DONALD HIGGINS,

Grievant,

v. **Docket No. 03-CORR-295D**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

ORDER GRANTING DEFAULT

On September 22, 2003, Grievant filed a default notice with the Education and State Employees Grievance Board, alleging a default had occurred at level three. A hearing was subsequently held in Elkins, West Virginia, on October 15, 2003, for the purpose of determining whether or not a default occurred. Grievant was represented by union representative Jack Ferrell, and Respondent was represented by Charles Houdyschell, Assistant Attorney General. The parties elected not to file post-hearing submissions, so this issue became mature for consideration at the conclusion of that hearing.

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

Findings of Fact

1. Grievant filed a level one grievance on June 4, 2003. It proceeded through levels one and two, and a level two response was issued on June 20, 2003.

2. Grievant mailed a level three appeal to the Division of Corrections ("DOC") Central Office on or about June 26, 2003, by regular mail. 3. After receiving no response to the level three appeal, Grievant filed it again on August 8, 2003, mailing it to DOC's Central Office by certified mail.

4. The Central Office is in the Capitol Complex in Charleston, West Virginia, where numerous state agencies are located. All mail directed to agencies at the capitol is routed through a central mail room, then distributed to the various offices. Mail room employees are not employed by the state agencies whose mail they receive; they are employed by a separate state agency.

5. Grievant's level three appeal was received in the central mail room on August 11, 2003, and an unidentified mail room employee (See footnote 1) signed the certified mail receipt on that date.

6. Employees of DOC did not receive Grievant's level three appeal, so no hearing was scheduled.

7. After receiving no response to his appeal, Grievant filed this claim of default on September 22, 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 failsto 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.

There is no dispute in this case that a timely level three hearing was not scheduled. However, DOC contends that it could not schedule a hearing when it never received the appeal, so no default

has occurred. In the alternative, DOC argues that, if a default did occur, it should be found to have been caused by excusable neglect.

Grievant has provided solid evidence that he did, indeed, file a level three appeal by sending it via certified mail to the appropriate address. It is also obvious that a levelthree hearing was not held or scheduled within seven days, as required by W. Va. Code §29-6A-4(c). More specifically, that statute states that a hearing shall be held “within seven days of receiving the appeal.” Therefore, the question remains whether DOC can be deemed to have “received” the appeal, and has consequently defaulted by not scheduling the hearing. Under the circumstances presented, the undersigned must find that DOC received Grievant's appeal. Grievant took every step he could possibly have taken to ensure that the appeal reached its destination. He appeared at the default hearing with a certified mail receipt, which, regardless of the identity of the person who actually signed for it, verifies that the addressee--the Division of Corrections--received the mail.

As noted in Alllison v. Division of Highways, Docket No. 98-DOH-415D (Dec. 30, 1998), a case in which the employer failed to timely request a hearing on the default which had undisputedly occurred, “[a]n employee should not have his rights adversely affected due to . . . the [employer's] obviously inadequate system for processing its mail.” Although the undersigned certainly understands that the capitol complex is a large facility, comprising several buildings, with undoubtedly a huge volume of mail, state agencies cannot simply be allowed to “blame the mail room” when items are sent specifically by certified mail, the purpose of which is to provide assurance that the addressee of the item has actually received it. In the instant case, the mail room employee's signature verifies that DOC received the appeal. The item's disappearance after it was signed for should not adversely affect Grievant's statutory right to assert a default when one clearly occurred.

Respondent asserts that its default should be excused, because it could not schedule an appeal it did not know about. The West Virginia Supreme Court of Appealshas 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.

In this case, it is tempting to conclude that the mistakes of mail room employees, who are not controlled by DOC, should excuse the employer's failure to act appropriately. However, DOC does have control over who signs for their certified mail, and could arrange for such items to be delivered directly to their offices, pick up these items at the post office themselves, or come to some other arrangement which would be acceptable for DOC andthe Postal Service. All state agencies must receive and process grievances and are under strict time constraints when doing so. Accordingly, a system which insures that grievance items sent by certified mail are actually received by the agency does not seem unreasonable.

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 hearing must be held within seven days of receipt of the appeal.

4. ___DOC failed to hold or schedule a level three hearing within seven days of receipt of

Grievant's appeal on August 11, 2003.

5. Respondent has failed to prove that its failure to hold a level three hearing 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. Respondent may request a Level IV hearing, within five days of the receipt of this written order granting default, to present evidence and/or argument on this issue. **In the event DOC does not request a hearing within five days of receipt of this order, an order will be entered granting the relief requested.**

Date: October 31, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The signature appears to be a stamp, and the name is illegible.