DENNY R. MORRIS, II,

Grievant,

v. **Docket No. 02-CORR-137D**

DIVISION OF CORRECTIONS/NORTHERN REGIONAL JAIL

AND CORRECTIONAL FACILITY,

Respondent.

O R D E R GRANTING DEFAULT

Grievant, Denny R. Morris, II, employed by the Division of Corrections (DOC or Respondent) as a Correctional Officer II at the Northern Regional Jail and Correctional Facility, filed a level one grievance on March 24, 2002, in which he alleged that due to mitigating circumstances, a suspension should be reduced. The parties agreed to waive consideration at level one, and a level two conference was conducted on April 11, 2002. Grievant's representative was notified on April 19, 2002, that he could pick up the level two decision. Grievant filed a claim for default with DOC Commissioner Jim Rubenstein on April 23, 2002, and at level four on May 13, 2002. A hearing on the default was conducted in the Grievance Board's Wheeling office on June 27, 2002. Grievant was represented by Howard Shiflett, and Respondent was represented by Cindy Quillen and Andrea Dernberger, Paralegals. Both parties waived the opportunity to submit post-hearing proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

The following facts are derived from the record.

Findings of Fact

1. Grievant has been employed by Respondent as a Correctional Officer II at the Northern Regional Jail and Correctional Facility at all times pertinent to this grievance. 2. Grievant filed a grievance on March 24, 2002, seeking a reduction in a suspension he had received. The parties agreed to waive processing at level one.

3. Grievant provided Respondent a hand written letter dated March 29, 2002, in which he stated, “Due to the warden being out of her office the week of 01 April 2002 Monday thru 05 April 2002, I waive the (5) five day time period she has to respond to the level two hearing. . . .”

4. A level two conference was conducted on April 11, 2002.

5. Grievant and his representative were notified on April 19, 2002, that a level two decision was available to be picked up. The decision was dated April 16, 2002.

6. Grievant notified Commissioner Rubenstein by letter dated April 22, 2002, that Respondent had defaulted at level two. In this letter Grievant stated, “[t]o be fair, the Warden would be unavailable to have a Level II hearing in the allotted time frame, I waived the time frame to have the Level II hearing.”

7. The Commissioner did not respond to Grievant's letter, and Grievant filed his claim at level four on May 13, 2002.

Discussion

The default provision for state employees is found in W. Va. Code § 29-6A-4, which provides in part:(1) A grievance shall be filed within the times specified in section four [§ 29-6A-4]of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and 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.

(2) Any assertion by the employer that the filing of the grievance at level one was untimely must 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.

The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, i.e., the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Luzadder v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-025D (Apr. 8, 2002); Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 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. If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutoryexcuse, or that Grievant agreed to waive the time lines. If no valid response is offered by Respondent, a subsequent hearing will be scheduled to determine whether the relief requested may be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-4(b) provides:

Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief 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.

Respondent did not explain why the decision was dated April 16, 2002, but was not released until April 19, 2002, and concedes that it was issued one day beyond the statutory time lines, but asserts that it relied upon the March 29, 2002, waiver by Grievant. Grievant asserts that he only waived the time line for the conference, not the time line for the decision. At hearing, Grievant explained that his intent in the March 29, 2001, letter was to simply waive the five day period in which the level two conference was to be conducted, because the Warden was to be away. He cites the April 22, 2002, letter in support of his intention. The second letter clearly states that Grievant waived the time frame for the level two conference, and his testimony regarding his intent is credible. Finally, it appears that the Warden Seifert's understanding of the waiver was consistent with Grievant's since she conducted the conference four days after her return, and produced a decision three working days later. Respondent offers no explanation why the decision was dated April 16 but was not issued until April 19, one day beyond the statutory due date. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Luzadder v. Dep't of Transp./Div. of Highways, Docket No. 02-

DOH-025D (Apr. 8, 2002); Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 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.

2. If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse, or that Grievant agreed to waive the time lines.

3. Upon appeal to level two of the grievance procedure, a conference must be conducted within five days of receipt of the appeal, and a decision issued within five days of the conference.

4. Grievant exercised his right to waive the time frame in which the level two conference was to be conducted, but did not waive the time period in which the decision was to be issued.

5. Grievant has proven by a preponderance of the evidence that Respondent defaulted when a level two decision was not issued within five days of the conference, andRespondent failed to show that the delay was due to a statutory excuse, or a waiver by Grievant.

Accordingly, Grievant's claim of default is **GRANTED**, and this case is dismissed from the docket of this Grievance Board and remanded to Level III. The parties are further instructed to set a Level III hearing on the merits of this grievance as soon as possible.

DATE: July 17, 2002 _____

Sue Keller

Senior Administrative Law Judge