JOHN SHANNON,

Grievant,

v. Docket No. 99-CORR-137D

DIVISION OF CORRECTIONS,

Respondent.

ORDER DENYING DEFAULT

and

REMANDING GRIEVANCE TO LEVEL ONE

John Shannon (Grievant) appealed to level four on April 7, 1999, alleging he was entitled to prevail by default in a grievance he filed against his employer, Respondent Division of Corrections (DOC). On June 23, 1999, a level four hearing was conducted in this Grievance Board's office in Morgantown, West Virginia. Grievant was represented by Jack Ferrell, Field Representative for the Communication Workers of America, and DOC was represented by counsel, Charles Houdyschell, Jr. The hearing was limited to the question of whether or not a default had occurred at level three of the grievance procedure. This matter became mature for consideration on July 12, 1999, upon receipt of the parties' written briefs.

The following findings of fact are made, based upon a preponderance of the evidence submitted at the level four hearing.

Findings of Fact

1. Grievant is employed by DOC at Pruntytown Correctional Center. 2. On March 17, 1999, Grievant attempted to initiate a grievance at level three of the grievance procedure, requesting a retroactive pay increase for completing the Officer Apprenticeship Program.

3. Grievant sent the March 17 grievance to the West Virginia Division of Personnel

(DOP), and it was received by DOP by certified mail on March 18, 1999.

3. Grievant did not send the March 17 grievance to any employee of DOC.

4. After he did not receive notification of a level three hearing from DOC, Grievant refiled the grievance on March 31, 1999, and sent it to the commissioner of DOC.

5. The March 31 grievance was received by DOC's agent by certified mail on April 1, 1999.

6. In order to avoid a default claim, DOC scheduled a level three hearing for April 7, 1999.

7. Upon notification of the level three hearing, Grievant refused to attend, because he wanted to pursue a default claim, which he had filed with the commissioner on April 2, 1999.

8. A level three hearing was not held, due to Grievant's refusal to participate.

9. Approximately two years ago, a memorandum was issued by DOC officials, stating that level one and level two grievance evaluators did not have the authority to award back pay.

10. Grievant and his representative assumed that, because lower level evaluators did not have authority to grant remunerative relief, they should initiate a grievance requesting back pay at level three. 11. No employee of DOC told Grievant to initiate his grievance at level three.

12. DOC did not waive consideration of this grievance at levels one and two.

Discussion

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board last year. 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. 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."

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless DOC is able to demonstrate that the remedy requested is eithercontrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there was no default, Grievant may proceed to the next level of the grievance procedure. DOC contends that no default occurred in this matter, as contemplated under the terms of the statute.

This 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 is claiming he prevailed by default under the statute, he bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). 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).

In this matter, Grievant contends he properly initiated this grievance at level three, because of the memorandum stating that lower level evaluators could not award back pay. However, Grievant admits that he only assumed that he should initiate his grievance at level

three, and no DOC officials told him to do so. Grievant also claims that, by filing his grievance only with DOP, he simply attempted to comply with the language on thegrievance form provided by this Grievance Board. The instructions upon which Grievant relies are printed on the back of the standard grievance form for state employees as follows:

Level III - W. Va. Code § 29-6A-4(c)

> Grievant may appeal to chief administrator of department or board within five (5) days of receipt of Level II decision.
>
> Upon appeal, a copy of grievance form and the Level II decision must also be sent to the Director of the Division of Personnel, Building 6, Room 416, State Capitol Complex, Charleston, West Virginia 25305.
>
> Chief administrator or designee shall hold hearing within seven (7) days of receipt of appeal.
>
> Chief administrator or designee must issue a written decision within five (5) days of the hearing.

(Emphasis in original).

W. Va. Code § 29-6A-4(c) provides the following guidance on appealing to Level III:

> Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission, or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.

Clearly, Grievant has not complied with the grievance form instructions or the statute. While DOP must be sent a copy of the level three appeal, it is clear that the appeal was to be filed with the chief administrator of Grievant's employing agency, DOC. In Chamberlain v. W. Va. Div. of Corrections, Docket No. 99-CORR-149D (June 4, 1999), a very similar situation existed, where the Grievant filed the appeal of his level two decision only with DOP, and did not notify DOC. In that decision, the administrative law judge noted that the instructions were obviously not meant:

> to give Grievant the option of notifying DOP, but not his employer, that he is appealing to Level III. . . . Otherwise, the employer will not necessarily be placed on notice that an appeal has been submitted, and the time limit for a response has begun to run.

In the instant case, as in Chamberlain, supra, no default has occurred, because Grievant did not comply with the procedure set forth in the grievance statute. He clearly did not file his "appeal" with the chief administrator of his employing agency, and he is not employed by DOP. Accordingly, because DOC did not receive notice that a grievance had been filed on March 17, no default occurred when DOC failed to respond. When the grievance was filed with DOC on April 1, 1999, a level three hearing was timely scheduled, as required by the statute, within seven days.

Accordingly, because no default has occurred, this matter must be remanded to the appropriate level of the grievance procedure for completion of the lower level proceedings. Because Respondent did not waive consideration of this grievance at levels one and two, it must be remanded to level one.

The following conclusions of law support the decision reached.

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. 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 grievantis 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." W. Va. Code § 29-6A-3(a).

2. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), he bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).

3. Grievant failed to establish that Respondent did not hold a level three hearing, after proper notification of the grievance, within the time limits specified in W. Va. Code § 29-6A-

4(c).

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a)(2) is DENIED and this matter is REMANDED to level one. This matter is STRICKEN and DISMISSED from the docket of this Grievance Board.

Date: August 4, 1999

DENISE M. SPATAFORE

Administrative Law Judge