BRENDA SHEHAB,

Grievant,

v. **Docket No. 03-HHR-293D**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES,

Respondent.

ORDER DENYING DEFAULT

Grievant, Brenda Shehab, filed a motion for default with her employer, the Department of Health and Human Resources ("HHR" or "Agency"), on September 17, 2003, claiming the agency defaulted at Level I. HHR requested a Level IV hearing on September 22, 2003. (See footnote 1) The underlying grievance deals with Grievant's belief that HHR had removed her access to certain data because she was guilty of a breach of confidentiality. A Level IV default hearing was held October 17, 2003, at the Grievance Board's Charleston Office. As the parties elected not to file proposed Findings of Fact and Conclusions of Law, this case became mature for decision on the day of the hearing. (See footnote 2)

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 by HHR as an Administrative Services Assistant III in the Division of Surveillance and Disease Control.

2. On or before August 26, 2003, the access to Human Resources Information Systems within the Office of Epidemiology and Health Promotion was limited by order of Chris Curtis, Acting Director of the Bureau of Public Health.

3. On August 26, 2003, Grievant sent an e-mail to Ms. Curtis identifying what work she could not do with her access denied, how she could work around it, and that the change was not a "major inconvenience." Grievant also assured Ms. Curtis she did not leak information. Grievant's Exh. 3.

4. Ms. Curtis called Grievant and told her she did not think she was responsible for the leak. Grievant's Exh. 3.

5. On September 8, 2003, Grievant filed a grievance with her supervisor, Director Loretta Haddy, about the restricted access. In her initial Statement of Grievance, Grievant requested: 1) to be immediately reassigned; 2) to be relieved of many duties; 3) reallocation to a different classification; and 4) a letter for her personnel file and to the Division of Personnel stating she had not engaged in any wrongdoing.

6. When Ms. Haddy met with Grievant on September 8, 2003, she read the initial grievance, discussed the situation with Grievant, and then asked Grievant to revise her relief sought. At that first meeting, Ms. Haddy signed a Level I Decision dated September 8, 2003, that Grievant had prepared for her signature, stating that Ms. Haddy did not have the authority to grant the relief sought.

7. Part of Grievant's duties was to prepare similar letters for her supervisor's signature.

8. Later that same day, Grievant reformulated her relief sought, and then submitted another Grievance Form to Ms. Haddy. The relief sought stated Grievant wanted: 1) to be immediately relieved of many duties; and 2) a letter from Ms. Curtis for her personnel file and to the Division of Personnel stating she had not engaged in any wrongdoing.

9. After Grievant rewrote her relief sought, Ms. Haddy tore up the Level I response, and went to her supervisor, Dale Porter, to get Grievant the relief she wanted. Mr. Porter agreed to look into the situation, and he talked to Ms. Curtis about the grievance.

10. Ms. Haddy told Grievant to expect a letter from Ms. Curtis shortly. (See footnote 3)

11. As a result of the filing of the grievance and her discussion with Mr. Porter, Ms. Curtis wrote Grievant on September 12, 2003, explaining the reasons for the change, noting the past practice had been inconsistent with other offices in the Bureau of Public Health, clarifying other employees' access had been limited as well, explaining the decision was not directed toward any one person, and apologizing "if [Grievant] interpreted this as a reflection on [her] credibility or competence." Resp. Exh. 2. A copy of this letter was also sent to Ms. Haddy.

12. Ms. Curtis thought the grievance was resolved, and expected Ms. Haddy to sign the Grievance Form if this was needed. 13. Ms. Haddy did not believe she had any further duty with the grievance once she had talked to Mr. Porter.

Discussion

W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance

procedure. W. Va. Code § 29-6A-4(a) identifies the required response at Level I:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002). 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. 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 HHR can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the time lines for one of the reasons listed in W. Va. Code § 29- 6A-3(a)(2), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. 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). If there is no default, Grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-3(a)(2) provides, in pertinent part:

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.

Grievant asserts the Level I decision was never issued. Respondent argues a written Level I decision was issued, but the Grievance Form was not signed, because the Agency thought the matter was resolved. Ms. Curtis expected Ms. Haddy to sign the formif this was needed, and Ms. Haddy thought the matter would be resolved higher up the ladder.

This grievance is an example an agency attempting to resolve the issue at the lowest possible level, Level I. Grievant did have a meeting with her immediate supervisor, and she did receive a written response to her grievance from Ms. Curtis, it just was not the one she wanted, and not as specific as she believed it should be. Grievant indicated she expected the Level I response to speak directly to her requested relief. The Level I response is not required to be this specific. Additionally, Ms. Curtis's letter did not say where Grievant was to file at the next level, but since Grievant had already typed up the prior denial of her grievance, it is clear she knew this information.

Additionally, this scenario can be seen as 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 befound 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 resulted in the agency's failing to schedule a Level III hearing in a timely manner; (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 II 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).

In this case the Agency, in good faith, attempted to resolve the underlying problem at the lowest level and explained to Grievant there was no problem with her work or behavior, but that Ms. Curtis decided to bring the Bureau of Public Health in line with other HHR agencies. Given Grievant's Statement of Grievance, a supervisor might very well think that this statement would resolve the issue. Grievant did receive a written response to her grievance, but an apparent miscommunication resulted in no one signing off on her Grievance Form. To find a default here would be contrary the purpose of the grievance procedure which is to resolve issues as soon as they arise.

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).

2. A written decision must be issued at Level I within five days of the receipt of a written notice of the default. W. Va. Code § 29-6A-4(a).

3. Grievant received a written response to her grievance within the statutory time frames.

4. "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)).

5. Respondent acted in good faith, issued a written Level I decision within the time frames, but due to excusable neglect did not sign the Grievance Form or inform Grievant where to file her grievance for Level II.

6. Given this set of facts, no default is found.

Accordingly, Grievant's request that a default be entered is **DENIED**. Grievant may appeal this grievance to Level II if she so desires.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 31, 2003

Footnote: 1

In a letter dated September 23, 2003, HHR's Attorney Landon Brown conceded a default occurred at Level IV. At hearing, Mr. Brown explained this letter was sent in error, and HHR did not concede a default occurred at Level I. Given this explanation, the default hearing concerned both the issue of whether a default occurred, and if a default occurred, was it excused by one of the statutory reasons.

Footnote: 2

Grievant represented herself, and Respondent was represented by Landon Brown, Esq., Senior Assistant Attorney General.

Footnote: 3

At hearing, Grievant testified that she did not think the letter she received on September 12, 2003, was sent in response to her grievance. The undersigned Administrative Law Judge finds this statement to be untrue.