CATHY CORLEY, et al.,

Grievants,

v. **Docket No. 05-BEP-080D**

BUREAU OF EMPLOYMENT PROGRAMS/

UNEMPLOYMENT COMPENSATION DIVISION,

Respondent.

ORDER DENYING DEFAULT

On March 9, 2005, Grievants, Cathy Corley, David Shannon, and Elizabeth Petersen, filed a motion for default with this Grievance Board, stating their employer, the Bureau of Employment Programs ("BEP"), had defaulted at Level III. (See footnote 1) The underlying grievance dealt with a hostile work environment allegedly created by a co-worker. Mediation was conducted without success, and subsequently a Level IV default hearing was held on July 21, 2005, at the Grievance Board's Charleston office. This case became mature for decision on August 23, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievants assert default occurred when Respondent failed to hold a Level III hearing within the required time frame. Respondent agrees it did not hold a Level III hearing, but avers Grievants did not properly file to Level III; thus, BEP was never informed Grievants were appealing the Level II Decision, and any failure to act was due to excusable neglect. BEP also asserts: 1) Grievants delayed filing their default claim; and 2) this grievance should be dismissed entirely because of Grievants' failure to file properly to Level III in a timely manner.

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

Findings of Fact

1. Grievants are employed by BEP in the Unemployment Compensation Division.

2. Grievants filed this grievance on December 3, 2004, and it was denied at Levels I and II. The Level II Decision is dated January 21, 2005.

3. On January 27, 2005, the Office of the Commissioner for BEP received a signed grievance form from Grievants, but the "date filed" to Level III section was blank. There was no cover letter explaining Grievants were filing to Level III. Resp. No. 1 at Level IV.

4. The Commissioner asked Thomas Rardin, Human Resources Officer for BEP, to review the document. He determined that as the document was incomplete, no action was required, and a Level III hearing should not be scheduled. It is BEP's past practice to not schedule a Level III hearing if a grievance form is not completed. (See footnote 3)

5. BEP took no further action on this grievance.

6. The date filed section is important as it informs an agency how long it has to act in order to conform with the mandatory time lines. 7. On March 9, 2005, Grievants filed another grievance form with BEP, and this grievance form had the "date filed" to Level III section completed. On that same date Grievants filed a notice of default. Grievants admitted at hearing that the "date filed" section was not completed on the form submitted to the Commissioner earlier, but it was completed on the form filed with the default request. It was clear the "date filed" section was added to the copied form later, as that section was in ink, and the rest of the grievance form submitted on March 9, 2005, was copied. Grt. No. 1 at Level IV.

8. On all grievance forms under the heading " **IMPORTANT**" are the following instructions, "Grievant **MUST** fill out ALL pertinent parts of the grievance form. If some parts are not completed, this will delay processing this grievance. . . ." (Emphasis in original).

Discussion

W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure. The time lines 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, Grievants are 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). If BEP 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), or the remedy requested is either contrary to law or clearly wrong, Grievants 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.

Grievants assert a default occurred because BEP did not hold a Level III hearing within the required time frame. Respondent avers: 1) Grievants never actually appealed to Level III as their original form was incomplete, 2) any failure on the part of BEP torespond comes under the statutory excuse of excusable neglect, as Grievants' failure to properly file created BEP's error; and 3) Grievants delayed for a month to file this default claim after they knew BEP had not set a hearing.

Respondent specified its failure to respond was due to excusable neglect because Grievants did not file their appeal to Level III correctly. 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 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. While it is understandable Grievants thought they had correctly filed to Level III, it is also understandable BEP followed its past practice and did not see the grievance as filed at Level III. Grievants recognized the form they originally submitted was not properly completed because they corrected their error when they filed their notice of default. Although the grievance procedure is to be a simple process, it is essential that certain rules must be followed so each party will know where the grievance is in the process, and what should happen next. An important expectation is the proper completion of the grievance form by the grievant, and that is why the grievance form contains the notice that "Grievant **MUST** fill out ALL pertinent parts of the grievance form."

This case is similar to Siler v. Division of Corrections, Docket No. 03-CORR-301D, (January 12, 2004). In Siler, the administrative law judge found excusable neglect and stated:

> Clearly, this case involves honest mistakes on the part of both parties. Grievant neglected to complete the level three section of her grievance form, which caused Mr. Armstrong to conclude that it was not a level three appeal, and merely copies of lower level responses, which he commonly receives. Accordingly, the undersigned finds that Respondent's failure to schedule a level three hearing in this case was the result of excusable neglect, so a finding of default would be inappropriate.

Given this similar set of facts, the undersigned Administrative Law Judge cannot find a default

occurred in this case either. There were "honest mistakes on the part of both parties," and Respondent's failure to act was created by Grievants' failure to follow the clear directions on the grievance form. Siler, supra. What happened was exactly what the form said could happen, a delay occurred.

In addition, 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 thencomplain 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 Res., 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). Accordingly, the undersigned Administrative Law Judge does not find default in this set of facts. By the same token, the undersigned Administrative Law Judge does not find Grievants failed to file their grievance to Level III in a timely manner, as they substantially complied with the requirements. (See footnote 4)

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. 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 time lines. 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)).

6. When the failure of an agency to respond is the result of an unintentional mistake made by a grievant in completing a grievance form, excusable neglect can be found. Siler v. Div. of Corrections, Docket No. 03-CORR-301D, (Jan. 12, 2004).

7. 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 Res., 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). 8. Respondent's failure to respond was also created by Grievants's failure to complete the form, and default is not found in this set of facts. Siler, supra; Rhodes, supra.

Accordingly, Grievants' request for default is **DENIED**. Respondent is directed to hold a Level III hearing within the statutory guidelines after receipt of this Order, and this case is **DISMISSED** from the docket of the Grievance Board.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 9, 2005

Footnote: 1

Two other Grievants did not wish to continue at Level IV.

Footnote: 2

Grievants represented themselves at Level IV, and after the Level IV hearing Andrew Katz, Esq., submitted a

Memorandum in Support of Default Judgment for Grievants. BEP was represented by Special Assistant Attorney General Jeffery G. Blades.

Footnote: 3

It also would have been acceptable for Mr. Rardin to contact Grievants and assess whether they intended to file to Level III.

Footnote: 4

Given this outcome, the undersigned Administrative Law Judge will not address the alleged delay in filing the default claim.