**JOAN NOGGY, et al.,**

**Grievants,**

**v.** **Docket No. 01-CORR-364D**

**DIVISION OF CORRECTIONS/NORTHERN**
**REGIONAL JAIL AND CORRECTIONAL FACILITY,**

**Respondent.**

## ORDER DENYING DEFAULT

On May 21, 2001, Joan Noggy, Rose Noggy, and Joseph Frey ("Grievants") appealed to level four of the grievance procedure, alleging they are entitled to prevail by default in their grievances filed against their employer, Respondent Division of Corrections ("DOC"). Grievants contend a default occurred at level three. On July 27, 2001, a hearing was held in the Grievance Board's office in Wheeling, West Virginia. Grievants represented themselves and DOC was represented by counsel, Leslie K. Tyree. The parties elected not to file written proposals, so this matter became mature for consideration at the conclusion of the hearing.

The following findings of fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

## Findings of Fact

1. Grievants are employed as correctional officers at the Northern Regional Jail and Correctional Facility ("NRJ").

2. In April of 2001, each Grievant filed a separate grievance, alleging entitlement to overtime pay while attending the West Virginia Corrections Academy. 3. Grievant Joan Noggy was the first to file her grievance, which she gave to her immediate supervisor, Shawn Straughn, Unit Manager.

4. Upon receiving Grievant Joan Noggy's grievance, Mr. Straughn took the grievance to the

Human Resources Department to obtain a tracking number. The grievance was logged in by Phyllis Langmyer, Administrative Assistant.

5. After assigning a number to the grievance, Ms. Langmyer informed Mr. Straughn that, since the grievance involved a monetary issue, it could proceed to level three upon agreement. She provided Mr. Straughn with a form for the grievant to sign, which stated “[w]e hereby agree to file this Grievance at Level 3 . . . [s]ince that is the level vested with the authority to grant the requested relief.” This form also contained lines for the level one and two authorities to provide signatures.

6. Ms. Langmyer told Mr. Straughn to return the form to her after it had been completed.

7. Although Ms. Langmyer meant only that she should be provided copies of the agreement to proceed to level three, Mr. Straughn believed that she meant to return the grievance to her for filing at level three.

8. Mr. Straughn had no previous experience with the form allowing a level one grievance to proceed to level three, and he assumed it was a new procedure in the grievance process. He informed all the employees in his unit that grievances would be processed in this manner, instructing them to file level three grievances with the Human Resources Department, after completing the form for skipping levels one and two.

9. All three Grievants followed Mr. Straughn's instructions, obtaining the appropriate signatures, and filing the grievances and “skip” forms with the HumanResources Department.

10. Ms. Langmyer or other employees of the Human Resources Department simply filed the grievances in that office, assuming they were copies.

11. Approximately 18 days after the grievances were given to the Human Resources Department, Grievants inquired as to the status of their grievances. At that time, it was discovered that the grievances had merely been filed away.

12. These three grievances have never been answered or processed at level three of the grievance procedure.

## Discussion

W. Va. Code § 29-6A-3(a) provides, in pertinent part, that a grievant shall prevail 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." Because Grievants are claiming they prevailed by default under the statute, they bear the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources , Docket No. 98-HHR-346D (Nov. 25, 1998). 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).

W. Va. Code § 29-6A-4 provides, in pertinent part, regarding proceedings at levels one through three:

(a) Level one.

> Within ten days following the occurrence of the event upon which the grievance is based, . . . may file a written grievance with the immediate supervisor of the grievant. . . . The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. . . .

(b) 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 . . . .

(c) Level three.

> Within five days of receiving the decision of the administrator of the grievant's work location, . . . the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department . . . or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.
>
> The chief administrator or his or her designee shall hold a hearing . . . within seven days of receiving the appeal. . . .

There is no dispute in this case that there was no timely response to the grievances. However, Respondent contends that its failure to process these grievances was the result of a simple misunderstanding, and it could not have been expected to process them as level three grievances when they were never filed with the appropriate level three authority, i.e., the commissioner of DOC.

In Parsons v. McCoy, 157 W. Va. 183, 202 S.E.2d 632 (1973), the Court in discussing whether a finding of default should be upheld, stated "the majority of cases appear to hold that where an insurance company has misfiled papers, this amounts to excusable neglect . . . ." (Citations omitted). The Court found the misfiling was the result of a "misunderstanding" and "inadvertence" and no default was found. In Wood County Comm'n v. Hanson, 187 W. Va. 61, 415 S.E.2d 607 (1992), the Court repeated the Parsons language and again found the misplacement of a complaint and theresulting failure to file an answer in a timely fashion was due to excusable neglect and would not result in a default. "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied." Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997) (citations omitted).

The undersigned finds that Respondent has provided ample evidence of excusable neglect. Although Ms. Langmyer did not testify, Mr. Straughn's own memorandum indicates that Ms. Langmyer later explained to him that she meant for the grievants to file copies of their grievances and skip forms with her, and that the originals should have been filed with the commissioner. Ms. Langmyer filed the forms, as she would normally with any grievance forms, for her office's records. It was not her responsibility to forward them to the commissioner or process them at level three. Accordingly, the evidence in this case clearly shows that Respondent's failure to process these grievances was the result of a misunderstanding, which is not a basis for granting a default judgment. Respondent has proven that it was prevented from responding at level three in a timely fashion due to excusable neglect, as allowed by the provisions of W. Va. Code § 29-6A-3(a).

Consistent with the foregoing discussion, the following conclusions of law are appropriate in this matter.

## 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 inthis 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. When requesting to prevail by default, Grievants bear the burden of establishing such

default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources , Docket No. 98-HHR-346D (Nov. 25, 1998).

3. No default will be found where the employer's failure to respond was due to misunderstanding or inadvertence. Parsons v. McCoy, 157 W. Va. 183, 202 S.E.2d 632 (1973).

4. Grievants have proven by a preponderance of the evidence that DOC failed to respond at level three within the statutorily prescribed time limits.

5. DOC has proven that it was prevented from responding at level three in a timely fashion due to excusable neglect.

Accordingly, Grievants' request for a determination of default under W. Va. Code § 29-6A-3(a) is **DENIED**. This matter is hereby **REMANDED** to level three for processing at that level, and it is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

**Date: August 29, 2001** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**