**JANET C. SWINLER, et al.,**

**Grievants,**

**v. Docket No. 03-T&R-250D**

**DEPARTMENT OF TAX & REVENUE,**

**Respondent.**

## ORDER DENYING DEFAULT

**Janet C. Swinler, Cheryl E. Cummings, and Cathy R. Taylor ("Grievants"), employed by the Department of Tax and Revenue ("T&R") as Revenue Agents II, filed a level one grievance on July 17, 2003. A level one decision was issued on July 21, 2003, and appeal to level two was made on July 22, 2003. A level two decision was issued on August 4, 2003, but was not received by Grievants until August 9 and 11, 2003. Grievants filed a level three appeal, and a Claim of Default, on August 11, 2003. By letter dated August 18, 2003, T&R requested a hearing on the default claim. The hearing was subsequently held in the Grievance Board's Westover office on September 8, 2003. Grievants appeared *pro se* and T&R was represented by counsel, Jan P. Mudrinich. The parties declined the opportunity to file 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 undisputed.**

## Findings of Fact

**1. Grievants have been employed by T&R as Revenue Agents II at all times pertinent to this grievance.**

**2. Grievants filed a level two grievance appeal on July 22, 2003, and a conference was conduced on July 30, 2003 in Respondent's Clarksburg Regional Office.**

**3. A level two decision was issued on August 4, 2003, and was sent by certified mail to Grievants' residences.**

**4. Due to their work assignments, Grievants were unable to collect the decisions until**

August 9 or August 11, 2003.

## Discussion

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which 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.

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence. 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.

Grievants' default claim is based upon the fact that they did not receive a level two decision within five days of the level two conference. W. Va. Code § 29-6A-4 provides as follows regarding when Respondent must act at level two:

**(b) Level two.**

**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 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.**

**Grievants base their claim upon information provided to them by Mark Morton, General Counsel for Revenue Operations, that their level three appeal would have to be inthe Commissioner's hands before the close of the fifth business day following their receipt of the level two decision on Saturday, August 9, 2003. Grievants reason that Respondent should be held to the same strict standard which they were, i.e., the decision should have been in their hands within five days.**

**Respondent asserts that the grievance procedure statute does not require a grievant to receive his or her decision within five days. It only requires that the decision be issued and transmitted to a grievant within five days, and Respondent followed this procedure. This issue has been addressed by the Grievance Board a number of times. The fact that Grievants did not receive the decision within five days of the level two conference is not determinative. W. Va. Code § 29-6A-3(i) requires that:**

**[d]ecisions rendered at all levels of the grievance procedure shall be dated, in writing setting forth the decision or decisions and the reasons for the decision, and transmitted to the grievant and any representative named in the grievance within the time prescribed.**

**Emphasis added.**

**The decision was transmitted within the statutory time lines. Respondent cannot be held accountable for any delays after the decision is placed in the mail system. Respondent has proven that the decision was issued and transmitted to Grievants in a timely manner, and that is all that is required. Patterson v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-253D (Feb. 5, 2003); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998).** (See footnote 1)

**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. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.**

**3. W. Va. Code § 29-6A-4 requires the employer to issue a level two decision within five days of the level two conference.**

**4. W. Va. Code § 29-6A-3(i) requires only that the decision be transmitted to the grievant(s) within the statutory time frames.**

**5. Respondent demonstrated that the level two decision was issued and transmitted to Grievants in a timely manner, and that is all that is required. There is no requirement that Grievant receive the decision within any particular time frame. Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998).**

**Accordingly, Grievants' request that a default be entered is DENIED. This grievance should be, and the same hereby is, ORDERED REMANDED to level three of the grievance procedure for state employees for hearing within seven days of receipt of this Order. Thisgrievance is ORDERED DISMISSED and STRICKEN from the docket of this Grievance Board.**

**DATE: OCTOBER 15, 2003**

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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***Footnote: 1***

***.Although Grievants' perception that they are held to a different standard than T&R is understandable, it is not accurate. Had they mailed their appeal by certified mail and thus had proof of timely filing, that would be acceptable. While the advice given by Mr. Morton was a very strict application of the time lines, it would have been in Grievants' best interestabsent any proof of filing.***