STEPHEN EVANS,

Grievant,

v. **Docket No. 03-HHR-230D**

DEPARTMENT OF HEALTH and HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL,

Respondent.

ORDER DENYING DEFAULT

On August 3, 2003, the Department of Health and Human Resources ("HHR" or "Agency"), requested a default hearing with this Grievance Board, because Grievant, Stephen Evans, had filed a motion for default with HHR dated July 25, 2003, and received July 30, 2003. Grievant also mailed a default request to this Grievance Board. Grievant stated HHR had defaulted when it failed to hold an informal conference at Level I within the three day time frame. The underlying grievance deals with a ten-day suspension. A Level IV default hearing was held April 13, 2004, at the Grievance Board's office in Beckley, and this case became mature for decision on that date. (See footnote 1)

Issues and Arguments

Grievant asserts a default occurred at Level I when he was not contacted for an informal conference in a timely manner. Respondent maintains it made repeated attempts to contact Grievant to schedule the informal conference, and it was unable to do so. Accordingly, Respondent avers its failure to hold the conference in a timely manner was due to excusable neglect.

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 in the Housekeeping Department at Welch Community Hospital**

("WCH").

2. On or about July 11, 2003, Grievant received a ten-day suspension for leave abuse.

3. Grievant was informed he could grieve this suspension and did so by filing a grievance form with Sheila Smith on July 14, 2003, at 3:30 p.m. It is unknown who Ms. Smith is, but she is not one of Grievant's supervisors. Ms. Smith gave the grievance form to the only administrator there that day, Pat Martin, the Chief Nursing Officer at 4:45 p.m. 4. Ms. Martin is also not in Grievant's chain-of-command, and has no supervisory responsibility for Grievant. Ms. Martin looked for Grievant's supervisors, Elijah Poole, Housekeeping Lead, and Joyce Thompson, Housekeeping Supervisor, but did not find them there at that time of day.

5. Mr. Poole acts as the Housekeeping Supervisor when Ms. Thompson is absent.

6. The grievance form filed by Grievant did not request an informal conference, and was not signed or dated.

7. Ms. Martin planned to give the grievance form to one of Grievant's supervisors the next day, but they were not there. 8. On Wednesday, July 16, 2003, after 5:00 p.m., Ms. Martin saw Mr. Poole and gave him the grievance form.

9. Mr. Poole did not know Grievant was currently serving his suspension and planned to talk to him about the grievance on Thursday, July 17, 2003, during the evening shift he was scheduled to work.

10. In the morning of July 17, 2004, Mr. Poole prepared, in advance, a letter to Grievant to notify him that an informal conference was scheduled for 4:00 p.m. that day. Resp. No. 3, at Level IV. After Mr. Poole had written this letter, he found out from Ms. Thompson, who had talked to Grievant that morning, that Grievant was suspended, and he would not be in that day. Because Mr. Poole was scheduled for another meeting he asked Ms. Thompson to call Grievant back and tell him when the conference was scheduled.

11. Ms. Thompson attempted to call Grievant at 11:10 a.m., but there was no answer.

12. During the course of that day, July 17, 2003, Mr. Poole attempted to call Grievant eight times without success. Resp. No. 1, at Level IV.

13. Mr. Poole discussed the issue with Mr. Garrett, (See footnote 2) **and was told to keep trying to call Grievant and to continue to make a record of his attempts. On July 18, 2003, Mr. Poole tried to call Grievant ten times from 11:53 a.m. to 3:43 p.m., without success. Three**

times the phone was busy and seven times there was no answer. Resp. No. 2, at Level IV.

14. Mr. Poole contacted Grievant on Monday, July 21, 2003, and Grievant indicated he had not been home.

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure and subsection (a) states:

> **(a) Level one.**
>
> **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.**

(Emphasis added).

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 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 supra; Williamson, supra.

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 HHR did not hold the informal conference within the required time frame. With this set of facts, there are three issues to examine and address.

The first issue to address is Grievant's failure to request an informal hearing on his grievance form. W. Va. Code § 29-6A-4 states "an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance" if this meeting is requested by the grievant or the immediate supervisor, however this "meetingis not required." Accordingly, while it is certainly appropriate for Mr. Poole to attempt to contact Grievant to discuss the matter, all HHR was required to do was issue the decision within six days of the receipt of the grievance form.

The second issue to address is Grievant's failure to give the grievance form to anyone within his chain-of-command. W. Va. Code § 29-6A-4 requires the grievance form to be filed with a supervisor. Because of this failure, Mr. Poole did not receive the grievance form until after normal working hours on July 16, 2003, two days after Grievant had brought it to the hospital. This failure should not used to penalize Respondent.

As for the third issue of failure to schedule the informal conference, Respondent asserts that if it is found in default, it is due to 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 specified 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 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; 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; and where Respondent committed an error which it attempted to correct as soon as possible. White v. W. Va. Dep't of Tax & Revenue, Docket No. 99-T&R-003D (Aug. 20, 1999); McCauley, Jr. v. Div. of Corrections, Docket No. 99-CORR-101D (May 11, 1999); Thaxton v. Div. of Veterans' Affairs, Docket No. 98-VA-426D (Dec. 30, 1998).

The case is very similar to the recent case of Ross v. Division of Juvenile Services, Docket No. 03-DJS-296D (January 29, 2004). In that case, the respondent also made multiple good faith efforts to contact the grievant to schedule the Level II conference without success. No default was found in Ross.

The same reasoning applies here, as Respondent made multiple attempts to contact

Grievant, but Grievant was out of town during this period, and he had not left another number where he could be reached. Mr. Poole started calling Grievant on July 17,2003, the first working day after he received the grievance (See footnote 3) and after he learned Grievant would not be coming to work. HHR had until the end of the day on July 17, 2003, to hold the informal conference, (See footnote 4) and it attempted to contact Grievant repeatedly to do so. Additionally, Mr. Poole continued to try and contact Grievant the following day, again without success. Accordingly, no default occurred because of excusable neglect.

Further, as frequently noted by this Grievance Board, 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 & 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).

Here, Grievant was the source of the error, as he was aware HHR would be attempting to call him to set up a grievance meeting, but he left town, was unavailable by phone, and left no other contact number. HHR should not be penalized for its inability to contact Grievant.

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." W. Va. Code § 29-6A-3(a)(2).

2. An informal conference, if requested, must be scheduled within three working days of the date of receipt of the grievance form. W. Va. Code § 29-6A-4(a).

3. "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 specified 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)).

4. Respondent did not default because of excusable neglect. It made a good faith effort to schedule the informal conference within the allotted time frame, but was unsuccessful because Grievant was out of town, and he had not left Respondent a number where he could be reached.

5. 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 & 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 setaside 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).

6. Grievant cannot assert a default when he did not file his grievance form with the appropriate supervisor, did not indicate he wanted an informal conference, and Respondent made repeated attempts to contact him at the appropriate telephone number without success because Grievant had left town.

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

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: May 17, 2004

Footnote: 1

Grievant represented himself, and Respondent was represented by B. Allen Campbell, Esq., Senior Assistant Attorney General. The hearing was delayed due to Grievant's failure to return his representative calls. Eventually, because of this refusal, the representative declined to continue to represent Grievant.

Footnote: 2

Although not identified at hearing, the state phone book reveals Wayne Garrett to be the Director of Welch Community Hospital.

Footnote: 3

Mr. Poole did not receive the grievance form until 5:00 p.m. on July 16, 2003. See Finding of Fact 9.

Footnote: 4

The day the grievance form is received is not counted.