FRANCIS CHANDLER,

Grievant,

v. Docket No. 01-DEP-526D

WEST VIRGINIA DEPARTMENT OF

ENVIRONMENTAL PROTECTION/

INFORMATIONAL TECHNOLOGY

OFFICE,

Respondent.

ORDER GRANTING DEFAULT

Grievant, Francis Chandler, filed this grievance against the West Virginia Department of Environmental Protection ("DEP"), on September 11, 2001. The grievance was filed because Grievant's supervisor apparently engaged in a counseling session with Grievant over discussing payroll printouts. The Statement of Grievance reads:

> **Violations of Grievance and EEOC procedures and other state and federal rules and regulations as they apply.**
>
> **The facts as set forth in Exhibit 1 are totally false. The time line doesn't fit an all day presents (sic) on the first floor since Christine Harold doesn't arrive until after 10:00 AM and after she did arrive she went to the 2d floor to prepare for a presentation. I arrived on the first floor to go to lunch with her just after 11:30 AM and we left shortly thereafter. As to looking at payroll sheets and discussing pay rates it just didn't happen. I'm aware that Christine Harold has this information, but she has never shown it to me.**
>
> **I feel that this email was sent to prejudice and compromise Christine Harold's Level II hearing and to harass and to frighten me away from**

giving her assistance.

Relief Sought: Cease and desist spreading mis-information (sic).

The Level I response was not received by Grievant until September 24, 2001, and Grievant filed for default with the Grievance Board on October 1, 2001. A default hearingwas held on March 24, 2002. This issue became mature for decision on April 3, 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 September 11, 2001.

2. Grievant's supervisor, Larry Evans, was not very knowledgeable about the grievance procedure and did not clearly understand the Statement of Grievance, and he was very unclear about the Relief Sought.

3. Mr. Evans sought guidance from DEP's Human Relations Section. He consulted Elaine Ransom, who deals with the Employee Relations aspects of the Human Relations Section.

4. Ms. Ransom did not understand Grievant's requested relief either.

5. She discussed the issue with Grievant on September 14, 2001.

6. She then talked to Mr. Evans, and Grievant and Mr. Evans met for the Level I conference on September 14, 2001.

7. Ms. Ransom incorrectly indicated to Mr. Evans that he had ten days from the date of clarification, September 14, 2001, to respond to the grievance. **(See footnote 2)** **8. Mr. Evans was out of town September 17, through September 19,**

2001, on agency business. He returned to his office on Thursday, September 20, 2001.

9. On September 21, 2001, Grievant told Mr. Evans his response was overdue. Mr. Evans told Grievant he had ten days from the date of the clarification.

10. Mr. Evans issued a Level I decision on September 24, 2001, indicating he was without authority to resolve the grievance.

11. At no time did Respondent request a waiver of the timelines.

12. Grievant filed this request for default with the Grievance Board on October 1, 2001.

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 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, 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." Because Grievant requested a hearing at Level IV on the issue of default, 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). 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 (a) mandates the following time frames at Level I:

> **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 grievancewithin 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.**

(Emphasis added.)

The facts given by the parties are clear. The grievance was filed on September

11, 2001. There was no request for an extension of the timelines by Respondent. The Level I response was due on September 19, 2001, but was not issued until September 24, 2001. (See footnote 3) Mr. Evans failed to issue the decision in a timely manner.

Respondent's argument is September 14, 2001, should be counted as the first of the six days allowed for Mr. Evans to respond to the grievance because of the confusion over Grievant's requested relief. No case law was cited to support this contention, and the undersigned Administrative Law Judge has found none. While it is true Grievant's requested relief was not a model of clarity, this does not excuse Respondent from the timelines. Respondent could have requested an extension, and if Grievant refused, Respondent could have denied the grievance and directed Grievant to the next level. Further, it appears the late decision was caused by Respondent's confusion about how long it had to respond to the grievance. It is important for an agency to be aware of the grievance timelines, and to follow them. As has been frequently stated by this Grievance Board in dismissing a grievance, "Ignorance of the law . . . will not excuse or toll the running of the limitation period." Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052 (Sept. 27, 1991). See Price v. Dep't of Admin., Docket No. 98-DOA-138 (June 24, 1998). This same principle must also be applied to Respondent, especially when information about grievance time frames is easily accessible.

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. 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. Respondent has six days to respond to a grievance at Level I.

4. Grievant has proven Respondent failed to respond to his grievance at Level I within the mandatory timelines. 5. Respondent did not demonstrate it was prevented from meeting the timelines by one of the reasons listed in W. Va. Code § 29-6A-3(a).

Accordingly, this default is GRANTED. Respondent and Grievant are directed to give the undersigned Administrative Law Judge agreed upon dates for a hearing on the issue of whether the requested remedy is contrary to law or clearly wrong. It is again noted the requested relief is unclear.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 26, 2002

Footnote: 1

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

Footnote: 2

Exactly who said what to whom is unclear, but either Ms. Ransom told Mr. Evans he had ten days, or Mr. Evans asked Ms. Ransom if he had ten days, and she did not tell him this was incorrect.

Footnote: 3

Even if Mr. Evans being out of town could be used to delay the response, September 24, 2001, would still be too late.