ROBERT SMITH,

Grievant,

v. **Docket No. 05-DOH-002D**

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Robert Smith ("Grievant"), employed by the Division of Highways ("DOH") in District 7, completed a level one grievance form on December 16, 2004, in which he alleged he was not afforded an interview for the position of HES2 [Highway Supervisor 2]. For relief, he requested instatement as an HES2 or a 15% pay increase, which was not to affect any other merit raises, and legal fees.

On January 6, 2005, Grievant claimed a default occurred when a level one decision was not timely issued. A hearing on the default was conducted on February 8, 2005, at which time Grievant represented himself, and DOH was represented by counsel, Barbara L. Baxter. Both parties waived their right to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the close of the hearing.

The following essential facts are undisputed by the parties.

Findings of Fact

1. Grievant has been employed by DOH in District 7 at all times pertinent to this default claim.
2. Grievant completed a level one grievance form on December 16, 2004.
3. On December 20, 2004, District Engineer Greg Clayton advised Grievant thatthe grievance must be filed with his immediate supervisor at level one.
4. Grievant placed the grievance form in the inter-office mail system, directed to his immediate supervisor, Tom Woodrum, on December 20, 2004.
5. The envelope used by Grievant was marked "Personal & Confidential." The envelope was not metered or date stamped as is standard practice.
6. Mr. Woodrum was on sick leave on December 22, and annual leave December 23.

December 24 was a holiday, followed by the weekend. Mr. Woodrum worked on December 27, 2004, but did not see the envelope on his desk. After taking annual leave on December 28, Mr. Woodrum found the grievance on his desk December 29, 2004.

7. A level one decision, stating that the relief could not be granted at that level, was issued by Mr. Woodrum on January 3, 2005.

8. Grievant received the level one decision on January 4, 2005, and filed this claim for default the following day.

Discussion

Grievant asserts the level one decision was not timely issued. Respondent argues a written level one decision was timely issued from the date the grievance was found by Mr. Woodrum on his desk. Because Grievant is claiming he prevails by default under the statute, he bears the burden of establishing such default by a preponderance of the evidence. See W. Va. Code § 29-6A-3(a)(2). grievance. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002); Board, et al. v. WVDHHR / Lakin Hosp., Docket No. 99-HHR-329D (Sep. 24, 1999). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidencewhich 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.

"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). If a default occurs, Grievant is presumed to have prevailed on the merits of the case. W. Va. Code § 29-6A- 3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if DOH can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the time lines for one of the reasons listed in W. Va. Code § 29- 6A-3(a)(2), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter; Williamson. If there is no default, Grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-3(a)(2) provides, in pertinent part:

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 hearingexaminer 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, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

W. Va. Code § 29-6A-4(a) provides that the required response at level one shall be issued within six days of the receipt of the written grievance. Accepting that Grievant placed the grievance form in inter-office mail on December 20, 2004, it would reasonably have been delivered to Mr. Woodrum on December 21, 2004. Because Mr. Woodrum was on sick leave December 22, 2004, and December 24 and 31 were holidays, they may not be counted as part of the statutory time period. Therefore, the decision was timely issued on the sixth day after receipt.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Because Grievant is claiming he prevailed by default under the statute, he bears the burden of establishing such default by a preponderance of the evidence. See W. Va. Code § 29-6A-3(a)(2). Board, et al. v. WVDHHR / Lakin Hosp., Docket No. 99- HHR-329D (Sep. 24, 1999).

2. "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).

3. A written level one response shall be issued within six days of the receipt ofthe written grievance. W. Va. Code § 29-6A-4(a).

4. Grievant received a written response to his grievance within the statutory time frames.

5. Given this set of facts, no default is found.

Accordingly, Grievant's request that a default be entered is **DENIED** . Grievant may appeal this grievance to level two if he so desires.

DATE: MARCH 7, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE