TROY HARMON, JR.,

Grievant,

v. **Docket No. 98-CORR-284D**

DIVISION OF CORRECTIONS/
MT. OLIVE CORRECTIONAL COMPLEX,

Respondent.

ORDER REMANDING GRIEVANCE TO LEVEL III

On July 15, 1998, Grievant, Troy Harmon, Jr., filed a grievance against Respondent, Division of Corrections/Mt. Olive Correctional Complex, challenging his reduction in pay upon his demotion on January 16, 1998, based upon his discovery that other employees have "undergone the same type of classification change with absolutely no reduction of their pay." He also cited 143 C.S.R. 1 § 5.6. The relief sought is stated as follows:

> In that my pay reduction was based upon deception, i.e., I was literally told that the pay reduction was mandatory and necessary to the classification change when it was not and, in that the pay reduction was imposed discriminatorily, I seek the following relief:
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> 1. That my former salary of $19,260.00 per year be forthwith reinstated.
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> 2. That I be reimbursed[,] or compensated, for all pay lost or the difference in pay from the time of the pay reduction to the present with applicable interest.

Grievant's supervisor, Sheila Poore, responded at Level I on July 15, 1998, that she

was unable to resolve this grievance. On July 16, 1998, Grievant appealed to Level II. On that same day, Acting Warden Howard Painter assigned Linda Coleman, the Associate Warden of Administration, as his representative to hear the grievance at Level II. A conference was then held on Wednesday, July 22, 1998. At 5:11 p.m. on Wednesday, July 29, 1998, and at 7:55 a.m., on Thursday, July 30, 1998, Grievant asked the receptionist at Mt. Olive Correctional Complex if he had any mail. On both occasions he was told that he had no mail. As he had not yet received the Level II decision, at 7:55 a.m., on July 30, 1998, Grievant handed the receptionist a letter declaring Respondent was in default due to the Level II response time exceeding five days. The letter was addressed to Ms. Coleman, and a copy was sent to the Division of Personnel, the Grievance Board[1], and Hilda Williams, Human Resources Director at Mt. Olive. Grievant received the Level II decision in the Interdepartmental Mail on Thursday, July 30, 1998, at 4:30 p.m. Grievant asserts that he had to have received the decision by July 29, 1998, in order for the Level II response to have been timely.

A Level IV pre-hearing conference was held on September 2, 1998, to inform the parties that the Level IV hearing on this matter would be solely for the purpose of determining whether a default had occurred at Level II. The Level IV hearing on this issue was held on September 10, 1998. Grievant was represented by Jack Ferrell, and Respondent was represented by Charlie Houdyschell, Esquire. The parties did not wish to submit written argument, and the issue of whether a default occurred became ripe for decision at the conclusion of the hearing.

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[1] This was docketed in as this grievance.

The issue of default in a grievance filed by a state employee has only recently come within the jurisdiction of the Grievance Board. On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998.[2] That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. 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.

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A-5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure." See also W. Va. Code § 18-29-5.

W. Va. Code § 29-6A-4(b) provides as follows regarding when Respondent must act at Level II:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her

[2] This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

> designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

Respondent did not challenge whether Grievant could pursue his allegation of default at Level IV. If a default has occurred, then the grievant wins and Respondent may request a ruling at Level IV regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure. Further, the Supreme Court of Appeals of West Virginia has held, in the context of the default provision in the education employees grievance procedure[3]:

> In order to benefit from the "relief by default" provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Vol. 1994), a grieved employee or his/her representative must raise the "relief by default" issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default.

Syl. Pt. 4, Hanlon v. Logan County Bd. of Educ., 496 S.E.2d 447 (1997) (emphasis added). Thus, a grievant may come to Level IV asking for a ruling on the lower level procedural issue of whether a default has occurred, in order to know how to proceed with his

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[3] The education employees grievance procedure provides as follows regarding default at W. Va. Code § 18-29-3(a):

> 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 or illness, the grievant shall prevail by default. Within five days of such 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 that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

grievance.

Respondent argued a default did not occur, presenting the testimony of Ms. Coleman that she had, in fact, written the Level II decision on the date which appears on its face, July 29, 1998, and had done everything she was required to do to have the decision delivered to Grievant. The parties agree that July 29, 1998, is the key date; however, Respondent correctly pointed out that W. Va. Code § 29-6A-4(b) requires the Level II grievance evaluator to "issue a written decision upon the appeal within five days of the conference." (Emphasis added.) W. Va. Code § 29-6A-3(i) states that the decision is to be "transmitted" to the grievant and his representative within the time lines set forth in the statute. The grievance procedure does not speak to when the decision must be received by a grievant. Grievant's argument that he had to receive the Level II decision within five days is rejected. See Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993).

While Grievant did not argue that the decision was not "issued" within five days, the evidence presented by the parties on this factual matter was conflicting, and cannot, in this instance, simply be ignored. This Grievance Board has found that the burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Galloway v. Div. of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). It is appropriate that this same principle apply to an assertion of default by a grievant, so that

the burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence.[4] In this case, the burden is upon Grievant to demonstrate that the Level II decision was not issued on or before July 29, 1998. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

It must also be kept in mind that, "default judgements are not favored by the law." Thompson v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-117 (Apr. 30, 1998). "[C]ases should generally be decided on the merits." Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). Rule 55 of the West Virginia Rules of Civil Procedure allows a plaintiff to obtain a judgment by default when a defendant fails to timely "plead or otherwise defend." However, "[t]he principle is well founded that courts look with disfavor on judgments obtained by default." Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, ___ (1970). Rule 60 provides excuses which may be asserted to set aside a default.

> If any doubt exists as to whether relief should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits. McDaniel v. Romano, 155 W. Va. 875,

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[4] If the respondent is the party appealing to Level IV, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no default occurred, due to the presumption set forth in W. Va. Code § 29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

> 878, 190 S.E.2d 8, 11 (1972). The law strongly favors an opportunity for the defendant to make a case to an action against him. Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, 456 (1970).

Graley v. Graley, 174 W. Va. 396, ___, 327 S.E.2d 158, 160 (1985). The Supreme Court of Appeals of West Virginia has also determined that four factors should be considered, as follows:

> In determining whether a default judgment should be entered in the face of a Rule 6(b) motion [for default judgment] or vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party.

Syl. Pt. 3, Parsons v. Consolidated Gas Supply Co., 163 W. Va. 464, 256 S.E.2d 758 (1979).

The Court, in footnote seven in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), quoted the language of W. Va. Code § 18-29-3(a), noting it reads that "the grievant shall prevail by default," and then stated, "[a]pparently, the relevant factors enunciated in Syllabus Point 3 of Parsons v. Consolidated Gas Supply Corp., 163 W.Va. 464, 256 S.E.2d 758 (1979), do not apply." However, the Court indicated in its discussion in Martin that these four factors may be applicable to the determination of whether a default should be set aside in the education employees grievance procedure. The Court stated in its evaluation of the Administrative Law Judge's determination that a default had not occurred:

> Although not the dispositive factor in our ultimate determination, we find the plaintiff [grievant] has demonstrated no prejudice in this case nor has she shown that the Board was intransigent. See generally Hively v. Martin, 185 W. Va. 225, 406 S.E.2d 451 (1991).

Id., 195 W. Va. at 306. Hively is a per curiam opinion with two syllabus points as follows:

> "Although courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits." Syllabus Point 2, McDaniel v. Romano, 155 W. Va. 875, 190 S.E.2d 8 (1972).

Syl. Pt. 1, Hively, supra.

> "[The following factors should be considered by a court where there has been an appearance and late answer filed by the defaulting party]: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party." Syllabus Point 3, as modified, Parsons v. Consol. Gas Supply Corp., 163 W. Va. 464, 256 S.E.2d 758 (1979).

Syl. Pt. 2, Hively, supra.

This Grievance Board has in the past applied these four factors in evaluating whether a Grievant who was five months late in appealing a lower level decision to the next level, should have her grievance dismissed as untimely. Jack, supra. In that case, the Administrative Law Judge did not dismiss the grievance, based upon a finding that general principles of equity were applicable, and that the four factors noted above weighed in favor of the grievant.

Although the appeal to Level IV was ultimately found to have met the statutory timelines, Jack was cited as persuasive in Brown v. West Virginia State Board of Directors at Bluefield State College, Docket No. 92-BOD-128 (March 30, 1994). The Administrative Law Judge noted the ruling in Jack had considered:

> the standards utilized by circuit courts in setting aside default judgments under the West Virginia Rule of Civil Procedure 60(b). Consistent with the established principle that cases should be decided upon their merits as opposed to being dismissed for technical or procedural reasons, ALJ Anderson held that it would be inequitable to dismiss Jack's grievance upon the basis of timeliness because Jack was not at fault.

Brown, supra.

In determining whether a grievance has been timely filed or appealed, this Grievance Board has relied upon equitable considerations to create exceptions not specifically set forth in the statute. "It is true that the time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver and estoppel. See Spahr, supra; Durruttya v. Board of Educ. of Mingo, 382 S.E.2d 40 (W.Va. 1989) (substantial compliance). See also Naylor v. W.Va. Human Rights Comm'n, 378 S.E.2d 843 (W.Va. 1989); Independent Fire Co. No. 1 v. W.Va. Human Rights Comm'n, 376 S.E. 2d 612 (W.Va. 1988)." Gaskins v. W. Va. Dep't of Health, Docket No. 90-H-032 (Apr. 12, 1990). "Equitable theories, including estoppel may be applied to toll the time for filing a grievance." Rose, et al., v. Raleigh County Bd. of Educ., Docket Nos. 94-41-296/314 (Nov. 29, 1994), aff'd per curiam, Appeal No. 23450 (W. Va. Feb. 24, 1997). Even a request for a statement as to why the most senior employee was not selected was found to toll the time limits for filing a grievance. Stout and Southern v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994). Further, "numerous decisions by the West Virginia Supreme Court of Appeals establish that the procedural requirements of the grievance statute are not to be strictly applied, when such is not necessary to protect the rights of the parties." Harmon v. Jackson County Bd. of Educ., Docket No. 95-18-001R (June 30, 1998).

Accordingly, it is appropriate that the long-standing common law principles stated above be considered and applied in evaluating an allegation of default under the state employees grievance procedure.

Grievant stated he receives mail from the institution at a central reception area,

directly from the receptionist on duty. He stated he never receives mail from the institution at his home. He explained that he checked with receptionist Kelly Parsons at 5:11 p.m. on July 29, 1998, and she informed him he had no mail. He then left work for the day, and noted on his way out that Ms. Coleman's car was not in her parking space. He checked with receptionist Debbie Smith at 7:55 a.m. the next morning, and again at 12:30 p.m., and was told on both occasions that he had no mail. He delivered the default letter to the receptionist at 7:55 a.m.

Grievant presented as Grievant's Exhibit 2 a memorandum to Grievant from Debbie Smith, Receptionist, and signed by her, dated July 31, 1998, in which she related the events of July 30, 1998, regarding this matter. She stated when Grievant asked if he had any mail at 7:55 a.m., on July 30, 1998, she had advised him he had no mail; that he had handed her an Interdepartmental Mail envelope addressed to Linda Coleman; that later that day Ms. Coleman had picked up her mail; and that "[s]ometime later Linda Coleman returned with a thick interdepartmental mail envelope for Troy Harmon."

Grievant stated he received the Level II response at 4:30 p.m. on July 30, 1998, when he again checked with the receptionist for his mail. It was in an Interdepartmental Mail envelope, approximately one inch thick. He stated he received only one Interdepartmental Mail envelope from Ms. Coleman. He had not attempted to contact Ms. Coleman during this time to see whether she had written the decision.

The Level II decision is dated July 29, 1998. Ms. Coleman testified she had written the Level II decision the evening of July 29, 1998. She stated she has no authority to issue a decision without the warden's approval. She stated the warden was out of town, and she had called him to get his approval. She then made copies and distributed them. She

stated she placed the decision in an envelope addressed to Grievant, marked it confidential, and left it with the receptionist that evening before she left, around 4:00 p.m. or 4:30 p.m. She could not explain why the envelope was not at the reception area when Grievant checked the next morning, and did not address Ms. Smith's written statement that Ms. Coleman had left an Interdepartmental Mail envelope with her late on July 30, 1998. No other witnesses were presented to resolve these discrepancies.

The written statement of Ms. Smith is hearsay.

> Under W. Va. Code § 18-29-6, the formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dept. of Health and Human Res., Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.
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> There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dept. of Justice, 5 M.S.P.B. 150 (1981).

Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997).

Grievant presented no reason for his failure to call Ms. Smith as a witness so her

testimony could be cross-examined. She was a critical witness, as her statement calls into question the veracity of Ms. Coleman's testimony. While her statement is consistent with Grievant's testimony, and corroborates it, it is inconsistent with Ms. Coleman's testimony. It should be given some weight, but not so much that it alone is relied upon to make a finding that Ms. Coleman lied under oath, or was mistaken about the dates.

In assessing the credibility of witnesses,

> some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ 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. Id.

Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

In this case, Ms. Coleman spoke softly, even after being advised by the undersigned that she needed to speak up. However, the undersigned has no way of knowing whether Ms. Coleman is normally soft spoken. Otherwise, nothing about her demeanor was striking. She obviously had a personal stake in the outcome, as did Grievant. Her testimony conflicts with Grievant's in that she testified she placed the decision at the reception desk for Grievant at 4:00 or 4:30 p.m. on July 29, 1998, but it either was not there, or the receptionist did not find it, 40 minutes to an hour later; and it did not appear until the next afternoon. The undersigned is also perplexed by Ms. Coleman's reference to the afternoon of July 29, 1998, as "evening." She stated she wrote the decision the evening of July 29, 1998, and later said she left the decision at the receptionist's desk for Grievant that evening before she left around 4:00 or 4:30 p.m.

There are at least four possibilities: Ms. Coleman did not place the decision at the receptionist's desk until the afternoon of July 30, 1998; the decision was misplaced on the receptionist's desk for a day; someone took the decision off the receptionist's desk, and later returned it; or someone took it off the receptionist's desk, and never returned it, and when Ms. Coleman discovered this, she placed a new copy at the receptionist's desk. There was no evidence regarding the likelihood that a document could or would be taken from the receptionist's desk by a third party. Grievant testified that, while he does not have a mail slot, two different receptionists looked through the stack of mail on three separate occasions and did not find anything for him. The three latter possibilities do not seem likely to have occurred.

The undersigned concludes that it is more likely than not that Ms. Coleman, in fact, wrote the Level II decision on the evening of July 29, 1998, after she left work that day, and may have gotten the warden's approval that day, but she did not make the copies and take the steps necessary to get the decision distributed, as is required by the statute, until July 30, 1998. Grievant has proven a default occurred.

While it is more likely than not that Respondent defaulted as described above, which is the standard Grievant must meet, neither party presented testimony which would explain exactly what happened. Also, had Ms. Coleman placed her decision in the mail to Grievant after she finished it that evening, which would have been in compliance with the statute, he would not have received it until at least the next evening after work. Ms. Coleman did not cause any delay in the grievance procedure, and Grievant was not prejudiced in any way because he received the decision one day late. Thus, under the particular facts of this case, the undersigned concludes that it is appropriate that the default be set aside.

Respondent is cautioned that, under a different set of circumstances, the Grievance Board may not look favorably on such a delay. Respondent may not simply ignore the statutory requirement that a decision be issued within five working days of the Level II conference.

Accordingly, Grievant's request that a default be entered is **DENIED**. Because the proceedings at Level III were not completed, it is appropriate that this matter be, and the same hereby is, **ORDERED REMANDED TO LEVEL III** of the grievance procedure for state employees for proper adjudication. This matter is **ORDERED DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD
Administrative Law Judge

Dated: October 6, 1998