JOHN S. TOTH,

Grievant,

v. **Docket No. 98-CORR-344D**

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER GRANTING DEFAULT

John S. Toth (Grievant) is employed by the West Virginia Division of Corrections (Corrections), as a Correctional Officer, holding the rank of Sergeant, at the Anthony Correctional Center (ACC). He filed this action on August 13, 1998, alleging that he was wrongly denied promotion to Lieutenant. This grievance was denied, also on August 13, 1998, by Chief Correctional Officer V. Wayne White. Corrections received Grievant's appeal to Level II on August 14, 1998. Grievant received no response at Level II until August 20, 1998, when he received a letter, dated August 19, 1998. This letter scheduled a hearing for this grievance on August 24, 1998. Grievant sent a letter to Corrections, dated August 22, 1998, claiming that he had prevailed by default, inasmuch as Corrections had failed to hold a conference on his grievance within five days of its receipt of his appeal.

On September 2, 1998, Grievant appealed his claim of default to Level IV. A Level IV default hearing was held on November 17, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by Jack Ferrell of the Communications Workers of America, and Corrections was represented by Assistant Attorney General Charles Houdyschell, Jr. The parties declined to submit

proposed findings of fact and conclusions of law and this grievance became mature for decision at the conclusion of the default hearing.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDING OF FACT

1. Corrections received Grievant's appeal to Level II on August 14, 1998.

2. ACC Warden Scott W. Patterson returned from vacation on August 17, 1998, and removed Grievant's appeal from its sealed pink envelope. While on his vacation, Warden Patterson was replaced by Deputy Superintendent Mark Williamson.

3. Grievant received no response at Level II until August 20, 1998, when he received a letter, dated August 19, 1998.

4. Corrections' letter of August 19, 1998, informed Grievant that a hearing had been scheduled for August 24, 1998.

5. August 24, 1998, is six working days after August 14, 1998.

6. Grievant's administrator or his designee failed to hold a conference within five days of the receipt of Grievant's appeal.

7. Grievant sent a letter to Corrections, dated August 22, 1998, claiming that he had prevailed by default, as Corrections had failed to hold a conference on his grievance within five days.

8. Corrections held the August 24, 1998, conference. Grievant did not attend or participate. The Level II decision resulting from this conference denied this grievance.

9. As a result of these events, ACC now opens and date stamps all mail upon receipt.

DISCUSSION

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.[1] 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 falls 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): "the grievance board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

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,

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[1] 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).

> 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 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.

If a default has occurred, then a grievant is presumed to have prevailed on the merits of the grievance and Corrections may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure. Corrections argues that no default occurred under the terms of the statute. The Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340, (Feb. 26, 1993). Because Grievant claims he prevailed by default under the terms of the statute, he bears the burden of establishing such default by a preponderance of the evidence. Patteson v. Dep't of Health and Human Resources/Division of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998).

A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally

supports both sides, a party has not met its burden of proof. Id.

The facts in this matter are undisputed. Grievant appealed his grievance to Level II on August 14, 1998, and no conference was scheduled until August 24, 1998. 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 is excluded. See W.Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E. 362 (1911). See also W.Va. R. Civ. P. 6(a). Therefore, August 14, 1998, is excluded.

Accordingly, Corrections did not hold Grievant's conference until six work days after he filed his appeal at Level II. Thus, it becomes Corrections' responsibility to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level II in compliance with W. Va. Code § 29-6A-4(b) "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud" as provided by W. Va. Code § 29-6A-3(a)(2).

Corrections argues that, although Grievant filed his grievance at Level II on August 14, 1998, no "receipt of the appeal" took place until August 17, 1998, when ACC Warden Scott W. Patterson returned from vacation[2] and removed Grievant's appeal from its sealed pink envelope. Corrections argues that this constituted excusable neglect on its part. The undersigned disagrees.

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[2] The record reflects that Warden Patterson spent his vacation at his home, which is located on the grounds of ACC.

The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon its interpretation under the Federal Rules of Civil Procedure. "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied." Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997), quoting Bailey v. Workman's Comp. Comm'r, 170 W. Va. 771, 296 S.E.2d 901 (1982), quoting 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (1969).

The statute provides that the requisite conference shall be held by the administrator, Warden Patterson, or his designee. Uncontradicted testimony at Level IV established that, at a correctional facility, and particularly at the higher levels of such a facility's management, no one leaves his or her post without being replaced by another employee. While on vacation, Warden Patterson was replaced by Deputy Superintendent Mark Williamson. Thus, it became Mr. Williamson's responsibility, as Warden Patterson's designee, to receive and to respond to Grievant's appeal.

Grievant did not allege bad faith on Corrections' part. On the other hand, Corrections did not establish a reasonable basis for noncompliance with the time frame specified by W.Va. Code § 29-6A-4(b), inasmuch as it had an employee in place to respond to Grievant's appeal. That employee simply failed to do so.

Corrections also argued that Mr. Williamson was distracted from his duty to respond to Grievant's appeal by an escape from ACC. However, such slight proof of this as was presented at Level IV showed that this escape took place on August 10, 1998, nine work days before a response was required of Corrections. Corrections also produced no

evidence to show the extent to which the escape distracted Mr. Williamson from his other duties.

In these circumstances, the employer has failed to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level II as a result of sickness, injury, excusable neglect, unavoidable cause or fraud.

Accordingly, it is determined that Corrections is in default in regard to this grievance, and Corrections may proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2) that the remedy sought by Grievant is contrary to law or clearly wrong. Corrections may request a Level IV hearing, within five days of the receipt of this written notice of default, to present evidence on this issue.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by W.Va. Code §29-6A-4, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud, the grievant shall prevail by default. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a Level IV hearing examiner for the purpose of showing that the remedy received by the prevailing party is contrary to law or clearly wrong. W.Va. Code §29-6A-3(a)(2).

2. At Level II, the administrator or his or her designee shall hold a conference within five days of receiving an appeal. The administrator or his or her designee shall issue a written decision upon the appeal within five days of the Level II conference. W.Va. Code

§ 29-6A-4(b).

3. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. Patteson v. Dep't of Health and Human Resources/Division of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998).

4. Grievant established, by a preponderance of the evidence, that a timely response was not provided to Grievant at Level II.

5. Corrections was not prevented, as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud, from providing a required response in a timely manner. See W.Va. Code § 29-6A-3(a)(2).

Accordingly, Grievant's request for a finding of default at Level II under W.Va. Code § 29-6A-3(a)(2) is **GRANTED**. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order.

ANDREW MAIER
ADMINISTRATIVE LAW JUDGE

Dated December 10, 1998