DONALD E. LUZADDER,

Grievant,

v. **Docket No. 02-DOH-025D**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION

OF HIGHWAYS,

Respondent.

ORDER GRANTING DEFAULT

On January 29, 2002, Grievant filed this claim at level four, seeking to prevail by default pursuant to the provisions of W. Va. Code § 29-6A-3(a)(2). Grievant alleges a default occurred at level one of the grievance procedure. On February 19, 2002, Respondent requested a hearing on the default claim, which was held in the Grievance Board's office in Westover, West Virginia, on March 20, 2002. Grievant represented himself, and the Division of Highways ("DOH") appeared by counsel, Belinda B. Jackson. The parties submitted fact/law proposals by April 1, 2002, at which time this matter became mature for consideration.

The following findings of fact pertinent to resolution of this matter are made by a preponderance of the evidence of record.

Findings of Fact

1. On January 17, 2002, Grievant filed a level one grievance with his immediate supervisor, Don Steorts.

2. Grievant and Mr. Steorts met on January 18, 2002, and a level oneconference was conducted.

3. Mr. Steorts prepared a written response to the grievance on his computer on January 18, 2002.

4. Although it is his normal practice to either hand deliver grievance responses or to place them in interdepartmental mail, Mr. Steorts had no recollection of transmitting his response to

Grievant.

5. After not receiving a response from Mr. Steorts, Grievant filed a written notice of default on January 29, 2002.

6. Mr. Steorts' written level one response was e-mailed to Grievant on February 19, 2002, by DOH counsel Belinda Jackson.

Discussion

The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). If a default has occurred, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless Respondent is able to demonstrate that the remedy requested is either contrary to law or clearly wrong. Jackson, supra; See W. Va. Code § 18-29-3(a). "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.

W. Va. Code § 29-6A-3(a) provides, in pertinent part, that a grievant shall prevail by default "if a grievance evaluator required to respond to a grievance at any level fails tomake 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-4(a) provides as follows regarding when Respondent must act at level one:

> Within ten days following the occurrence of the event upon which the grievance is based, ... the grievant . . . 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.

Respondent's only defense to this default claim is that, since Mr. Steorts did prepare the response on his computer, and it was his normal practice to deliver his responses by hand delivery or interdepartmental mail, he “must have” delivered his response to Grievant. Unfortunately, this falls far short of establishing that the response was actually transmitted to Grievant or on what date that may

have occurred. The evidence introduced at the level four hearing easily establishes that a response may have been prepared, but there is no evidence that it was ever transmitted to Grievant. Accordingly, Grievant is entitled to prevail by default.

Consistent with 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 writtennotice 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. The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998).

3. Grievant has proven by a preponderance of the evidence that Respondent failed to respond within the statutory time frame at level one.

4. Respondent failed to establish that it was prevented from issuing a timely level one response due to sickness, injury, excusable neglect, unavoidable cause, or fraud.

Accordingly, Grievant's request for a determination of default is **GRANTED**. Because Respondent has previously requested a hearing regarding whether the requested remedy is clearly wrong or contrary to law, such hearing will be scheduled. **Within five days of receipt of this Order, the parties are directed to confer with one another andprovide this office with at least THREE MUTUALLY AGREEABLE DATES for scheduling said hearing.**

Date: April 8, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge