MICHAEL GILLUM,

Grievant,

v. **Docket No. 98-DOH-387D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING RELIEF BY DEFAULT AND REMANDING GRIEVANCE TO LEVEL III

On or about September 16, 1998, Grievant Michael Gillum filed a grievance against Respondent Department of Transportation/Division of Highways ("DOH"), alleging he should have been awarded a merit increase. Grievant's supervisor, Ronnie Salmons, responded on that same day, September 16, 1998, that this issue could not be resolved at Level I. Grievant appealed to Level II on September 16, 1998. A Level II conference was held on Wednesday, September 23, 1998, with Grievant and J. Wilson Braley, District Engineer, in attendance. On October 6, 1998, Grievant filed a claim of default at Level IV, as he had not received his Level II decision as of that date.

A Level IV hearing was held on November 16, 1998, solely for the purpose of determining whether a default had occurred at Level II. Grievant appeared pro se, and Respondent was represented by Timbera Carrico, Esquire. The parties did not wish to submit written argument, and the issue of whether a default occurred became mature for

decision at the conclusion of the hearing.

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 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

[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).

> 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.

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[2]:

> 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 <u>during the grievance proceedings</u> as soon as the employee or his/her representative becomes aware of such default.

Syl. Pt. 4, <u>Hanlon v. Logan County Bd. of Educ.</u>, 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

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[2] The education employees grievance procedure provides as follows regarding default at <u>W. Va. Code</u> § 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.

issue of whether a default has occurred, in order to know how to proceed with his grievance.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence.[3] Harmon v. Division of Corrections, Docket No. 98-CORR-284 (remand order, Oct. 6, 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.

The parties agree that September 30, 1998, is five working days after the Level II conference. Grievant's testimony focused on the fact that he did not receive the decision until October 8, 1998. However, the default provisions are triggered by the failure to "issue a written decision upon the appeal within five days of the conference." W. Va. Code § 29-6A-4(b) (emphasis added). W. Va. Code § 29-6A-3(i) states that the decision is to be "transmitted" to the grievant 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 did not have to receive the Level II decision within five days; it had to be issued within five days. Harmon, supra. In this case, the burden is upon Grievant to demonstrate that the Level II decision was not issued on or before September 30, 1998.

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[3] 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).

Respondent argued a default did not occur, presenting the testimony of Mr. Braley that he had told the Grievant what his decision would be at the Level II conference, and had drafted the Level II decision on that same date. He testified he then left town for a couple of days, he returned to work on September 28, 1998, and signed the decision on the date which appears on it, September 29, 1998, four working days after the Level II conference. He stated he gave the signed decision back to his secretary, Barbara King, and that he believed she had placed it in interdepartmental mail, as was their practice, the next day, September 30, 1998. He did not specifically tell her to place this decision in interdepartmental mail that day, as she was an efficient secretary who knew the importance of getting the decision out in a timely fashion, and knew to do this without being told. He characterized her as being very diligent about getting decisions out in a timely fashion. He stated his office typically uses interdepartmental mail to forward documents to the field offices. Grievant works in a field office. Grievant stated he had no reason to believe the decision was not written on September 29, and placed in interdepartmental mail on September 30, 1998.

Grievant's own testimony supports the plausibility of a decision which was placed in interdepartmental mail not being received for six working days. Grievant admitted that interdepartmental mail is notorious for being unreliable, and neither he nor his supervisor use it to transmit important documents, but use a telecopier. Mr. Braley stated in a letter to Grievant dated October 13, 1998, and admitted into evidence as Respondent's Exhibit 2, that his office was not aware that interdepartmental mail to Grievant's job site was not running at the time the decision was placed in interdepartmental mail, as the mail carrier was not working.

Mr. Braley testified that after the decision was placed in interdepartmental mail, his secretary attempted to contact Grievant by telephone in order to assure that he had received the decision. Grievant testified that he received no messages to call Mr. Braley's secretary, but admits he was off work at least one day. He denied that any messages had been left at his home, as Mr. Braley stated his secretary told him she had done. Whether any messages were in fact ever left for Grievant, either at his home or at work, is of no consequence. Mr. Braley did not actually place any telephone calls, but was only testifying to what his secretary had represented to him, so this matter does not impact his credibility, as suggested by Grievant. The undersigned would encourage Mr. Braley to continue the practice of following up with a telephone call to assure grievants are receiving their decisions.

The undersigned concludes Grievant failed to prove Mr. Braley did not sign the Level II decision on September 29, 1998, and failed to prove it was not placed in interdepartmental mail to Grievant on or before September 30, 1998.

Accordingly, Grievant's request that a default be entered is **DENIED**. This matter should 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: December 2, 1998