ALLEN ASH, SR.,

Grievant,

v. **Docket No. 04-DJS-409D**

DIVISION OF JUVENILE SERVICES/
INDUSTRIAL HOME FOR YOUTH,

Respondent.

ORDER DENYING DEFAULT

Allen Ash, Sr. ("Grievant") filed a notice of default claim with this Grievance Board on November 19, 2004, alleging a default occurred at level three of the grievance procedure. A hearing was held in Westover, West Virginia, regarding the default issue on February 9, 2005. Grievant represented himself, and Respondent was represented by Steven E. Dragisich, Assistant Attorney General. This matter became mature for consideration at the conclusion of the default hearing.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant initiated a grievance with his employer on September 29, 2004, regarding a promotion.

2. The grievance proceeded through levels one and two, and a level three hearing was conducted by Quewanncoii ("Que") Stephens on Wednesday, November 3, 2004.

3. Mr. Stephens gave his handwritten decision to Brenda Hoylman, paralegal, on November 8, 2004, to be typed. 4. The level three decision was signed by Mr. Stephens on Tuesday, November 9, 2004. The decision was placed in the United States mail that day, and the postmark reflects as much.

5. Grievant received the decision at his local post office on November 12, 2004.

6. November 9, 2004, was four working days after the level three hearing.

Discussion

"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). The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). At level three, W. Va. Code § 29-6A-4(c) requires that a written decision be issued within five days of the hearing. Grievant contends that this was not accomplished in this case. However, it is unclear upon what basis Grievant believes that the decision was not issued within the five- day time limit.

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. In computing the time period in which an act is to be done, the day on which the appeal was submitted isexcluded. 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). Accordingly, because November 6 and 7 were the weekend, November 9 was four working days after November 3.

In addition, the statute only requires the employer to "issue" a Level III decision within the applicable time limit. Therefore, when the decision was signed and placed in the mail on November 9, 2004, the employer completed all actions necessary to meet the statutory time limit. W. Va. Code § 29-6A-3(i) provides that the decision is to be "transmitted to the grievant and any representative named in the grievance within the time prescribed." The statute makes no reference to when the decision must be received by the grievant, and this Grievance Board has determined that the controlling event is when the decision is effectively transmitted to the grievant. Wensell v. W. Va. Regional Jail & Corr. Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corr., Docket No. 98-CORR-284D (Oct. 6, 1998).

Accordingly, the undersigned concludes that the level three decision was issued within the statutory five-day time requirement, and no default occurred.

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. At level three, W. Va. Code § 29-6A-4(c) requires that a written decision be issued within five days of the hearing.

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.

4. For purposes of determining whether a decision has been issued in a timely fashion, this Grievance Board has determined that the controlling event is when the decision is effectively transmitted to the grievant. Wensell v. W. Va. Regional Jail & Corr. Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98- DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corr., Docket No. 98-CORR-284D (Oct. 6, 1998).

5. Respondent issued the level three decision on the fourth working day after the level three hearing, so it was issued within the statutory five-day time limit.

Accordingly, Grievant's request for default judgment is **DENIED**. The parties are directed to confer with each other and provide the undersigned with at least three mutually agreeable dates for a level four hearing no later than **March 9, 2005.**

Date: February 28, 2005

DENISE M. SPATAFORE

Administrative Law Judge