THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOHN ROBINSON,

Grievant,

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

Janis I. Reynolds

Senior Administrative Law Judge

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER DENYING DEFAULT

John Robinson, Grievant, filed a claim of default against his employer, Anthony Correctional Center ("ACC") on March 16, 2006, alleging default occurred at Level III of the grievance process. The underlying grievance deals with ACC's promotion practices. A Level IV default hearing was held on June 15, 2006, at the Grievance Board's office in Beckley, to determine if a default had occurred. Grievant represented himself, and Respondent was represented by Charles Houdyschell, Jr., Senior Assistant Attorney General. This case became mature on June 29, 2006, upon the parties' submissions of proposed findings of fact and conclusions of law.

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 at ACC as a Correctional Officer. 2. This grievance was initially filed on February 24, 2006, and the Level I Decision was issued on March 2, 2006.

3. Grievant then appealed to Level II on March 8, 2006.

4. As a Level II conference must be scheduled on, or before, the fifth day after receipt of the grievance, not counting the day received, the Level II conference should have been scheduled on, or before, March 15, 2006.

5. By letter dated March 13, 2006, Grievant was informed the Level II conference was scheduled for March 17, 2006.

6. Grievant received notice of the scheduled Level II conference on March 13, 2006.

7. By letter dated March 14, 2006, Grievant filed a notice of default with the Grievance Board. Grievant did not send a copy of this notice to ACC.

8. At the time Grievant alleged default with the Grievance Board, ACC was not in default.

9. On March 17, 2006, ACC held the Level II conference, and Grievant did not attend. A Level II Decision was issued within the required timelines.

Synopsis

Grievant asserts he filed his notice of default "as soon as he was aware that the default was inevitable. . . ." Respondent avers default had not occurred at the time Grievant filed his default, and because the filing of a default tolls the timelines, default never occurred. Additionally, the undersigned Administrative Law Judge notes Grievant did not file his notice of default with ACC. This grievance must be denied for two reasons. First, the case law of the Grievance Board holds the filing of a default claim tolls the timelines, second, default had not occurred at the time Grievant alleged default.

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. Board v. W. Va. Dep't of Health and Human Res., 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.

If ACC had not rescheduled the Level II conference, and if Grievant had filed a notice of default after the March 15, 2006 deadline, a default would have occurred, as ACC was required to hold the hearing by that date. By filing on March 14, 2006, Grievant filed before default occurred, and this filing tolled the timelines for holding the Level II conference. The Grievance Board has held that a default claim will toll the time limits for lower proceedings until the issue of default is resolved. Little v. Dep't of Envtl. Protection, Docket No. 04-DEP- 201D (Nov. 24, 2004); D'Angelo v. Dep't of Health and Human Res., Docket No. 02-HHR-54D (Apr. 1, 2002). See Huston v. W. Va. Dep't of Tax & Revenue, Docket No. 99-T&R- 469D (Feb. 29, 2000). With this set of facts a default did not occur.

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 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. Board v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-329D (Sept. 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. Grievant filed his notice of default prematurely and by doing so tolled the timelines, thus, a default did not occur.

Accordingly, this default is **DENIED**. Respondent is directed to hold a Level II conference within

five days of the receipt of this Order because the prior Level II conference should not have been held after Grievant alleged default.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: August 25, 2006