RICHARD SIMMS,

Grievant,

v. Docket No. 02-CORR-009D

DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER DENYING DEFAULT

On January 9, 2002, Grievant, Richard Simms, filed a grievance against his employer, Respondent, the Division of Corrections/Anthony Correctional Center ("Corrections"). On February 4, 2002, Grievant filed a claim of default at Level IV.

A Level IV hearing was held on March 20 and May 7, 2002, solely for the purpose of determining whether a default had occurred at Level I. Grievant was represented by Dennis Brackman, and Respondent was represented by Leslie Kiser-Tyree, 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, on May 7, 2002.

The following findings of fact are made based upon the evidence submitted at the Level IV hearing.

Findings of Fact

1. Grievant filed this grievance with his supervisor, Corporal Brian Barnett, on January 9, 2002.
2. Corporal Barnett met with Grievant on Thursday, January 10, 2002.
3. Corporal Barnett unexpectedly became ill, and was off work on approved sick leave from Monday, January 14, through Thursday, January 17, 2002. As Corporal Barnett had not planned to be off work, no one was specifically designated during this time to assume his duties. Corporal Barnett returned to work on January 18, 2002.

4. By decision dated January 18, 2002, Corporal Barnett responded, in writing, that he could not grant the grievance. On Friday, January 18, 2002, Corporal Barnett gave the decision to Margaret Fraley, the Warden's secretary, to transmit to Grievant.

5. Ms. Fraley placed the decision in an envelope addressed to Grievant that day, and placed it in the outgoing mail.

6. Monday, January 21, 2002, was a state holiday.

7. The envelope addressed to Grievant was post-marked January 22, 2002.

Discussion

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> (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.

Respondent did not challenge whether Grievant could pursue his allegation of default at Level IV, and this Grievance Board has determined that a grievant may come to Level IV 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. Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998). 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 1) Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (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 issue here is whether a default occurred at Level I. W. Va. Code § 29-6A-4 provides as follows regarding when Respondent must act at Level I:

(a) Level one.

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

In counting the time allowed for an action to be accomplished under the state employees grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). Grievant met his initial burden of demonstrating a default occurred. The grievance was filed on January 9, 2002, and the decision was not issued until January 18, 2002, seven working days later. It was not transmitted to Grievant until January 22, 2002, eight working days later. The decision had to be issued within six working days of the date Corporal Barnett received the grievance. The grievance was received on January 9, 2002, and it had to be issued by no later than January 17, 2002.

Respondent argued the decision was not timely issued due to excusable neglect, pointing to Corporal Barnett's illness, and the testimony of Ms. Fraley that she had placed the decision in the mail on January 18, 2002. Ms. Fraley could not explain why the envelope was post-marked January 22. Grievant, relying upon Grievance Board precedent on excusable neglect, argued Corporal Barnett's illness did not excuse Respondent from responding within six days, as Respondent was required to designate another employee to act in his absence. Grievant argued further that the procedure at Anthony Correctional Center was that when a supervisor is absent, another employee is to be designated to handle grievances. Deputy Warden Adrian Hoke testified that this is in fact the procedure, when an employee is off work on annual leave; however, he testified this is not the procedure when an employee unexpectedly must take sick leave, as occurred here.

Respondent has proven an excuse to the default. While Respondent relied upon the excuse of excusable neglect, Respondent, and Grievant, overlooked the clear statutory language which tolls the time period for a response when "a grievance evaluator required to respond to a grievance at any level . . . [is] prevented from doing so directly as a result of sickness . . .." Corporal Barnett was on

sick leave for four working days. This Grievance Board has held that the days a grievance evaluator is off work on approved sick leave are not counted in computing the time period for a response. Lewis v. Bureau of Employment Programs, Docket No. 00-BEP-382D (Jan. 19, 2001). Corporal Barnett was not required to issue his decision until January 24, 2002. He issued the decision, and it was transmitted to Grievant, within the time limits. No default occurred. As noted, Grievant pointed to Grievance Board decisions which found a default had occurred when no one responded to a grievance in the supervisor's absence, even though another employee had been designated to stand in for the supervisor during his absence. Grievant did not identify the cases he was referring to by name. The cases the undersigned has found which tend to support Grievant's position are not applicable here. Those cases involved a supervisor who was on annual leave, not a supervisor who was ill. See Brackman, et al., v. Div. of Corrections, Docket No. 99-CORR-374D (Apr. 10, 2000); Toth v. Div. of Corrections, Docket No. 98-CORR-344D (Dec. 10, 1998). Corrections was not required to designate another employee to respond to the grievance while Corporal Barnett was off work for four days on approved sick leave, as the statute tolls the time period for a response when a grievance evaluator is ill.

Grievant also asserted that Respondent did not timely raise its defense to the default, seeming to suggest that Corporal Barnett needed to state in his response to the grievance that he had been on sick leave for four days. There is no such requirement. At the time the decision was issued, Grievant had not claimed a default, and a grievance evaluator is not required to assume that a default will be claimed and address his reasons for not meeting the statutory time lines in his response.

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." W. Va. Code § 29-6A-3(a)(2).

2. A written decision must be issued at Level I within six working days of the date the grievance is presented to the grievant's supervisor. W. Va. Code §§ 29-6A-4(a) and 29-6A-3(i). 3. Respondent was prevented from issuing a decision within six working days of the date

the grievance was presented to Grievant's supervisor, as a direct result of the approved sick leave of Grievant's supervisor. This is one of the reasons specified by W. Va. Code § 29-6A-3(a)(2), and establishes no default occurred, as the decision was issued within six working days, once the supervisor's sick days are taken into account. Lewis v. Bureau of Employment Programs, Docket No. 00-BEP-382D (Jan. 19, 2001).

Accordingly, Grievant's request that a default be entered is **DENIED**. If Grievant wishes to appeal the Level I decision to Level II, he has five days from receipt of this Order to do so.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 20, 2002

Footnote: 1

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).