THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GEORGE WILKINSON,

Grievant,

v. **Docket No. 06-CORR-066D**

DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

ORDER GRANTING DEFAULT

George Wilkinson, Grievant, filed a claim of default against his employer, Mount Olive Correctional Complex ("MOCC") on February 15, 2006, alleging default occurred at Level II of the grievance process. The underlying grievance deals with MOCC's promotion practices. A Level IV default hearing was held on April 13, 2006, at the Grievance Board's office in Charleston, for the purposes of determining whether a default had occurred. (See footnote 1) Grievant was represented by Christopher S. Moorehead, Esq., and Respondent was represented by Charles Houdyschell, Jr., Senior Assistant Attorney General, and John Boothroyd, Assistant Attorney General. This case became mature on April 27, 2006, upon the parties' submissions of proposed findings of fact and conclusions of law.

The following material facts have been proven:

Findings of Fact

1. Grievant is employed at MOCC as a Canine Unit Officer. 2. This grievance was initially filed on January 31, 2006, and then appealed to Level II on Tuesday, February 7, 2006.

3. Warden Thomas McBride assigned the grievance to Terri Arthur on February 8, 2006. The Level II meeting was scheduled for and held on February 15, 2006.

4. Grievant received notice of the scheduled meeting on February 10, 2006.

5. Grievant worked Wednesday, February 8th; Monday, February 13th; Tuesday February 14th; and Wednesday, February 15th. Thursday, February 9th and Friday, February 10th were his scheduled days off.

7. At the meeting on February 15th, Grievant informed Ms. Arthur he was claiming default because the Level II conference was held on the 6th day when only 5 days were permitted by statute.

8. On February 15th, Ms. Arthur issued her decision denying the grievance. In that decision she stated she did not count the Thursday and Friday as Grievant did not work.

Discussion

When a grievant asserts that his employer is in default in accordance with *W. Va. Code* § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See W. Va. Code* § 29-6A-3(a)(2). *Board, et al. v. WVDHHR/Lakin Hospital*, Docket No. 99-HHR-329D (Sept. 24, 1999).

W. Va. Code § 29-6A-4(b) provides: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 or her 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.

Ms. Arthur scheduled what she believed was a timely Level II grievance meeting based on a good-faith interpretation of the term “working days” pursuant to *W. Va. Code* §26-6A-2(c)which defines "Days" as working days exclusive of Saturday, Sunday or official holidays. Ms. Arthur made it very clear in her Level II decision that she interpreted “working days” to mean the days the employee works. However, the Grievance Board has held, “the term 'working days' refers not to days when an employee is actually working, or performing the duties and responsibilities of his or her job, but rather refers to a work week comprised of 'regular working hours,' defined by the employer, which in the

instance of most West Virginia state government agencies, would be 8:30 to 4:30, Monday through Friday." *Sheppard v. W. Va. DHHR/Bureau of Children and Families*, Docket No. 01-HHR- 598D (May 9, 2002).

Grievant has proven Respondent did not hold the Level II conference within the 5 day time frame prescribed by *W. Va. Code* § 29-6A4(b). The above discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When a grievant asserts that his employer is in default in accordance with *W. Va. Code* § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer mayshow that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See W. Va. Code* § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

2. *W. Va. Code* § 29-6A-4(b) provides:

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 or her 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.

3. Respondent defaulted at Level II.

Accordingly, this default is **GRANTED**. The parties are directed to send to the Grievance Board five mutually agreed upon dates for the default remedy hearing within five days of receiving this Order.

Date: June 6, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Respondent also asserted the grievance was untimely.