MARSHALL LEO,

Grievant,

v. **Docket No. 03-DEP-235D**

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondent.

ORDER GRANTING DEFAULT

On August 14, 2003, Respondent filed a level four request for a hearing on Grievant's claim of default. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on September 17, 2003, for the purpose of determining whether or not a default had occurred. Grievant represented himself, and Respondent was represented by Doren Burrell, Senior Assistant Attorney General. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on September 29, 2003.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant initiated a grievance regarding a vehicle assignment on March 28, 2003. Level one and two decisions were rendered on April 8, 2003, and May 6, 2003, respectively.

2. A level three hearing was convened on June 24, 2003. At the beginning of that hearing, Hearing Evaluator Scott Elswick asked Grievant to waive the five-day time limit for issuance of the level three decision, stating: “For the convenience of myself and also the court reporter, we ask that you waive that to a 30-day period.” Level III Tr. at 7. 3. Grievant agreed to the 30-day timeline for issuance of the level three decision.

4. All of the evidence could not be taken at the hearing on June 24, 2003, so the hearing reconvened on July 11, 2003, to conclude the testimony.

5. During an off-the-record discussion at the July 11 hearing, Grievant clarified to Mr. Elswick that he still expected his decision to be rendered within 30 days of the original hearing date of June 24.

6. Mr. Elswick understood that Grievant expected a decision within 30 days of June 24, 2003.

7. On July 29, 2003, Grievant sent an email message to Karen Watson, Assistant General

Counsel for Respondent, inquiring as to the status of the decision and asserting that Respondent was in default for not rendering the decision by July 24, 2003.

Ms. Watson was out of the office and did not open this message until August 5, 2003.

8. On July 30, 2003, Jeff Schoolcraft, who is grievance coordinator for Respondent, telephoned Mr. Elswick to inquire about the status of the decision. Mr. Elswick informed Mr. Schoolcraft that the decision was ready and would be hand delivered the following day.

9. Although intending to render the decision by July 24, 2003, Mr. Elswick encountered problems due to the lengthy record and virus problems with his computer system, which had deleted the decision from his files.

10. Mr. Elswick delivered the decision to Mr. Schoolcraft on July 31, 2003. Mr. Schoolcraft placed the decision on the desk of Sandy Key, Human Resources Manager, who reviews level three decisions prior to final issuance. Ms. Key was in meetings thatday, so Mr. Schoolcraft sent her an email message, requesting that she quickly review the decision, so that it could be issued.

11. Ms. Key was out of the office on August 1, 2003, and August 2 and 3 were a weekend.

12. On August 5, 2003, Mr. Burrell called Mr. Schoolcraft, inquiring about the decision. Upon investigation, Mr. Schoolcraft found the decision in Ms. Key's office, and it was unclear whether or not she had reviewed it. Mr. Schoolcraft immediately had the decision delivered to the general counsel's office for final review and signature, and phoned Grievant to tell him the decision was coming.

13. The level three decision was issued on August 6, 2003.

Discussion

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which provides, in pertinent part:

> (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 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.

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence. 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.

At level three, W. Va. Code § 29-6A-4(c) provides that a written decision must be issued within five days of the hearing. However, this Grievance Board has held on numerous occasions that an agreement to extend the timelines for issuance of a decision is binding upon the parties when made during a formal, recorded hearing and constitutes a valid waiver of the statutory requirement. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). The concept of an actual waiver of one's established rights implies a voluntary act. Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claimingthe benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998).

Clearly, there was an agreement between the parties to a 30-day extension. Moreover, both Grievant and Mr. Elswick testified that Grievant was quite specific in clarifying at the second day of hearing that his extension only applied to the original hearing date. Therefore, Grievant expected his decision by July 24, which did not happen. Respondent counters that, although the level three decision obviously was not issued within thirty *calendar* days, it was issued within thirty *working* days of the June 24 hearing. Respondent relies upon the definition of "days" contained in West Virginia Code § 29-6A-2, which refers to "working days exclusive of Saturday, Sunday or official holidays."

However, this definition is for purposes of the grievance statute's provisions, and there is no basis for applying it to an agreement to waive the statutory time limits. Moreover, Respondent admittedly understood that Grievant intended to agree to 30 calendar days, not working days. Accordingly, the undersigned finds that Respondent failed to issue the decision within the agreed upon timeframe.

Respondent's alternative argument is that, if the decision was not issued in a timely fashion, this failure was the result of excusable neglect as allowed by the statute. 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., 170W. 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.

Unfortunately for Respondent, the undersigned cannot find that its failure to timely issue the decision was because of excusable neglect. If viewed solely from Mr. Elswick's point of view, it would have been likely that his delay could have been excused, because the computer virus problem he suffered was clearly beyond his control. However, once the decision was placed in the hands of Respondent's administrators for final review and issuance, the additional delay has not been adequately justified. Although Mr. Schoolcraft clearly understood that the decision needed to be issued quickly and took appropriate measures to make sure that Ms. Key understood this, the decision still sat in her office, for unexplained reasons, for several days. Once again, upon discovering that the decision had still not been issued on August 5, Mr. Schoolcraft rushed the

decision to the general counsel's office so that it could be issued forthwith, but the significant delay cannot beexcused. Accordingly, the undersigned finds that Respondent has failed to prove excusable neglect applies under these circumstances.

The following conclusions of law support the decision reached.

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 who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

___3. At level three, W. Va. Code § 29-6A-4(c) provides that a written decision must be issued within five days of the hearing.

4. The parties may agree to an extension of the statutory time limits for issuance of a decision, which constitutes a valid waiver of the statutory requirements. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).

5. The parties agreed to a 30-day extension of the statutory timeframe for issuance of the level three decision. 6. Respondent failed to issue the level three decision within the agreed upon 30-day time limit.

7. "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. Respondent has failed to prove that its delay in issuing the level three decision was the

result of excusable neglect.

Accordingly, Grievant's request for a finding of default at level three is **GRANTED** , and Respondent may proceed to show that the remedy sought by Grievant is contrary to law or clearly wrong. The parties are directed to confer with one another and provide the undersigned with at least **three mutually agreeable dates** for scheduling the remedy hearing, no later than **October 17, 2003.**

Date: October 8, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge