary to law or clearly wrong.

After several continuances, a default hearing was held in the Grievance Board's Charleston office on March 21, 2003. Grievant was represented by Joe Hill, and Respondent was represented by Barbara Baxter, Esq. The parties elected not to file proposed findings of fact and conclusions of law, so the matter became mature for decision at the close of the hearing.

On March 25, 2003, Grievant filed a motion to admit post-hearing evidence in the form of a copy of the original Grievance Form and level one decision and appeal to leveltwo. Over Respondent's objection, (See footnote 1) the same is admitted as Grievant's Exhibit No. 4, as it should be a part of the record anyway.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant filed a grievance on or about July 26, 2003, regarding a position that was filled

June 18, 2002. (See footnote 2)

2. The grievance was denied at level one on August 5, 2002, by Rodney Neal, Amma Headquarters Supervisor, who stated he did not have authority to grant the grievance.

3. The decision stated that to appeal to level two, grievant should send the original grievance form to the District Engineer within five days of receiving the decision, and provided the address for Mr. John Dawson, District Engineer.

4. After receiving the level one decision, Grievant signed the grievance form, which bears an original date stamp from the District Engineer's Office for July 29, 2002, indicating he wished to appeal the decision to level two. He believed he gave the form to Dennis King, District I Assistant District Engineer for Maintenance on July 29, 2002. 5. The grievance form submitted by Grievant after the level four default hearing bears the original signature of Grievant, is attached to the original level one decision, and has the original district engineer's office date stamp.

6. As of August 19, 2002, Respondent had not held a level two conference or otherwise responded to the grievance at level two, and Grievant claimed a default.

7. Grievant did not appeal to level two on July 29, 2002.

DISCUSSION

West Virginia Code § 29-6A-3(a) states, "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."

A grievant who claims he prevailed by default under the statute bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998); Donnelan v. Harrison County Brd. of Educ., Docket No. 02-17-003D (June 6, 2002). 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).

Grievant claimed to have appealed the level two decision on or about July 29, 2002 by signing the Grievance Form and delivering it to Mr. King. Respondent asserts it never received a level two appeal

and had no way of knowing Grievant had appealed or wished to appeal.

Grievant could not have made his appeal to level two on July 29, 2002, as he believes he did, as the level one decision was not issued until later, on August 5, 2002. Grievant's Exhibit No. 4 bears the District Engineer's Office date stamp of July 29, 2002, three days after Grievant signed it as filed at level one on July 26, 2002. This date stamp most likely shows the date Respondent received the grievance at level one. Since the level one decision was not issued until August 5, Grievant could not have appealed that decision on July 29.

Grievant also claims he appealed to level two by delivering the form to Mr. King. Even if he had he done so, he would not have been following the proper appeal instructions indicated on the level one decision. The level one decision states clearly that a level two appeal should be sent to John W. Dawson, and should include the original level one decision and grievance appeal. However, the evidence suggests this appeal was never made, as Grievant still had the grievance form, original level one decision, and appeal form with Grievant's original signature (Grievant's Exhibit No. 4) after the level four default hearing. The most likely explanation for Respondent's lack of response to Grievant's level two appeal is that Grievant never made a proper appeal.

The following conclusions of law support this discussion.

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. A grievant who claims he prevailed by default under the statute bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va.Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998); Donnelan v. Harrison County Brd. of Educ., Docket No. 02-17-003D (June 6, 2002). 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).

3. Grievant did not establish by a preponderance of the evidence that he appealed to level two,

and so failed to establish Respondent had a duty to respond within any particular time limits.

For the foregoing reasons, this request for a default determination is hereby **DENIED**. This case is remanded for further proceedings at level three, (See footnote 3) and this matter is hereby dismissed from the docket of the Grievance Board.

Date: April 15, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent objected to the admission of this exhibit "unless an additional hearing is held to allow the Division of Highways to present evidence that this undated document was not timely received by the District Engineer's office."

Footnote: 2

Respondent attempted to assert a timeliness defense at the level four default hearing, claiming the grievance was untimely filed. Since an untimely filing would not excuse an obligation to respond to the grievance, argument on this issue was not heard, although a proffer of evidence was made.

Footnote: 3

The parties indicated at the hearing that a level two decision denying the grievance was issued on September 9, 2002, after Grievant had asserted a default.