ANTHONY MARASCIO and ROBERT DEVAUL,

Grievants,

v. Docket No. 06-DOH-207D

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Anthony Marascio and Robert DeVaul ("Grievants"), employed by the Division of Highways ("DOH"), assert that a default occurred at level three when the decision was not issued within the statutory time frame. Grievants seek the relief requested in their grievance. At the conclusion of the level three hearing on March 7, 2006, Grievants agreed to extend the deadline for a decision until May 18, 2006. Grievants subsequently agreed to DOH hearing examiner Brenda Craig Ellis' request to extend the time frame to May 31, 2006, and then until June 8, 2006. By letter dated June 15, 2006, Grievants notified DOH that a default had occurred. At the request of DOH, a hearing on the default was conducted on August 1, 2006. Grievants were present and represented themselves. DOH counsel Barbara Baxter, Esq., appeared by telephone, as did all the witnesses. Both parties declined the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature at the close of the hearing.

The following facts are derived from a preponderance of the evidence made part of the record at the default hearing.

Findings of Fact

1. Grievants have been employed by DOH, assigned to District 6, at all times pertinent to this grievance.

2. A level three hearing was concluded on March 7, 2006. 3. Grievants agreed to the hearing evaluator's request to extend the statutory five-day time limit in which a decision must be issued until May 18, 2006. The deadline was later extended to May 31 and finally, to June 8, 2006.

4. Ms. Ellis placed the decision in the mail at the main Charleston post office after 7:00 p.m. on June 8, 2006.

5. DOH uses a postage meter provided by Pitney Bowes for correspondence. The envelopes with Grievants' decision did not have a date on the postage label, and were not postmarked by the U.S. Postal Service.

6. Grievant DeVaul was given notice by the U.S. Post Office on June 10, 2006, that he had certified mail to be delivered.

Discussion

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 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).

If a default occurs, the grievant is presumed to have prevailed. 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). 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), or the remedy requested is either contrary to law or clearly wrong, Grievants will not receive the requested relief. 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). W. Va. Code § 29-6A-3(a) 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 hearing examiner 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.

Grievants argue that DOH defaulted when the level three decision was not issued by the agreed-upon due date. DOH asserts that the decision was effectively, and timely, transmitted to the Grievants on June 8, 2006, when the decision was delivered to the post office. Ms. Ellis testified that she personally had deposited the decision at the main post office at approximately 7:30 p.m. on June 8, 2006.

The Grievance Board has previously held that a decision is timely issued if placed in the mail on or before the date by which the decision is required to be made. *Cain, et al. v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-402DEF (Dec. 16, 2005), *citing Stover v. Raleigh County Bd. of Educ.*, 02-41-179 (Sept. 19, 2002). In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Ms. Ellis credibly testified that she signed and dated the certificate of service on June 8, 2006, and was ethically bound to place it in the mail that day. Her claim is supported by the

fact that Grievant DeVaul's envelope has a notice of attempted delivery on June 10, 2006. Although DOH risks having documents posted without a date returned, the U. S. Postal System was also remiss in this instance in not having postmarked thedecisions. In any case, the explanation stated by DOH was reasonable, and Grievants failed to prove that DOH defaulted at level three.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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. The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002).

3. Grievants did not meet their burden of proving that DOH defaulted by failing to timely issue a decision at level three.

Accordingly, the Grievants' request for judgment by default is DENIED. The parties are directed to provide this office, on or before August 31, 2006, with three dates they are available for a level four hearing.

DATE: August 21, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE