DR. RONALD INGLE,

Grievant,

v. DOCKET NO. 05-HE-228D

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

ORDER GRANTING DEFAULT

Grievant Ronald Ingle filed a grievance with his employer, West Virginia State University (WVSU) on June 8, 2005, claiming he had been improperly issued a terminal contract. He claims WVSU defaulted at level one when his immediate supervisor failed to reply within the allotted time.

A level four hearing to determine whether a default occurred was held in the Grievance Board's Charleston office on August 12, 2005. Grievant was represented by Chris Barr, Staff Representative for AFT-West Virginia/AFL-CIO, and Respondent was represented by counsel, Elaine L. Skorich, Assistant Attorney General. The matter became mature for decision on September 12, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant claims he properly filed his grievance at level one, and that his immediate supervisor made no response. WVSU claims Grievant did not properly file his grievancewith his immediate supervisor, and that after it was filed with the human resources office, his supervisor did not respond due to excusable neglect.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Dr. Ingle is employed by WVSU as an Assistant Professor of Music. His immediate supervisor is Dr. Charlotte Giles, the Music Department Chair. Her supervisor is Dean David Wohl. Barbara J. Rowell is Director of Human Resources at WVSU, and is not in the chain of command for Grievant's department.

2. On June 8, 2005, Dr. Ingle filed a grievance at level one by hand-delivering the grievance

form to Ms. Rowell.

3. Although W. Va. Code § 29-6A-3 and WVSU's Employee Handbook specify that level one grievances are to be filed by delivery to the employee's immediate supervisor, Ms. Rowell had instructed Dr. Ingle to file the grievance with the Human Resources Department because she is WVSU's designee to receive level one grievances. She sent Dr. Ingle a memorandum telling him how and where to file his grievance on instructions from her supervisor, who was told to make that communication from WVSU President Hazo W. Carter, Jr.

4. Ms. Rowell's memorandum, dated June 2, 2005, stated in part:

> In order for your complaint to be addressed in the proper manner it is necessary that you follow the procedures of the EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD FOR HIGHER EDUCATION EMPLOYEES and complete the appropriate paperwork.
>
> I have enclosed a copy of the form and directions for you to complete. This paperwork must be completed and returned to my office within five (5) days of receipt of the information.

5. Dr. Giles' has a ten-month contract that runs from August 9 to June 17, but she is not required to be on campus to do any work after graduation, around the end of May. On June 8, 2005, when Dr. Ingle filed his grievance, she was not on campus, so Ms. Rowell called her and told her the grievance had been filed.

6. There was some confusion over whether Dr. Giles was to pick up the grievance from the human resources office or whether Ms. Rowell was to track down Dr. Giles next time she was to be on campus (at the community college) on the following Friday, June 10. When Dr. Giles did not come to pick up the grievance, Ms. Rowell called Dr. Wohl the next Thursday, June 16, and told him about the grievance.

7. Dr. Wohl told Ms. Rowell he did not have time to look at it because he was about to leave for vacation.

8. Dr. Giles has never picked up the grievance form and has made no response, nor has anyone else from WVSU.

Discussion

"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). When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented fromresponding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

As is pointed out by WVSU, a grievance must be filed with the immediate supervisor of the grievant "[w]ithin 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. . . ." W. Va. Code § 29-6A-4(a). WVSU bases its defense of the default claim in part on the undisputed fact that Dr. Ingle did not file his grievance with Dr. Giles, his immediate supervisor. WVSU contends Dr. Giles had no duty to respond to a grievance that was not filed with her.

It is clear that Dr. Ingle filed his grievance erroneously and in contradiction of the statutory grievance procedure. It is equally clear that he did so at the express instruction of his employer. "'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)." *Pullen v. Div. of Corrections*, Docket No. 04-CORR-323D (Dec. 15, 2004). Grievant inquired about the proper procedure from a source of information that should be reliable on the subject, his institution's human resources department, then did exactly what he was instructed, in writing to do. WVSU, having induced the error it ascribes to Dr. Ingle, cannot rely on the error to avoid its obligation.

Dr. Giles' decision to ignore the grievance is likewise inexcusable, although WVSU claims her failure to respond was due to excusable neglect. "'Excusable neglect seems torequire 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))." *Bowe v. W. Va. Workers'*

Compensation Comm'n ., Docket No. 04-WCC-054D (April 12, 2004). “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.” *Monterre, Inc. v. Occoquan Land Dev. Corp.*, 189 W. Va. 183, 429 S.E.2d 70 (1993).

WVSU has shown no good-faith effort to meet its duty to respond to this grievance. Dr. Giles knew the grievance was filed the day Dr. Ingle delivered it, yet she chose to ignore it. Whether or not she initially thought Ms. Rowell was going to find her and bring it to her, at the end of the day she knew she still did not have the grievance and she did nothing to get it. Despite having several days left on her contract term for that year, she believed she could avoid the issue until the following August when she returned to campus for regular office hours. Dr. Wohl's explanation of the extended term of Dr. Giles' contract, without specific duties assigned during the term after graduation as a “reward” for doing extra administrative duties, does not explain how she could not be required to work during the term.

WVSU appears to make a collateral argument against a determination of default by attacking the merits of Dr. Ingle's claim, but these arguments are misplaced. In fact, ifWVSU believed such defenses had merit, they should have been the response Dr. Giles failed to make. That a respondent believes a grievance is untimely or even premature does not relieve the respondent of its required response to the grievance.

The following conclusions of law support this discussion:

Conclusions of Law

1. A grievant must establish, by a preponderance of the evidence, that his employer defaulted on a grievance in order to prevail on such claim. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. Dep't of Health and Human Res./Lakin Hosp.*, Docket No. 99-HHR-329D (Sep. 24, 1999).

2. A grievance must be filed with the immediate supervisor of the grievant “[w]ithin 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." W. Va. Code § 29-6A-4(a).

3. "'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)." *Pullen v. Div. of Corrections*, Docket No. 04-CORR-323D (Dec. 15, 2004).

4. WVSU cannot complain of Dr. Ingle's error in filing his grievance because WVSU was the source of the error. 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 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))." *Bowe v. W. Va. Workers' Compensation Comm'n .,* Docket No. 04-WCC-054D (April 12, 2004). "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." *Monterre, Inc. v. Occoquan Land Dev. Corp.*, 189 W. Va. 183, 429 S.E.2d 70 (1993).

6. Respondent has not shown its failure to respond to this grievance was a result of excusable neglect.

For the foregoing reasons, Grievant's request for a determination that Respondent defaulted at level one is **GRANTED**.

Pursuant to W. Va. Code § 29-6A-3(a)(2), Respondent may, within five days of the receipt of this notice, request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievants is contrary to law or clearly wrong. If no hearing is timely requested, the relief requested will be granted based on the presumption that Grievant prevailed on the merits of the grievance.

September 20, 2005

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M. Paul Marteney

Administrative Law Judge