DELBERT BUNNER,

Grievant,

v. **Docket No. 05-DOH-290D**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Delbert Bunner, Grievant, filed a claim of default against his employer, the Division of Highways ("DOH"), on August 16, 2005, alleging a default occurred at Level III of the grievance process. The underlying grievance deals with a salary adjustment given to DOH employees in the Eastern Panhandle. A Level IV default hearing was held on October 17, 2005, for the purpose of determining whether the alleged default occurred. (See footnote 1) Grievant represented himself, and Respondent was represented by counsel, Krista Duncan, Esq. This case became mature for decision on October 28, 2005, after receipt of the parties' proposed findings of fact and conclusions of law.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant filed a grievance with his immediate supervisor on July 12, 2005. The grievance was denied at Levels I and II, as his supervisors did not have the authority to grant the relief requested.

2. Grievant filed a Level III appeal on July 20, 2005, which was received in the Office of the Hearing Examiner, Brenda Craig Ellis, on July 25, 2005. 3. At the time this grievance was filed, the Division of Highways' Hearing Office had two employees beside Ms. Ellis: Jacque Beaver, a paralegal, and Fritzi Williams, a secretary. Ms. Beaver was on vacation at the time this grievance was filed. The Hearing Office received approximately 260 grievances about the Eastern Panhandle salary adjustments, and the majority of these grievances were received between July 15 and August 23, 2005. Also, the number of regular grievances received by the Hearing Office had increased from 120

a year to more than 120 by mid-October of 2005.

4. Grievant's grievance form was received in the Hearing Office on July 25, 2005, along with fourteen grievances about the same issue from the same county. Some of these grievants were represented by the union and some were not. A total of 67 grievances was received in the Hearing Office that week.

5. In the stack of grievance papers from the fifteen employees was Grievant's Statement of Grievance, his lower level decisions, and a "Time Frame Waiver Form" with Grievant's name hand written on it. (See footnote 2) There was an X on the form indicating Grievant waived the time for holding the Level III Hearing until "09/1/05," but Grievant did not sign this form.

6. When this form was received by the Hearing Office, Ms. Williams only noticed the waiver date, and did not notice Grievant had not signed the waiver form.

7. On or about August 2, 2005, Ms. Williams started contacting many of the grievants to ask for an extension until September 30, 2005. Seven of the Wirt County non-union employees agreed to the extension. On August 9, 2005, the Wirt County secretary faxed Ms. Williams to tell her that five grievants would not agree to the extension. Grievant was one of this group. Ms. Williams called Wirt county and left a message for Grievant to call her.

8. Grievant returned Ms. Williams' call on August 16, 2005. Grievant informed Ms. Williams he had never signed the waiver form, he would not agree to the requested extension, and he was filing for default. Exh. B.

9. A default notice was filed with DOH on August 16, 2005.

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 DOH 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 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 DOH did not schedule a Level III hearing within the required time frame. DOH admits it did not hold a Level III hearing within the required timelines, but contends this failure should be forgiven because of excusable neglect. The Division of Highways notes the partially completed information on the Time Frame Waiver, and avers the sheer number of grievances received during this time frame made it next to impossible to check completely every form in detail. 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.

This Grievance Board has found excusable neglect, constituting grounds for denying a claim of default, where misfiled documents resulted in the agency's failure to schedule a Level III hearing in a timely manner; (McCauley, Jr. v. Div. of Corr., 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 resolvethe 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 Hearing Office, in good faith, attempted to process a large number of grievances with few staff. The failure to note Grievant did not sign the Time Frame Waiver was an oversight on the part of Ms. Williams, but there is no indication of any bad faith, and there is "some reasonable basis for noncompliance with the time frame." Perdue, supra.

Accordingly, the undersigned Administrative Law Judge finds that no default occurred in this case.

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 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)).

6. Respondent acted in good faith, and had "some reasonable basis for noncompliance" because it believed Grievant had agreed to waive the timelines until the phone conversation of August 16, 2005. See Monterre, supra.

Accordingly, Grievant's request a default be entered is **DENIED**. This matter is hereby **REMANDED** to level three for a hearing on the merits of the grievance, and the hearing shall be held within **10 WORKING DAYS** of the date of receipt of this Order, unless otherwise agreed in writing by the parties.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: November 30, 2005

Footnote: 1 *Originally, Respondent conceded default, but DOH withdrew that concession prior to the default hearing.*

Footnote: 2 *Grievant asserted he attached a note to his grievance form stating he did not want his grievance combined with any other grievances. The Hearing Office did not receive this note, and Grievant did not have a copy of this document.*