**JAMES A. ROSE,**

**Grievant,**

**v. Docket No. 02-DEP-412D**

**WEST VIRGINIA DEPARTMENT OF**

**ENVIRONMENTAL PROTECTION/**

**DIVISION OF MINING and RECLAMATION,**

**Respondent.**

## ORDER DENYING DEFAULT

**Grievant, James A. Rose, filed two grievances against the West Virginia Department of Environmental Protection ("DEP"), on October 15 and 22, 2002. The first grievance dealt with what Grievant perceived as rude behavior from his supervisor, and the second dealt with his non-selection for a position. In a letter dated December 21, 2002, Grievant filed a Notice of Default with this Grievance Board asserting Respondent had not met the deadlines specified in W. Va. Code § 29-6A-4(c).**

**A default hearing was held on February 11, 2003. This issue became mature for decision on February 28, 2003, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 1)

**After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

### Findings of Fact

**1. These grievances were filed on October 15 and 22, 2002. They were consolidated, a Level II conference was held on November 6, 2002, and they were**

**denied at Level II on December 6, 2002. 2. On November 25, 2002, DEP received a letter from Attorney Lacy Wright notifying the agency that he had been retained to represent Grievant in his grievances.**

**3. On December 10, 2002, Grievant wrote Mr. Wright and updated him on the progress so far in the grievances. He also sent him various grievance documents. Contrary to Grievant's assertions, this letter did not indicate in any way that Grievant would be handling the Level III grievance process, and Mr. Wright would not be needed until Level IV. Grt. No. 2 at Level IV.**

**4. Grievant appealed the Level II Decision on December 10, 2002, to Director Michael Callaghan, and this appeal was received on December 11, 2002. In this letter Grievant stated he wanted the hearing scheduled at Welch, and within the statutory time frames. Grievant also identified the individuals and materials he wished to have subpoenaed. Grt. Nos. 3 & 4 at Level IV.**

**5. On December 13, 2002, DEP Attorney Karen Watson was assigned the task of setting up the Level III hearing.**

**6. Ms. Watson noted Grievant's requests for the hearing to be held in Welch, and for the statutory time frames to be followed. She began contacting all the parties involved to set up the hearing. Resp. No. 2 at Level IV.**

**7. Ms. Watson found it was going to be difficult to schedule the Level III hearing within the time frames because of the impending holidays and the schedules of the others involved. The only Hearing Examiner DEP has on contract is Jack McClung, and he could only have the hearing in Welch on Thursday, December 19, 2002. He did not want to do this however, as he had a hearing scheduled on December 18, 2002, and because of thetime it would take to travel to and from Welch. The only Assistant Attorney General DEP works with is Steven Dragisich, and he only had Friday, December 20, 2002, free.**

**8. Given these problems, Ms. Watson contacted Mr. Wright on December 16,**

**2002, and asked if the Level III hearing could be held outside the statutory time frames. Mr. Wright verbally agreed without consultation with his client.**

**9. Thereafter, Ms. Watson made repeated calls and sent numerous e-mails to all concerned. She did not talk to Mr. Wright again, as he was out when she called, but discussed dates with Mr. Wright's secretary, Joy. By December 17, 2002, the representatives had finally agreed upon the date of February 6, 2003.** (See footnote 2) **Resp. Nos. 3 & 4 at Level IV.**

**10. Around noon on Wednesday, December 18, 2002, Grievant wrote Jeff Schoolcraft, in DEP's Human Relations Department, to complain that he had not received a hearing date or his requested documents. He noted he had not agreed to an extension and his hearing must be held by Friday, December 20, 2002.**

**11. Ms. Watson sent an e-mail to various people confirming the February 6, 2003, date, on December 18, 2002. She also wrote Mr. Wright noting the agreement to waive the statutory time frames and stating the date for the Level III hearing. She requested Mr. Wright fax her a response by Friday, December 20, 2002, confirming thisagreement in writing. Ms. Watson sent this letter by fax and by regular mail.** (See footnote 3) **Ms. Watson also sent a copy of this letter to Grievant. Grt. No. 9 at Level IV.**

**12. On December 18, 2002, Grievant faxed Mr. Wright a note stating Mr. Wright was not to be his attorney at Level III, but he would still need him for Level IV. Grievant also noted Mr. Wright or his secretary had scheduled the Level III hearing without first checking with him. Grievant did not send a copy of this note to DEP.**

**13. At 3:20 p.m. on Wednesday, December 18, 2002, Grievant e-mailed Ms. Watson and stated he had just learned the Level III hearing was scheduled for February 6, 2003, and he did not approve of the extension. He indicated Mr. Wright's secretary had acted inappropriately, and she had scheduled the hearing**

**without consultation and without approval from Mr. Wright. Grievant requested the Level III hearing be held within the statutory time frames, which would be by Friday, December 20, 2002. Grt. No. 6 at Level IV.**

**14. Although not required to do so, after receiving this e-mail, Ms. Watson called Mr. Wright's office to inform him of Grievant's concerns.**

**15. On December 19, 2002, Mr. Wright faxed and wrote Ms. Watson stating he had been informed by his receptionist on December 18, 2002, that Ms. Watson had requested a tentative hearing date for Grievant's hearing, and had requested it be extended to February 6, 2003. Mr. Wright stated he had not agreed and would not agreeto this extension. He then requested the hearing be held within the statutory time frames. Grt. No. 8 at Level IV.**

**16. After receipt of this fax, Ms. Watson wrote Mr. Wright reminding him of his December 16, 2002 discussion with her when they had reviewed the information Grievant had asked for, and he had agreed to extend the statutory time frames. She also noted her subsequent phone calls to his office checking on dates, and that Mr. Wright had not been available but his secretary had given Ms. Watson dates that would be acceptable. Grt. No. 9 at Level IV.**

**17. On Friday, December 20, 2002, Mr. Wright again faxed and wrote Ms. Watson stating his client did not agree to an extension of the statutory time. Grt. No. 9 at Level IV.**

**18. Grievant filed this request for default with the Grievance Board and Director Callaghan by letter dated Saturday, December 21, 2002.**

**19. On January 2, 2003, Mr. Wright wrote Ms. Watson disagreeing with her on whether he had agreed to an extension. In this letter, he did agree they had discussed the issue of an extension on December 16, 2002, but since there was no agreement, DEP had a duty to go ahead and schedule the hearing within the statutory time frames.** (See footnote 4) **Grt. No. 13 at Level IV.**

**20. On January 3, 2003, Mr. Wright wrote Ms. Watson advising her he no longer represented Grievant with regard to his grievances. Grt. No. 14 at Level IV.**

## Issues and Arguments

**Grievant maintains he and his attorney never agreed to an extension of the statutory time frames, and since the hearing was not held by December 20, 2002, a default occurred. He also asserts Mr. Wright was not his attorney during this time, and DEP was aware of this because he had not listed a representative on his grievance form.**

**Respondent avers it dealt with Mr. Wright on the matter of an extension because it had received notice in November 2002 that he was Grievant's representative/attorney. Respondent notes it would have been incorrect to communicate with Grievant on grievance issues once he had representation. Respondent maintains Mr. Wright agreed to an extension, and it was based on this agreement that Ms. Watson set the hearing for February 6, 2003, and then sought the written waiver. Respondent asserts Grievant's attorney's actions resulted in the failure to schedule the hearing within the statutory time frames.**

## Discussion

**As there were several issues raised by the parties, they will be discussed one at a time.**

### I. Procedural matters

**W. Va. Code § 29-6A-3(a) states:**

> **(2)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 alevel 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.**

**In addition, W. Va. Code § 29-6A-5(a) states: "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."**

**Grievant bears the burden of establishing default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.**

**If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless DEP is able to demonstrate the remedy requested is either contrary to law or clearly wrong. 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). Of course, if DEP demonstrates a default has not occurred because it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A-3(a), Grievant will notreceive the requested relief. If there is no default or the default is**

**excused, Grievant may proceed to the next level of the grievance procedure.**

**II. Credibility and hearsay**

**Because the testimony of Ms. Watson and the letter of Mr. Wright disagree as to whether the parties had agreed to a waiver, there is a need to assess the credibility of these individuals. Because Mr. Wright did not appear at hearing, his written statements are hearsay.**

**In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).**

**The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'information.** (See footnote 5) **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

**The comments of Grievant about what Mr. Wright said and the writings of Mr.**

**Wright are obviously hearsay, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997). The key question is whether these statements are credible, and what weight, if any, to give these statements.**

**The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.** (See footnote 6) **Id.; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec. 31,1996); Perdue, supra; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).**

**In assessing the material presented, it is important to note that Ms. Watson was present at hearing, and her testimony was under oath. The undersigned Administrative Law Judge had no concerns with her demeanor, Ms. Watson's testimony was plausible, and her testimony was supported by contemporaneous e-mails.**

**In a letter dated January 14, 2003, Mr. Wright sets out his version of what happened and asserts he never agreed to a waiver, only agreed to review the proposal. These statements are not sworn, and Mr. Wright informed Grievant he would not be available to testify at the default hearing. No reason was given why Mr. Wright could not attend the hearing, and no reason was offered as to why his**

**statements were not sworn or in affidavit form. Additionally, his statements are not plausible. It is difficult to believe Ms. Watson would have spent the time and energy required to set a new hearing date without an agreement. It is also difficult to believe Mr. Wright and his secretary would have participated in this exercise if there was not to be a result. Accordingly, after assessing the statements under the credibility and hearsay factors the undersigned Administrative Law Judge finds Mr. Wright did agree verbally to an extension of the statutory time frames, and Ms. Watson reasonably believed Mr. Wright would sign a waiver prior to the required hearing date to that regard, after the future hearing date had been confirmed.**

**Grievant's testimony that Mr. Wright was not his attorney at this time, and that both DEP and Mr. Wright knew this fact, is incorrect and not established by the evidence. It must be noted that Mr. Wright asserted in his letter of January 14, 2002, that DEP "hadsubstantial ex parte contact with Mr. Rose when he was represented by counsel." Grt. No. 15 at Level IV.**

**III. Default Merits**

**W. Va. Code § 29-6A-4(c) mandates the following time frames at Level II:**

> **The chief administrator or his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.**

**Accordingly, DEP was obligated to hold a hearing by Friday, December 20, 2000, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud," or the parties had agreed to a waiver. W. Va. Code § 29-6A- 3(a)(2).**

**A. Waiver**

**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 § 18-29-3(g). Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Parker v. W. Va. Dep't of Health and Human Resources, 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). See Parker, supra.**

**Respondent contends the parties had a verbal agreement that they would agree to a waiver, and DEP's expectation was this waiver would be placed in writing when there wasa date certain for the hearing. In reviewing all the evidence, the undersigned Administrative Law Judge notes the Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya, supra, "the grievance process is for 'resolving problems at the lowest possible administrative level.'" Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95- 29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable. Morrison v. Div. of Labor, Docket No. 99- LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).**

**Respondent contends Mr. Wright's agreement to extend the statutory time frames and then his withdrawal of this agreement less than two days before the hearing had to be scheduled, in the face of an angry client, induced an error. A**

party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-133D (Jan. 17, 2001); Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). See, e.g., State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996)("Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate andadverse consequences."); Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

This case presents a similar set of facts as the recent case of Bowman v. Marion County Board of Education, Docket No. 02-24-403D (Feb. 26, 2003). In that case the parties had verbally agreed to a waiver and then late the Grievant changed her mind. Grievant then claimed default. There, as here, the hearing was not held within the statutory time frames. Senior Administrative Law Judge Sue Keller held:

> [T]he failure to hold a level two hearing within the statutory period was clearly due to the oral agreement between [the parties] to waive the time lines, . . . . Grievant's attempted unilateral recission of the waiver lacked any valid basis, and to hold the Board in default in these circumstances would encourage grievants to refuse to cooperate with their employers as a means of obtaining relief without providing evidence to support their claims.

See Akers v. Higher Ed. Interim Governing Bd., Docket No. 01-HE-039D (May 3, 2001). The reasoning form Bowman applies here. It is clear from the record DEP believed it had an agreement to waive the timelines based on the December 16, 2002 phone discussion. DEP expected Mr. Wright to put this agreement in writing as soon as a date certain was set. DEP's expectations were reasonable,

**and Grievant's attorney induced error by his actions. Grievant cannot now assert a default on the part of Respondent. Bowman, supra.**

**Given the specific facts of this case, the undersigned Administrative Law Judge believes to find default here would not promote the goals of the grievance procedure. Bowman, supra. However, this ruling does not mean hearings should not be scheduledwithin the time frames outlined by statute. Both parties should schedule grievances quickly, and should attempt to find dates within the time frames, if at all possible.**

**B. Excusable neglect**

**DEP has also raised the defense of excusable neglect. Respondent has the burden to prove this claim that it's failure to act was the result of excusable neglect.**

**The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon its interpretation under the Federal Rules of Civil Procedure. "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 with the time frame specific 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)(quoting Bailey v. Workman's Comp. Comm'r., 170 W. Va. 771, 296 S.E.2d 901 (1982) and quoting 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (1969)). The West Virginia Supreme Court of Appeals has noted, "while fraud, mistake and unavoidable cause are fairly easy to spot, excusable neglect is a more open-ended concept. In general, cases arising under the civil rules are comparatively strict about the grounds for a successful assertion of excusable neglect." Id. Excusable neglect may be found where events arise which are outside the defaulting party's control, and contribute to the failure to act within the specific time limits. See Monterre, Inc. v. Occoquan Land Dev.**

**Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). However, simple inadvertence or a mistake regarding the contents of the procedural rule will not suffice to excuse noncompliance with time limits. See White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, supra, n. 8. This Grievance Board has found excusable neglect, constituting grounds for denying a claim of default, where misfiled documents caused an agency employee to fail to timely schedule a level three hearing; (McCauley, Jr. v. Div. of Corrections, Docket No. 99-CORR- 101D (May 11, 1999) and Thaxton v. Div. of Veterans' Affairs, Docket No. 98-VA-426D (Dec. 30, 1998)); and where an agency employee, who lacked authority to resolve the grievance, failed to schedule a level two hearing because he had just met with grievants on the same issue fewer than two months earlier, and had no new information to present. White v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-003D (Aug. 20, 1999). Excusable neglect, constituting grounds for denying a claim of default, was not found where an employer had a designated substitute employee in place to respond to a grievant's appeal, and that employee simply failed to do so. Toth v. Div. of Corrections, Docket No. 98-CORR-344D (Dec. 10, 1998). See also Brackman v. Div. of Corrections, Docket No. 99-CORR-374D (Apr. 10, 2000).**

**A very similar issue was addressed in Darby v. Department of Health and Human Resources, Docket No. 00-HHR-336D (Dec. 28, 2000), and that case is precedent and controlling here. In Darby, the administrative law judge found excusable neglect when the only Hearing Examiner employed by the Department of Health and Human Resources was unable to hold the hearing within the timelines because of his busy schedule. The administrative law judge found the Department of Health and Human Resources acted in good faith in attempting to hold the hearing as soon as possible even though the hearing date would fall after the statutory deadlines. The failure in Darby did not occur, as here,during the busy**

**Christmas and New Year holidays when many state employees take annual leave.** (See footnote 7)

**This Grievance Board adheres to the doctrine of stare decisis (See footnote 8) in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resignation., Docket No. 92-HHR-132 (July 24, 1992)(citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974)). See also Belcher v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is founded upon a determination that the employees and employers whose relationships are decided by this Board are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.**

**In the instant case, as in Darby, DEP's failure to hold a level three hearing within seven days of receipt of the appeal is the result of excusable neglect. As in Darby, it is clear Ms. Watson did not ignore Grievant's appeal, but rather she became aware, as sheworked to schedule the hearing within the time frames, with the multiple parties involved, and with the interference of the holidays, that it was going to be very difficult to hold the hearing within the statutory time frames. Ms. Watson asked Mr. Wright to agree to an extension of the time frame, and he verbally agreed. Ms. Watson then worked diligently with the schedules of all the parties to set the hearing.**

**As this issue is controlled by the prior ruling in Darby, and the undersigned Administrative Law Judge may not go against established precedent. There was simply no way DEP could comply with the time lines, and it is clear DEP made an**

**attempt to work with Grievant. In the interests of fairness, this failure was simply a case of excusable neglect. Darby, supra.**

**The above-discussion will be supplemented by the following 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. 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." W. Va. Code § 29-6A-3(a). See Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000).**

**2. When a grievant asserts at Level IV 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. Donnellan v. Harrison County Bd. of Educ., Docket No.02-17-003D (June 6, 2002). Once the grievant establishes a default occurred, the employer may show 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); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR- 346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999).**

**3. 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 § 18-29- 3(g). Waiver of the strict statutory timelines is a common occurrence within**

**the context of the grievance procedure. Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999).**

**4. A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). See, e.g., State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) ("Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences."); Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")**

**5. Grievant's attorney induced error by his actions and Grievant cannot now assert a default on the part of Respondent.**

**6. Respondent has the burden to prove this claim that it's failure to act was the result of excusable neglect. 7. The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon its interpretation under the Federal Rules of Civil Procedure. "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 with the time frame specific 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)(quoting Bailey v. Workman's Comp. Comm'r., 170 W. Va. 771, 296 S.E.2d 901 (1982) and quoting 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (1969)).**

**8. The West Virginia Supreme Court of Appeals has noted, "while fraud, mistake and unavoidable cause are fairly easy to spot, excusable neglect is a more open- ended concept. In general, cases arising under the civil rules are comparatively strict about the grounds for a successful assertion of excusable**

**neglect." Id. Excusable neglect may be found where events arise which are outside the defaulting party's control, and contribute to the failure to act within the specific time limits. See Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). However, simple inadvertence or a mistake regarding the contents of the procedural rule will not suffice to excuse noncompliance with time limits. See White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, supra, n. 8.**

**9. Excusable neglect can be found when the only Hearing Examiner employed by an agency is unable to hold a hearing within the timelines because of his busy schedule, if the agency acts in good faith in attempting to hold the hearing as soon as possible, even though the hearing date would fall after the statutory deadlines. Darby v. Dep't of Health and Human Resources, Docket No. 00-HHR-336D (Dec. 28, 2000). 10. DEP has met its burden of proof and demonstrated its failure to set this hearing within the statutory time frames was due to excusable neglect.**

**Accordingly, this default is DENIED. These grievances are remanded to Level III of the grievance procedure.**

**JANIS I. REYNOLDS**

**ADMINISTRATIVE LAW JUDGE**

**Dated: April 23, 2003**

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***Footnote: 1***

***Grievant represented himself, and Respondent was represented by Assistant Attorney General Steven Dragisich.***

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***Footnote: 2***

***There were dates in January 2003 that DEP could have held the hearing, but these were not satisfactory for Mr. Wright.***

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***Footnote: 3***

***Grievant argued that Ms. Watson had not sent this fax because a copy of it was not in his file he later picked up from Mr. Wright. Ms. Watson's testimony was she asked her secretary to fax the letter, later checked to see if it had been done, and it had.***

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***Footnote: 4***

***In this letter, Mr. Wright asserted Ms. Watson had not attempted to schedule a hearing until she received Grievant's objection late on Wednesday afternoon, and the phone call Ms. Watson made to Mr. Wright to inform him of Grievant's objections was an attempt to by-pass Grievant's objections. This assertion is incorrect.***

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***Footnote: 5***

***The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).***

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***Footnote: 6***

***The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice, 5 MSBP 150 (1981).***

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***Footnote: 7***

***Many long-term employees must take earned annual leave at the end of the year or lose it, because they are allowed to carry over a limited number of hours.***

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***Footnote: 8***

***Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dep't of Admin. v. W. Va. Dep't of Health & Human Resources, 192 W. Va. 202, 451 S.E.2d 768, 771 (1994).***