SHARON MOLNAR,

Grievant,

v. **Docket No. 05-HE-452D**

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

ORDER GRANTING DEFAULT

Sharon Molnar, Grievant, filed a claim of default against her employer, West Virginia State University ("WVSU"), on September 28, 2005, alleging a default occurred at Level III of the grievance process. The underlying grievance deals with a denial of promotion to Associate Professor. A Level IV default hearing was held on January 9, 2006, at the Grievance Board's office in Charleston, for the purpose of determining whether default occurred. Grievant was represented Chris Barr of the West Virginia Federation of Teachers, and WVSU was represented by Elaine Skorich, Assistant Attorney General. This case became mature for decision on February 27, 2006, the date for the submission of proposed findings of fact and conclusions of law. (See footnote 1)

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

Findings of Fact

1. Grievant is employed by WVSU as an Assistant Professor.

2. Grievant filed this grievance on May 26, 2005.

3. Grievant appealed to Level III on December 1, 2005, by certified mail. This grievance was received in President Hazo Carter's office on December 2, 2005, by his Executive Secretary Crystal Walker. 4. Grievant's appeal letter noted on the front in the "Re:" section that it was a "Level III Grievance Appeal." The letter also stated, "Enclosed please find a Level III grievance appeal filed on behalf of Dr. Sharon Molar and all lower level decisions. . . ."

5. Ms. Walker was very busy with a high priority task that had to be completed that day. She failed to note the information in the letter or the attached grievance form and decisions. Because she did not recognize the correspondence as a Level III appeal, she did not place the letter and

attachments in President Carter's red folder, which is for urgent matters.

6. On December 15, 2005, Grievant's representative contacted President Carter and the Grievance Board and claimed default because Grievant had received no response to her Level III appeal.

7. After receipt of the default notice, Ms. Walker checked and found Grievant's appeal letter, grievance form and lower level decisions.

8. Respondent admitted it did not hold a Level III hearing within the required time frame.

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 II 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 Corr., 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 WVSU 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 WVSU did not hold a Level III hearing within the statutory time frames. WVSU admits it did not hold a Level III hearing within therequired timelines, but contends this failure should be forgiven because of excusable neglect. WVSU notes Ms. Walker was very busy preparing packets for the Board of Governors, and did not recognize the letter, the accompanying grievance form, and lower level decisions as a Level III appeal.

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." Perdue, supra. 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 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. White v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-003D (Aug. 20, 1999).

In this case Respondent has failed to demonstrate sufficient grounds for a finding of excusable neglect. While there is no finding of bad faith, and it is clear Ms. Walker was very busy at the time the Level III appeal came to the President's office, there was no explanation why the letter and attachments were not reviewed the following days for content. The letter was clearly marked as a Level III appeal, and even a cursory review would have imparted the need for immediate action. The actions taken in this case are simple inadvertence and do not establish a "reasonable basis for noncompliance." Perdue, supra.

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 held within five days of the Level III hearing. 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 noncompliancewith 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)).

5. Excusable neglect is not found with this set of facts. WVSU defaulted at Level III.

Accordingly, this default is **GRANTED**. The parties are directed to send to the Grievance Board five mutually agreed upon dates for the default remedy hearing.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: April 28, 2006

Footnote: 1

Grievant's request for default at a Level I was denied by Order dated November 14, 2005. See Molnar v. West Virginia State University, Docket No. 05-HE-391D.