BARBARA CARSON,

Grievant,

v. Docket No. 05-HE-052D

WEST VIRGINIA UNIVERSITY,

Respondent.

ORDER DENYING DEFAULT

By letter dated January 31, 2005, Barbara Carson ("Grievant") notified her employer, West Virginia University ("WVU") that she was entitled to a default judgment, having not received a level one decision for a grievance filed in December 2004. WVU counsel, Mary Roberta Brandt, contacted the Grievance Board by letter on February 7, 2005, denying a grievance had been filed, but preserving the opportunity to request a hearing on the requested relief. A hearing on the question of default was conducted on May 24, 2005, in the Grievance Board's Westover office. Grievant was represented by Mary Snelson of the West Virginia Education Association, and WVU was represented by Assistant Attorney General Kristi A. McWhirter. The hearing was limited to the issue of whether a default had occurred. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on June 10, 2005.

The following essential facts are undisputed, and may be set forth as findings of fact.

Findings of Fact

1. Grievant has been employed by WVU as a Food Service Worker-Lead at Jackson's Mill at all times pertinent to this grievance.

2. On December 21, 2004, Mary Snelson filed a level one grievance onGrievant's behalf, alleging that she had not been receiving the correct salary for an extended period of time. Grievant requested the difference in compensation between pay grade 6 and pay grade 11 from December 1, 1989 to December 10, 2004, with interest and benefits.

3. Ms. Snelson sent to Richard Matthews, Food Service Manager II, by facsimile and U.S. Mail. Ms. Snelson included a letter advising Mr. Matthews that in consideration of the holiday

season, Grievant would agree to an extension of the time lines for a level one decision until January 7, 2005.

4. Mr. Matthews did not receive the grievance, either by fax or U.S. Mail.

5. The facsimile machine for the Dining Services Department at Jackson's Mill is located in another building. At the time, there was no organized manner of dispensing documents faxed to individuals. Additionally, Dining Services shares a mailbox with other departments.

6. This was not the first instance in which Mr. Matthews did not receive a facsimile that had been sent to him.

Discussion

WVU denies that any default occurred since no grievance was ever filed. In the alternative, WVU asserts that Grievant failed to timely claim a default, delaying some twenty-three days after the level one decision was due. Grievant argues that the grievance was filed, and while she agreed to an extension of the time lines, WVU failed to issue a decision at all. W. Va. Code § 29-6A-4(a) sets forth the time lines to be followed at level one of the grievance procedure: 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.

The burden of proof is upon the party 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 WVU 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.

At level four, Grievant proved by a preponderance of the evidence that she had filed a level one grievance on December 21, 2004. Having found the default occurred, it must next be determined whether the default was due to one of the statutory exceptions. WVU's claim that the grievance was never received would fall under the auspices of excusable neglect. While Ms. Snelson established that the grievance form was faxed to the correct number at Jackson's

Mill, Mr. Matthews offered credible testimony that he never received the document. A facsimile machine located in another building, nostandard procedure for delivering documents to the designees, and shared mailboxes illustrate a haphazard process, at best. This situation is similar to cases involving the misfiling of grievances, which has been held to constitute excusable neglect for failure to timely issue a decision. Rockwell v. Dep't of Health & Human Res., Docket No. 02-HHR- 392D (July 22, 2003). While the communication system at Jackson's Mill has been shown to be negligent, Mr. Mathews was not.

The findings of fact and 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 written decision must be issued at level one within six days of the receipt of a written grievance. W. Va. Code § 29-6A-4(a). 3. Grievant met her burden of proof and demonstrated a default occurred.

4. WVU established excusable neglect for the failure to issue a decision at level one.

Accordingly, Grievant's request that a default be entered is DENIED. This matter is hereby REMANDED to level one for a response to be issued within six (6) WORKING DAYS of the date of this Order, and is further Ordered DISMISSED from the docket of the Grievance Board.

DATE: JUNE 30, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE