MICHAEL BOWE,

Grievant,

v. **Docket No. 04-WCC-054D**

WEST VIRGINIA WORKERS' COMPENSATION COMMISSION,

Respondent.

ORDER DENYING DEFAULT

On February 2, 2004, Grievant, Michael Bowe, filed a motion for default with this Grievance Board, stating his employer, the Workers' Compensation Commission ("WCC"), had defaulted at Level III. The underlying grievance dealt with a thirty-day suspension and transfer. Additionally, Grievant was directed to take individual sexual harassment training. A Level IV default hearing was held March 5, 2004, at the Grievance Board's Charleston office. (See footnote 1) This case became mature for decision on April 2, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant asserts default occurred when Respondent failed to schedule a Level III hearing within the required time frame. Respondent agrees it did not hold a Level III hearing within the required time frame, but argues this failure was due to confusion aboutwhether Grievant wanted a Level III or a Level IV hearing, failure of Grievant's representative to respond to repeated calls and faxes in a timely manner, and the inability of WCC's three contracted Hearing Examiners to conduct a hearing within the remaining time frame.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by WCC as an Employment Program Tax Examiner with Employers Services in the Underwriting Division at the Parkersburg Office. On January 9, 2004, Grievant filed a grievance dated January 8, 2004, over his suspension and requested mediation.

2. The Grievance Board attempted to set up this mediation, but WCC did not wish to mediate. By letter dated January 15, 2004, the Grievance Board notified Grievant of WCC's decision and informed Grievant he could either request a hearing at Level III or Level IV. Grievant was directed to file "his request for hearing at the appropriate level." Grt. No. 7 at Level IV.

3. Grievant did not request a hearing from WCC, but instead sent his prior grievance form with the old filing date, January 8, 2004, to WCC. Grievant changed the certificate of service date attached to the grievance form to Friday, January 16, 2004. 4. WCC received this filing on, or about, January 21, 2004. (See footnote 3) Both the Level III and Level IV hearing sections were signed off on this grievance form. A signature on these lines indicates the level to which an appeal is being filed. Grt. No. 1 at Level IV.

5. Because WCC had received the letter from the Grievance Board, and Grievant had not specifically requested a hearing, there was some confusion as to whether Grievant wanted a Level III or Level IV hearing.

6. WCC decided to act as if Grievant wished to proceed at Level III.

7. Beginning on January 21, 2004, Crisha Deyton, paralegal for WCC, began trying to reach Grievant's representative. Ms. Deyton's work hours are from 8:00 a.m. to 4:00 p.m.

8. Ms. Deyton called Grievant's representative three times on January 21, 2004, and also left a message for him to call her back. She did not receive a call that day.

9. On January 22, 2004, Ms. Deyton called Grievant's representative four times and got his voice mail. She also called a second WCC number, apparently also given by Grievant's representative, and left a voice mail message. Ms. Deyton then called Grievant and left another voice mail message.

10. On the morning of January 23, 2004, Ms. Deyton called Grievant's representative again and again left a voice mail message. She also obtained his fax number and faxed him a letter requesting a waiver of the time frame and hearing dates.

11. Also on the morning of January 23, 2004, Ms. Deyton called Grievant's supervisor, John Stikes, and confirmed the numbers she had been using to reachGrievant's representative were

correct. Mr. Stikes offered to e-mail Grievant's representative and let him know Ms. Deyton was trying to reach him.

12. Further, on the morning of January 23, 2004, Ms. Deyton e-mailed Grievant's representative after she received this information from Mr. Stikes. In this e-mail, she attached the fax she had previously sent him. Resp. No. 4, at Level IV.

13. Additionally, on the early afternoon of January 23, 2004, Mr. Michael Coutz, one of Grievant's supervisors, e-mailed Grievant's representative and directed him to call Ms. Deyton "ASAP." Resp. No. 4, at Level IV.

14. Grievant's representative responded to Ms. Deyton's fax on January 23, 2004, after normal work hours (5:07 p.m.). He indicated he had received only one phone call, on January 22, 2004, had attempted to call back, but it was after work hours, had called again on January 23, 2004, around 3:00 p.m., and Ms. Deyton was on another line and was to call him back. He indicated in this January 23, 2004 after hours fax (not received until January 26, 2004) that Grievant was unwilling to waive any timelines for the scheduling of the Level III hearing. Grievant's representative also informed Ms. Deyton who to call to schedule the conference rooms in Parkersburg office. Grt. No. 2 at Level IV and letter received by the Grievance Board.

15. Ms. Deyton received Grievant's representative's fax on Monday, January 26, 2004. She called about scheduling a room, and found out the only dates available that week were January 29 and 30, 2004. (See footnote 4) That same day, Ms. Deyton called one of thecontract Hearing Examiners, and he was unavailable, another contract Hearing Examiner was in the Legislature, and the third contract Hearing Examiner, although called two times, did not respond.

16. WCC uses contract Hearing Examiners in order to assure impartiality. (See footnote 5)

17. Ms. Deyton also checked the schedules of WCC's attorney, the court reporter and other needed witnesses for availability.

18. Ms. Deyton also ensured Grievant's representative's discovery request was completed by January 26, 2004.

19. On January 28, 2004, Grievant received notice that his Level III hearing was scheduled for Friday, February 6, 2004, in Parkersburg.

20. Grievant filed this Notice of Default dated Saturday, January 31, 2004, and it was received by the Grievance Board on Monday, February 2, 2004. The same Notice was faxed to WCC at 5:18

p.m. on Saturday, January 31, 2004. Confusingly, in that same Notice, Grievant's representative indicated Grievant wished to proceed with the Level III hearing.

21. Grievant agreed to a continuance of this Level III hearing when a key witness was unavailable because of illness. This Level III hearing was held, by agreement of the parties, on March 2, 2004, prior to the default hearing at Level IV. 22. Various letters and faxes in the record indicate that although Grievant's representative places times on the materials he sends, these times do not match the times the material is actually sent. The actual time is usually one to three hours after the listed time.

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

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 BEP can demonstrate a default has not occurred, or can demonstrate it wasprevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A- 3(a), 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).

W. Va. Code § 29-6A-3(a) 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 a default occurred because WCC did not schedule a Level III hearing within the required time frame. WCC admits it did not hold a Level III hearing by January 30, 2004, but maintains Grievant's representative did not respond to frequent requests for information, no Hearing Examiners were available, and there was some confusion as to whether Grievant wanted a Level IV or Level III hearing.

I. Credibility

An issue that must be addressed is credibility, as Grievant's representative testified Ms. Deyton only tried to contact him once. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of factand 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 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's information. (See footnote 6) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Grievant's representative asserted Ms. Deyton did not call him as she said she did. The undersigned Administrative Law Judge finds Ms. Deyton's testimony to be truthful. There was no

problem with her demeanor, and she refreshed her memory with contemporaneous notes. It is clear she repeatedly tried to reach Grievant and hisrepresentative, even checking to see if the numbers she had were correct, asking Grievant's supervisor for help, and using faxes and e-mails to try and make contact.

It is also noted Grievant's responses were frequently late, or not at all, and often made after-hours when no one was in the office to respond.

II. Default

The merits of the case will be addressed next. Respondent specified its failure to respond was due to excusable neglect and/or unavoidable cause. (See footnote 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." (Emphasis added). 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 contributeto 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, frequently attempted to contact Grievant's representative for dates and to sign a waiver of the timelines. Ms. Deyton made numerous calls, sent e-mails and faxes, enlisted the aid of supervisors, and checked to make sure the numbers she was calling were correct. This effort is clearly a good faith attempt.

By contrast, Grievant's representative did not respond in a timely manner, when he did respond it was often when no one would be in the office, and did not indicate Grievant would not waive the timelines until January 26, 2004, when there was only a short time left to arrange a complex multi-witness hearing. It is noted, especially in hearings involving severe disciplinary action and multiple witnesses, that parties frequently agree to waive the timelines for approximately thirty days or so, to ensure all parties and key witnesses can be present. While a waiver is certainly not a requirement, Grievant did have a duty to respond quickly to Ms. Deyton's frequent attempts at contact. This Grievant did not do.

Given this set of facts, the undersigned Administrative Law Judge cannot find a default occurred. Additionally, if Respondent did fail to act, this failure was partially created by Grievant's representative's failure to respond. This Grievance Board has consistently ruled that 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 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.")(Citations omitted).

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 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).

2. A Level III hearing must be scheduled within seven working days of the date of receipt of the Level III appeal. W. Va. Code § 29-6A-4(a).

3. A Level III hearing was not scheduled before the expiration of the timelines.

4. 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).

5. "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, attempted to comply with the timelines, but factors outside its control contributed to the failure to act within the specific time limits. Monterre, supra.

6. 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)("Havinginduced 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.")(Citations omitted).

7. Grievant's representative's failure to respond quickly to WCC's attempts to discuss and schedule the Level III hearing contributed to the failure to hold the hearing within the required timelines.

Accordingly, Grievant's request a default be entered is **DENIED**. Since Grievant has already proceeded with the Level III hearing, and the parties, at the time of this default hearing, were waiting for this Decision, this case is **DISMISSED** from the docket of the Grievance Board.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 12, 2004

Footnote: 1

A prior hearing had been scheduled February 27, 2004, but since Respondent's attorney did not receive notice of that hearing, a continuance was granted over Grievant's representative's objection. At the March 5, 2004 hearing, Grievant filed a Motion and objected again to this prior continuance. This Motion was denied.

Footnote: 2

Grievant was represented a co-worker Charles Carothers, and Respondent was represented by David Fryson, Esq.

Footnote: 3

Monday, January 19, 2004, was a federal and state holiday.

Footnote: 4

Grievant's representative indicated Grievant did not ask for the hearing to be scheduled in Parkersburg. The undersigned Administrative Law Judge takes administrative notice that the Level III hearing is required to be held close to a grievant'swork place.

Footnote: 5

Grievant's representative asserted the Attorney General's Office routinely provides Hearing Examiners for state agencies at Level III. Although it appears the Attorney General's Office could provide such a service, the undersigned Administrative Law Judge takes administrative notice that this action is seldom, if ever, done.

Footnote: 6

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).

Footnote: 7

Because this default Motion is denied on the grounds of excusable neglect, the issue of unavoidable cause will not be addressed.