HOWARD THACKER,

Grievant,

v. Docket No. 02-DEP-083D

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION/ INFORMATIONAL TECHNOLOGY OFFICE,

Respondent.

ORDER DENYING DEFAULT

Grievant, Howard Thacker, filed the original grievance against the West Virginia Department of Environmental Protection ("DEP"), on February 5, 2002, because he received a written reprimand. On March 29, 2002, Grievant filed a Notice of Default with this Grievance Board asserting Respondent had not met the deadlines specified in W. Va. Code § 29-6A-4(b).

A default hearing was held on June 3, 2002. This issue became mature for decision on July 2, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. This grievance was filed on February 5, 2002.

2. Grievant's supervisor, Angela Hopkins scheduled a Level I conference on February 8, 2002. She also issued Grievant a written response denying the

grievance on that date.

3. When Grievant left this conference, he had Ms. Hopkins' response and a copy of his grievance form. This Level I Decision stated at the bottom of the letter that if Grievant was not satisfied the decision, he could "file a second level appeal with Keith Borgel, Senior Manager of the Information Technology Office within five (5) days."

4. On February 13, 2002, Grievant sent the following e-mail to Ms. Hopkins at 8:58 a.m.

> **Please consider this email a formal appeal of the Level I decision for the grievance I filed with you. I am not in agreement with the decision letter you gave me on February 8th 2002. P.S. your office has not returned my original signed grievance in this matter. I need it to proceed to the next level.**

5. Grievant also "CC'd" this message to Elaine Ranson, Jeff Schoolcraft, and Mr. Borgel.

6. Ms. Hopkins read the e-mail shortly after it was written, immediately took Grievant his original grievance form, and apologized for not giving him a copy.

7. Ms. Hopkins believed the focus of the message was to tell her that he planned to appeal her Decision, and she needed her to return the original form to him to include in his appeal.

8. The other three recipients of the e-mail also received the message that morning as well. Mr. Borgel noted the message was not addressed to him, but he alsobelieved the message was to tell administration he planned to appeal the Level I Decision, but Grievant needed Ms. Hopkins to return the original form before he could do so.

9. Mr. Borgel expected to receive Grievant's grievance form in the near future.

10. Mr. Borgel never received Grievant's grievance form.

11. Grievant filed this request for default with the Grievance Board on March 29, 2002. (See footnote 2)

12. Grievant's testimony was very confused, and he repeatedly contradicted himself. He indicated he had some personal problems, and he stated, "sometimes I don't remember things as well as I would like to."

Issues and Arguments

Grievant asserts he turned in his grievance form in a timely manner to appeal to Level II, and DEP did not respond. He also asserts the e-mail he sent to Ms. Hopkins should have been considered as a formal appeal to Level II, and DEP defaulted when it did not respond. Respondent asserts it saw the e-mail to Ms. Hopkins as a request for the original form so that he could then perfect his appeal to Level II. Respondent also maintained the forms were never received by Mr. Borgel.

Discussion

W. Va. Code § 29-6A-3(a) states:

> **(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 defaultif 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, 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."

Grievant bears the burden of establishing default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless DEP is able to demonstrate the remedy requested is either contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if DEP demonstrates a default has not occurred because it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A-3(a), Grievant will not receive the requested relief. If there is no default or the default is excused, Grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-4 (b) mandates the following time frames at Level II:

> 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 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.

The undersigned Administrative Law Judge finds Grievant did not submit the grievance form to his second level supervisor, Mr. Borgel. Grievant may have meant to, and he believed he did, but he did not. As Grievant explained at hearing, he occasionally has trouble with his memory. This is what happened here. Respondent did not just receive the grievance, and then decide not to respond. Respondent did not get the grievance form. In support of this finding is the fact that Grievant has filed twelve grievances in the three years he has worked at DEP, and he noted there had not been any similar problems in previous grievances.

Grievant also stated it was not necessary to follow the filing directions at the end of the letter. This belief is incorrect. Each written response to a grievance must state where the employee is to file to appeal his claim to the next level, if his is not pleased with the decision. These directions are to be followed by a grievant in order to perfect his appeal. Thomas v. Clay County Health Dep't, Docket No. 01-CCHD-422D (Sept. 26, 2002). The undersigned Administrative Law Judge also finds the e-mail to Ms. Hopkins, copied to Mr. Borgel cannot serve as official notice of appeal to the next level of the grievance procedure. Grievant stated in this e-mail that he needed the original form to proceed to the next level. This demonstrates Grievant believed he had not filed to the next level of the grievance procedure at the time he wrote the e-mail. He planned to perfect his appeal after he received the original grievance form from Ms. Hopkins.

The above-discussion will be supplemented by the following Conclusions of Law.

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). See Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000).

2. When a grievant asserts at Level IV 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. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Once the grievant establishes a default occurred, the employer may show 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); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999).

3. No default occurred as Mr. Borgel did not receive Grievant's grievance form.

Accordingly, this default is DENIED. This grievance is remanded to Level II of the grievance procedure.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 31, 2002

Footnote: 1

Grievant was represented Fred Tucker of the United Mine Workers of America. Respondent was represented by Assistant Attorney General Barbara Elkins.

Footnote: 2

There was some confusion about when Grievant wrote the Grievance Board as there are two letters, exactly the same. One letter is dated March 22, 2002, and the other is dated March 28, 2002. Only the letter dated March 28, 2002, is date stamped by this Grievance Board as being received on March 29, 2002.