TIMOTHY CAIN, et al.,

Grievants,

v. Docket No. 05-DOH-402D

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Timothy Cain, Linda Hypes, Ronald Markle, Dean Fordyce and Jeff Clay ("Grievant"), employed by the Division of Highways ("DOH") filed individual grievances at level one in July and August 2005, challenging rules which denied them from accruing credit for years of service and leave while off work on Total Temporary Disability ("TTD"). For relief, they seek credit for the years of service, and credit, or in some cases, a lump sum of money for the hours of leave they should have been credited. The grievances were denied at levels one and two. An evidentiary hearing was conducted at level three on October 18, 2005. Grievant's denied DOH hearing examiner Brenda Craig Ellis' request to waive the time frame for a decision. By letter dated October 28, 2005, Grievant Cain requested the grievance be granted by default. (See footnote 1) **A hearing on the default was conducted by telephone on November 22, 2005. Grievants were represented by Tammy Cain, and DOH was represented by Barbara Baxter, Esq. Both parties declined the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature at the close of the hearing. The following facts are derived from a preponderance of the evidence made part of the record at the default hearing.**

Findings of Fact

1. Grievants are employed by DOH and have all suffered work-related injuries for which they were granted Total Temporary Disability benefits from the Workers Compensation Commission.

2. An evidentiary hearing was conducted by DOH at level three on October 18, 2005.

3. Grievants refused a request to extend the statutory five-day time limit in which a

decision must be issued.

4. The decision was placed in the mail at the main Charleston post office after 9:00 p.m. on October 25, 2005.

5. The decision did not have A date on the postage label, but was postmarked by the U.S. Postal Service on October 26, 2005.

Discussion

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).

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). If DOH can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the time lines 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, Grievants will not receive the requested relief. 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). 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.

Grievants cite Grievance Board Procedural Rule 3.3, which states that decisions "shall be transmitted within the time prescribed to the grievant and any representative named in the grievance." Grievants also rely on W. Va. Code § 29-6A-4(d), which requires the chief administrator or his or her designee at level three to issue a writtendecision within five days of the hearing, and W. Va. Code §29-6A-3(o), which provides that "[g]rievances shall be processed during regular working hours." Therefore, Grievants argue, the decision was due by the end of the working day on October 25, 2005. As an alternative, Grievants argue that the decision was due at 12:00 p.m. on October 25, based on the calculation of five days, and twenty-four hours per day, which gives the hearing evaluator one hundred twenty hours to issue a decision.

DOH asserts that the decision was effectively, and timely, transmitted to the Grievants on October 25, 2005, when the decision was delivered to the post office. An affidavit was provided in which Ms. Ellis, stated that she personally had deposited the decision at the main post office on Washington and Dickinson Streets at approximately 9:45 p.m. on October 25, 2005. DOH relies upon the holding in Stover v. Raleigh County Board of Education, 02-41-179 (Sept. 19, 2002), in which the Grievance Board applied the "mail-box rule" for determining whether a deadline had been met.

It is undisputed that a level three decision was due in this matter within five working days of the hearing. There is no statutory provision for calculating days by the number of hours from the adjournment of the hearing. Further, the provision that "[g]rievances shall be processed during regular working hours," has been interpreted to mean the hearings shall be conducted during working hours. Certainly Ms. Ellis would have preferred to have the decision completed by the end of the working day, but she did not.

As noted previously, the Grievance Board does apply the "mail-box rule" when determining whether a deadline has been met. Although affidavits are not the preferable form of evidence since Grievants could not cross examine Ms. Ellis, there is no evidence that her representation of when the decision was placed in the mail is untrue. Finally, theundersigned takes administrative notice that the cut off time for postmarking at the Charleston post office

is 7:00 p.m. Accepting that Ms. Ellis placed the decision in the mail slot after 9:00 p.m., it would have been postmarked October 26, 2005. Therefore, Grievants have failed to prove by a preponderance of the evidence that DOH defaulted at level three.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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. 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).

3. W. Va. Code § 29-6A-4(d), requires the chief administrator or his or her designee at level three to issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

4. Grievants did not meet their burden of proving by a preponderance of the evidence that DOH defaulted by failing to timely issue a decision at level three.

Accordingly, the Grievants' request for judgment by default is DENIED. The parties are directed to provide this office, on or before December 22, 2005, with three dates they are available for a level four hearing.

DATE: DECEMBER 16, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant Markle filed a separate claim for default which was assigned Docket No.05-DOH-401D. It appears that the remaining Grievants notified the Grievance Board by telephone that they wanted to join in the claim for default. Accordingly, all the above- named individuals are hereby Ordered consolidated.