EVAN WILLIAMS,

Grievant,

v v.

Docket No. 04-ADMN-239D

DEPARTMENT OF ADMINISTRATION/

PURCHASING DIVISION,

Respondent.

ORDER DENYING DEFAULT

On June 18, 2004, the Purchasing Division ("PD" or "Agency"), requested a default hearing with this Grievance Board, because Grievant, Evan Williams, had filed a motion for default with the Agency dated June 15, 2004. Grievant alleges a default occurred at Level I, when his employer failed to respond completely in its Level I response. The underlying grievance deals with a transfer. A Level IV default hearing was held July 12, 2004, and this case became mature for decision on that date. (See footnote 1)

Issues and Arguments

Grievant asserts a default occurred at Level I because his original grievance form was not returned at the same time as he received the Level I Decision. Respondent maintains all responses were given in a timely manner, and there is no mandated duty to return the grievance form, and the original grievance form is not needed to advance to the next level.

After a detailed review of the entire record, the undersigned Administrative Law

Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Buyer Supervisor in the Purchasing Division. 2. Grievant filed a grievance on his transfer on Tuesday, June 1, 2004, at 4:09 p.m.

3. His supervisor, Karen Byrd, e-mailed Grievant on Friday, June 4, 2003, setting the informal conference for Monday, June 7, 2004.

4. This conference was held on the scheduled date and Grievant was hand-delivered a response on Tuesday, June 8, 2004, denying the grievance.

5. Ms. Byrd then left town to attend a seminar, and was gone the rest of the week.

6. Grievant e-mailed Ms. Byrd on Monday, June 14, 2004, at 11:21 a.m. asking for the return of the original grievance form.

7. Ms. Byrd responded at 11:27 a.m., saying she would get him the form and then hand carried it to Grievant shortly thereafter.

8. Grievant filed his grievance to Level II with a memorandum to Director David Tincher dated June 15, 2004, but did not attach his original grievance form.

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure and subsection (a) states:

(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 acontinuing 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. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.**

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002). 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. 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 PD can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A- 3(a), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter supra; Williamson, supra. W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> **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.**

Grievant asserts a default occurred because PD did not "respond completely" within the required time frame. By respond completely, Grievant maintains Respondent did not return his original grievance form in a timely manner.

As stated by W. Va. Code § 29-6A-4, the employer is to schedule an informal conference to discuss the grievance within three days of the receipt of the written grievance if the grievant requests this conference. (See footnote 2) **After the conference, the immediate supervisor "shall" issue a written decision within six days of the receipt of the written grievance. Ms. Byrd received the grievance on June 1, 2004, (the day received and weekend days do not count), on June 4, 2004, she scheduled an informal conference for Monday, June 7, 2004, and then issued and delivered the Level I Decision the next day, on Tuesday, June 8, 2004. According to this time frame, Ms. Byrd scheduled the conference within the required three days, and issued the decision within the required six days. There is no default here. Grievant asserted that the Division of Personnel has a rule requiring the original grievance form to be returned with all decisions, but was unable to cite this rule or regulation. There is no such rule or regulation within the grievance procedure. While it is helpful to return the original form with the Decision, it is not required, and frequently a grievant completes new form at each**

level. This failure to return the form does not create a default.

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." W. Va. Code § 29-6A-3(a)(2).

2. An informal conference, if requested, must be scheduled within three working days of the date of receipt of the grievance form. W. Va. Code § 29-6A-4(a).

3. "The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance." W. Va. Code § 29-6A-4(a).

4. Respondent scheduled the informal conference within three days and issued the Level I Decision within six working days.

5. Failure to return the original grievance form does not constitute a default under W. Va. Code § 29-6a-3(a)(2).

6. Given this set of facts, no default is found.

Accordingly, Grievant's request a default be entered is DENIED. Respondent is directed to hold a Level II conference within the statutory time frames after receipt of this Decision.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 19, 2004

Footnote: 1

Grievant was represented by Fred Tucker of the United Mine Workers of America, and Respondent was represented by Heather Connolly, Esq.

Footnote: 2

Grievant did not request an informal conference on his grievance form, but Ms. Byrd did schedule one and Grievant did not object.