THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GLEN COOK,

Grievant,

v. **Docket No. 07-DNR-014D**

Sue Keller

Senior Administrative Law Judge

DIVISION OF NATURAL RESOURCES/

LAW ENFORCEMENT SECTION,

Respondent.

ORDER DENYING DEFAULT

Glen Cook ("Grievant"), employed by the Division of Natural Resources ("DNR") as a Conservation Officer, filed a Motion for Default on January 17, 2007, in which he alleged that a level two conference had not been conducted within the statutory time frame. On January 18, 2007, DNR requested a hearing on the alleged default. Chief Administrative Law Judge Paul Marteney subsequently conducted the hearing in the Grievance Board's Charleston office on March 21, 2007. Grievant appeared *pro se*, and DNR was represented by William R. Valentino, Assistant Attorney General. The grievance became mature at the conclusion of the hearing, and the matter was transferred to the undersigned on April 9, 2007, due to the impending resignation of Judge Marteney.

Synopsis

Grievant asserts a default occurred when a level two conference was not held within the required time frame. DNR maintains it did not receive the level two appeal on the date cited by Grievant, and that the conference was conducted on the fifth day after it was received. Questions of when DNR actually received the appeal, and whether the day ofreceipt is to be counted, resolved in favor of DNR and support the decision that no default occurred.

The following findings of fact are made based on the evidence made part of the record, including

the audio recording of the level four hearing, and the documents admitted as exhibits at that level.

Findings of Fact

1. Grievant has been employed by DNR as a Conservation Officer at all times pertinent to this grievance.

2. On December 16, 2006, Grievant filed a level one grievance after he was transferred to Kanawha County. A level one decision was issued on December 22, 2006.

3. Grievant filed a level two appeal by certified mail on January 18, 2007.

4. The document was delivered on December 29, 2006, at 8:04 a.m to the central mailing office of the capitol complex. All mail directed to agencies at the capitol is routed through the central mail room, then distributed to the various offices. Mail room employees are not employed by the state agencies whose mail they receive, but are employed by a separate state agency.

5. DNR date stamped the appeal as received on January 2, 2007.

6. A level two conference was conducted on January 9, 2007.

7. On January 17, 2007, Grievant filed a Motion for Default Judgment at level two.

Discussion

The burden of proof is upon a 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).

W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure. The time lines for level two require the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency to hold a conference within five days of receiving the appeal, and to issue a written decision within five days of the conference.

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.

Thus, if a default is proven, 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 Corr.*, 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 DNR can demonstrate a default has notoccurred, that 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, Grievant will not receive the requested relief.

In the present matter, Grievant took the precaution of filing his appeal by certified mail. The mail was delivered to the capitol complex where the DNR offices are located on December 29, 2006. The United States Postal Service does not deliver the mail directly to the individual offices or agencies, but leaves all state government mail at a central mailing location which then delivers the mail to the appropriate offices. This system undoubtedly has benefits, but has also been the cause of similar default claims in the past because delivery to the employer has been delayed.

Failure to receive mail, both U.S. and interdepartmental, has been viewed by this Grievance Board as unavoidable cause, defined by *Black's Law Dictionary* 792 (abr. 5th ed. 1983), as "[a] cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate. . . ." *Dilly v. W. Va. Div. of Corr.*, Docket No. 00-CORR-008D (Aug. 8, 2000); *Robinson v. W. Va. Div. of Corr.*, Docket No. 00-CORR-013D (Mar. 24, 2000); *Sauchuck, v. Parkways Economic Dev. and Tourism Auth*., Docket No. 99-PEDTA-297D (Dec. 14,1999). While it is clear central mailing received the appeal on December 29, 2006, the evidence demonstrates DNR did not receive the document until January 2, 2007.

Grievant also argued that because the appeal had been delivered before office hours on December 29, 2007, that day should have been counted as the first of the five working days in which the hearing was to be scheduled. Of course, since DNR did notreceive the appeal that day. The

record does not reveal what time of day DNR received the appeal on January 2, 2007, and it is not counted. Thus, the hearing was conducted on the fifth day after receipt of the appeal, and no default occurred. (See footnote 1)

The above-discussion will be supplemented by the following 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).

2. A level two conference must be scheduled within five working days of the date of receipt of the level two appeal. *W. Va. Code* § 29-6A-4(a).

3. Unavoidable cause is defined as "[a] cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate. . . ." *Black's Law Dictionary* 792 (abr. 5th ed. 1983).

4. Failure to receive mail, both U.S. and interdepartmental, has been viewed as unavoidable cause by this Grievance Board. *Dilly v. W. Va. Div. of Corr.*, Docket No. 00-CORR-008D (Aug. 8, 2000); *Robinson v. W. Va. Div. of Corr.*, Docket No. 00-CORR-013D (Mar. 24, 2000); *Sauchuck, v. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-297D (Dec. 14,1999).

5. Grievant has failed to prove that DNR defaulted at level two. Accordingly, Grievant's request that a default be entered is **DENIED**, and this case is REMANDED to the agency to issue a level two decision within five days of receipt of this Order.

DATE: APRIL 23, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Additionally, Grievant did not raise the issue of default until after the level two conference. In order to benefit from the "relief by default" provisions, the grieved employee must raise the default issue as soon as the employee becomes aware

of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).