ALAN R. CHAMBERLAIN,

Grievant,

v. **Docket No. 99-CORR-149D**

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

ORDER DENYING DEFAULT

and

REMANDING GRIEVANCE TO LEVEL III

On April 14,1999, Alan R. Chamberlain (Grievant) appealed to Level IV of the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., alleging he was entitled to prevail by default in a grievance he filed against his employer, Respondent West Virginia Division of Corrections (DOC). On May 13, 1999, a Level IV hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Elkins, West Virginia. (See footnote 1) That hearing was limited to the question of whether or not a default had occurred and, if so, was the remedy requested contrary to law or clearlywrong. In accordance with a briefing schedule established at the conclusion of the hearing, this matter became mature for decision on May 26, 1999.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

FINDINGS OF FACT

1. Grievant is employed by Respondent Division of Corrections (DOC) at its Huttonsville Correctional Center.

2. On March 14, 1999, Grievant initiated a grievance seeking reinstatement of pay and benefits lost while receiving Workers' Compensation between December 8, 1996, and December 4, 1997. J Ex A.

3. On March 15, 1999, Grievant's immediate supervisor, Captain Norris Weese, waived the grievance to Level II because he did not have authority to grant the relief requested. J Ex A.

4. Grievant proceeded to Level II on March 15, 1999. On March 17, 1999, Deputy Warden Keith Weese denied the grievance at Level II, stating that the grievance was not timely filed. J Ex A.

5. On March 23, 1999, Grievant appealed to Level III, mailing his appeal correspondence to the Director of the West Virginia Division of Personnel (DOP). J Ex A.

6. DOP's agent received Grievant's appeal to Level III via certified United States mail on March 24, 1999. 7. April 2, 1999, was the seventh working day following DOP's receipt of Grievant's Level III appeal.

8. As of April 12, 1999, Grievant had not been offered a Level III hearing by either DOP or DOC. Grievant wrote to the Commissioner of Corrections that same day, declaring a default in accordance with the grievance procedure for state employees.

9. As of the time Grievant sent his appeal to DOP, DOP was not a party to this grievance.

10. DOC did not become aware of Grievant's appeal to Level III until he declared a default.

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. (See footnote 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 alevel 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 either contrary 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 advanced his grievance to Level III, but received no response and did not get a Level III hearing within the seven-day time limit specified in W. Va. Code § 29-6A-3(c). During Grievant's testimony at Level IV in support of his default claim, he explained that he simply attempted to comply with the language on the grievance form provided by this Grievance Board when submitting his appeal to the next step in the procedure. 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.

J Ex A (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'semploying 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.

It is clear to the undersigned Administrative Law Judge that the word “may” was used in the foregoing instructions to indicate that a grievant has the option of appealing to Level III, or electing not to pursue the grievance to the next level. It was not meant to give Grievant the option of notifying DOP, but not his employer, that he is appealing to Level III of the grievance procedure. 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 any event, Grievant is only entitled to prevail by default if he complied with the procedure contained in the statute. W. Va. Code § 29-6A-4(c) requires that the Level III appeal be filed with the “chief administrator” of Grievant's employing agency. Grievant is not employed by DOP. Because DOC had no notice that a hearing needed to be scheduled, they cannot be found in default. (See footnote 3)

Because no default occurred in this matter, DOC does not have to show that the remedy sought is contrary to law or clearly wrong. Inasmuch as the Level III proceedings have not been completed,

this matter is appropriately **REMANDED** to Level III of the grievance procedure for state employees for further adjudication. Accordingly, this matter will be **STRICKEN** and **DISMISSED** from the docket of this Grievance Board. In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

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 grievant 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), the grievant must establish such default by a preponderance of the 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. See W. Va. Code § 29- 6A-3(a)(2).

3. Grievant failed to establish that Respondent DOC did not properly hold a Level III hearing on his grievance within the time limit specified in W. Va. Code § 29-6A- 4(c), as Respondent did not receive statutorily mandated notice of Grievant's appeal.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is **DENIED**. This matter is hereby **REMANDED** to Level III for further adjudication as previously indicated in this Order.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 4, 1999

Footnote: 1

Grievant was represented by John Jeffers. DOC was represented by Assistant Attorney General Charles Houdyschell, Jr.

Footnote: 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). As this grievance was initiated on March 14, 1999, it falls under the new statute.

Footnote: 3

This issue might easily have been avoided if the Level II decision had provided the name and address of the proper official in DOC to whom a Level III appeal should be directed. See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).