BRANDON JONES,

Grievant,

v. Docket No. 04-CORR-286D

DIVISION OF CORRECTIONS/

ST. MARYS CORRECTIONAL CENTER,

Respondent.

ORDER DENYING DEFAULT

Brandon Jones ("Grievant"), employed by the Division of Corrections ("DOC") as a Correctional Officer IV at St. Marys Correctional Center, filed an undated grievance directly to level two following his suspension, effective June 23, 2004. On July 21, 2004, Grievant filed a claim of default with the Grievance Board. A hearing was held on the default issue in the Grievance Board's Wheeling office on August 23, 2004. Grievant represented himself, and DOC was represented by Charles Houdyschell, Jr., Assistant Attorney General. The matter became mature for decision at the close of the hearing after both parties waived the opportunity to file proposed findings of fact and conclusions of law.

The following facts derived from the evidence submitted at hearing are undisputed, and may be set forth as findings of fact.

Findings of Fact

1. Grievant has been employed by DOC as a Correctional Officer IV assigned to St. Marys Correctional Center ("SMCC"), at all times pertinent to this grievance.

2. By letter dated June 23, 2004, Grievant was notified that he was suspendedimmediately, without pay, for a fifteen working day renewable period, as required, to conduct a full investigation of his conduct as well as allegations he had made regarding the conduct of other employees at the facility. Grievant was also directed to report to the Charleston Psychiatric Group for a fitness for duty evaluation on July 1, 2004.

3. Grievant filed an undated grievance at level two upon his receipt of notification of the

suspension. SMCC Deputy Warden Tony Lemasters scheduled a level two conference for July 7, 2004.

4. On July 5, 2004, Grievant requested the level two time lines be waived, and the level two conference be rescheduled after the fitness evaluation was submitted for review. Grievant stated that the request was being made because the evaluation had already been completed, and might well eliminate that part of the grievance.

5. At the conclusion of the fifteen working days, DOC renewed Grievant's suspension for an additional fifteen working days, for completion of the investigation.

6. By letter dated July 12, 2004, Grievant requested that Deputy Lemasters schedule a level two grievance conference because the extended suspension was causing him severe hardships.

7. Deputy Lemasters advised Grievant, by letter of July 16, 2004, that the original extension was to allow for the investigation to be completed and a fitness exam to be conducted. Since neither the results of the fitness exam, nor the investigation had been received, Grievant's request to schedule a conference at that time was denied.

8. DOC received the fitness exam results on July 21, 2004, and completed the investigation on either August 8 or 9, 2004.

9. Grievant has subsequently been dismissed from employment with DOC.

Discussion

Grievant argues that by extending the suspension DOC changed the circumstances under which he had requested the delay, and the failure to comply with his request for a conference on July 12, 2004, resulted in a default. DOC denies that it defaulted, noting that the fitness report was not available until July 21, 2004.

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

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 evidencewhich 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.

W. Va. Code § 29-6A-4(b) provides as follows regarding when Respondent must act at 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.

In general, "[a] right or privilege given by statute may be waived or surrendered, in whole or in part, by the party to whom or for whose benefit it is given." Smith v. Bell, 129 W. Va. 749, 41 S.E.2d 695 (1947). Although some statutes forbid waiver of the protections they afford, W.

Va. Code § 29-6A-3(a)(2) is not such a statute. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. See W. Va. Code § 29-6A-3(g). Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Huston v. W. Va. Dep't of Tax and Revenue and Div. of Personnel, Docket No. 99-T&R 469D (Feb. 29, 2000); Parker v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-296D (Nov. 30, 1999). This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). The West VirginiaSupreme Court of Appeals upheld this interpretation in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), in which a default claim was denied after Grievant had agreed to delay a level two hearing. The time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. Jackson, supra; Gaskins v. W. Va. Dep't of Health, Docket No. 90-H- 032 (Apr. 12, 1990).

This situation is unusual in that Grievant, rather than the Respondent, requested the waiver, and the request was made in writing. Grievant's testimony indicates that the request may have been made under the false assumption that DOC would receive the results of the fitness exam within a few days. While his circumstances did change after he requested the waiver, the suspension letter clearly advised Grievant that his return to work could be delayed by an extension. Deputy Lemasters incorrectly recalled that Grievant agreed to delay the conference until the investigation was completed; however, under Grievant's own terms, there was no default on July 21, 2004, the date this default was filed.

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 sameby a preponderance of the evidence.

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

4. The parties may agree to an extension of the statutory time limits for issuance of a decision, which constitutes a valid waiver of the statutory requirements. Parker v. W. Va. Dep't of Health & Human Res., Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999)

Accordingly, Grievant's request for a finding of default is DENIED . Because this issue will be resolved by the pending level four dismissal hearing, this grievance is Ordered stricken from the docket of the Grievance Board.

DATE: AUGUST 31, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE