ALLEN LEE ASH and JAMES D. SMITH

Grievants,

v. **Docket Nos. 98-CORR-488/493D**

DIVISION OF CORRECTIONS,

Respondent.

ORDER DENYING GRIEVANTS' MOTION FOR DEFAULT JUDGMENT

Grievants Allen Lee Ash, Jr., and James D. Smith, are employed by Respondent, Division of Corrections, as Correctional Officer IIs at the Huttonsville Correctional Center. On December 4, 1998, Grievants individually filed appeals to level four claiming Respondent had defaulted at level two. A level four hearing on the default claims was conducted on January 26, 1999, in the Grievance Board's Elkins office. Grievants appeared pro se, and Respondent was represented by Charles Houdyschell, Assistant Attorney General. Both parties presented evidence in support of their position and the matter 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. (See footnote 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 theemployer 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 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 that:

[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 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 Grievants could pursue their allegation of default at level four. If a default has occurred, then the grievant prevails, and Respondent may request a ruling at level four 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 hasheld, in the context of the default provision in the education employees grievance procedure: (See footnote 2) "[i]n 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., 201 W. Va. 305, 496 S.E.2d 447 (1997). Thus, a grievant may come to level four 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 grievance.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. (See footnote 3) Harmon v. Division of Corrections, DocketNo. 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. Dept. 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.

At level four, Grievants presented the following evidence. On August 21, 1998, Grievant Smith

filed a complaint stating that he had been discriminated against when he did not receive a 5% pay increase upon completion of the Officers Apprenticeship Program. A level one decision denying the matter was issued on August 24, 1998, and appeal to level two was made on that same date. By memorandum dated September 2, 1998, Mr. Semmler notified Grievant Smith that a second level hearing would be conducted on September 3. A level two decision was issued by Mr. Semmler on September 3, 1998. Grievant Smith filed a written claim for default on September 8, 1998, and continued to pursue his claim to level three. A level three decision waiving consideration, based upon the claim for default, was issued on November 18, 1998, and the matter was appealed to level four, where Grievant continued to assert that Respondent had defaulted at level two.

Grievant Ash filed a level one grievance seeking a 5% salary increase on September 9, 1998. A level one decision was issued on September 9, 1998, and appeal to level two was made on the same date. Grievant Ash testified that he called work on the evening of September 20 and Lieutenant Varner read a note he had received from Mr.Semmler, advising Grievant that his level two hearing would be conducted the following day. Following the hearing, a level two decision was issued to Grievant Ash on September 21, 1998. Grievant Ash filed a notice of default on September 21, 1998, and continued to proceed to level three. A level three decision waiving consideration, based upon the claim for default, was issued on November 18, 1998, and the matter was appealed to level four, where Grievant continued to assert that Respondent had defaulted at level two.

In response, Respondent asserts that Grievants failed to timely raise the default claim. Respondent argues that if a grievant fails to raise the issue of default for failure to conduct a timely hearing on or before the date of the hearing, then he waives the claim. Because Grievants herein did not raise the default issue at or before the level two hearing, Respondent concludes they waived the default claim, and the grievances should be remanded to level three for hearing.

W. Va. Code §29-6A-2(c) defines “days” as “working days exclusive of Saturday, Sunday or official holidays.” W. Va. Code §29-6A-4(b) requires the chief administrator or his designee to “hold a conference within five days of the receipt of the appeal.” Grievant Smith did not raise the issue of default until he received the level two decision, which was eight days after he filed the level two appeal. The Grievance Board has previously held that to benefit from the relief by default provisions, the employee must raise the issue as soon as he becomes aware of the default, and may not submit such a claim once a response to the grievance has been received. Harmon v. Fayette County Bd. of

Educ., Docket No. 96-10-500 (Aug. 26, 1997). Documentation submitted by Grievant Smithindicates that he was well aware of the time schedule both parties were to follow, and he offered no reason for the delay in claiming default.

Grievant Ash's level two conference was also conducted eight working days after the date of appeal. However, another factor must be considered in this instance. Grievant Ash had been on annual leave during the time period in question. W. Va. Code §29-6A-4 states, “the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.” Although Grievant Ash indicated that he was willing to report to work to process his grievance, the employee's absence for personal leave has been excluded from the time limits in accordance with the foregoing language. Williamson v. W. Va. Dept. of Tax & Revenue, Docket No. 98-T&R- 275D (Sept. 30, 1998). Therefore, if Grievant Ash's leave time is not calculated as part of the five day period in which Respondent was required to respond at level two, there was no default. If the leave time should be considered a viable part of the response period, Grievant delayed in claiming the default, in the same manner as Grievant Smith.

Accordingly, Grievants' request for a determination of default under W. Va. Code §29-6A-3(a)(2), is **DENIED**. These matter are **DISMISSED** from the docket of the Grievance Board, and **REMANDED** to level three for hearing consistent with the provisions of W. Va. Code §29-6A-4. The Grievance Board does not consider this Order to be a final order or decision which is appealable to circuit court under the provisions of W. Va. Code §§29-6A-7 or 29-5-4.

DATE: March 29, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 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).

Footnote: 2

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.

Footnote: 3

If the respondent is the party appealing to level four, 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 StateCollege, Docket No. 97-BOD-483 (May 14, 1998).