REGINA FRIEND,

Grievant,

v. **Docket No. 98-HHR-346D**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, HUNTINGTON HOSPITAL,

Respondent.

ORDER GRANTING DEFAULT

On September 11, 1998, Regina Friend (Grievant) submitted the following matter to this Grievance Board at Level IV:

> I am writing to you as instructed by Barbara Wheeler, Level III Grievance Evaluator, regarding a grievance I originally filed on August 4, 1998. I wish to formally request that a default judgement be granted to me as I have prevailed in the matter as the Grievance Evaluator failed to set a hearing in the time guidelines pursuant to WV Code 29-6A-4.

On October 30, 1998, a Level IV hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Charleston, West Virginia. The parties agreed that the undersigned would address the sole issue of whether Respondent Department of Health and Human Resources (DHHR) is in default, reserving the question of whether the remedy sought by Grievant is contrary to law or clearly wrong. The parties

presented oral arguments, waiving written arguments, and this matter became mature for decision at the conclusion of the hearing.[1]

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

FINDINGS OF FACT

1. On August 4, 1998, Grievant initiated a grievance contesting the salary reduction she suffered after accepting a voluntary, non-disciplinary demotion to a Social Services Worker II position in Braxton County, West Virginia. See G Ex A.

2. Due to the nature of her grievance, Grievant filed the grievance at Level II with her second-level supervisor, Arwanna Burroughs.

3. Grievant did not name a representative on her grievance form. See G Ex A.

4. Ms. Burroughs responded to the grievance on August 4, 1998, noting that she was without authority to grant the remedy requested, and contending that the grievance was not timely. See G Ex A.

5. Grievant appealed to Level III on August 10, 1998. See G Ex A.

6. Barbara Wheeler is employed by Respondent Department of Health and Human Resources (DHHR) as a Grievance Evaluator/Supervisor for Level III grievances. Ms. Wheeler supervises three additional Grievance Evaluators.

7. Grievant's August 10 appeal of this grievance was assigned to Ms. Wheeler.

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[1] Grievant was represented by Marilyn Kendall with the American Federation of State, County and Municipal Employees. Respondent was represented by Assistant Attorney General Meredith A. Harron.

8. Ms. Wheeler previously served as Level III Grievance Evaluator in an earlier grievance submitted by Grievant. That grievance was elevated to Level III on March 31, 1998. See R Ex 1.

9. The previous grievance involved Grievant's nonselection to a posted position. Grievant did not name a representative at the time she initiated that grievance. 1 0 .

After the previous grievance was set for Hearing at Level III, Grievant wrote Ms. Wheeler on June 8, 1998, stating she would be represented by Lynn Belcher, with the West Virginia State Employees Union (WVSEU). In that same correspondence, Grievant requested a continuance of the Level III grievance hearing, based on Ms. Belcher's not being available on the date of the hearing. See R Ex 1.

11. On August 10, 1998, Grievant wrote to Level III Grievance Evaluator Barbara Wheeler concerning the current grievance, and requested that subpoenas be issued for a number of witnesses. Grievant's letter indicated that a copy was being provided to "Dave Bielski, WVSEU." Mr. Bielski is employed by WVSEU in a management capacity.

12. At the time Ms. Wheeler received Grievant's Level III appeal and correspondence in the present matter on or about August 13, 1998, she believed Ms. Belcher was then laid off by, or on strike against, her employer, WVSEU.

13. Based upon Grievant's prior selection of Ms. Belcher as her representative in the earlier, separate grievance, and Grievant's action of sending a courtesy copy of her correspondence concerning her current grievance to Mr. Bielski of the WVSEU, Ms. Wheeler assumed that Grievant would likewise be represented by Ms. Belcher in the current matter. Ms. Wheeler further concluded that scheduling a Level III hearing in the

current grievance was not required until she received notice from Ms. Belcher that she was available to participate in a Level III hearing.

14. Ms. Wheeler made no effort to contact Grievant, Ms. Belcher or Mr. Bielski, either to verify that Grievant was represented by WVSEU or Ms. Belcher, or to confirm that Grievant wanted to waive the time frame for conducting the Level III hearing.

15. On September 1, 1998, Grievant wrote to Ms. Wheeler, requesting that she be awarded the relief requested in her grievance because she had prevailed by default. See G Ex C.

DISCUSSION

The issue of default in a grievance filed by a state employee has only recently come within the jurisdiction of the Grievance Board. On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998.[2] That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. 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

[2] This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998). As this grievance was initiated on August 4, 1998, it falls under the new statute.

> 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.

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A-5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

If a default occurs, the grievant wins and Respondent may request a ruling at Level IV regarding whether the relief requested should be granted. If there was no default, the grievant may proceed to the next level of the grievance procedure. Respondent contends no default occurred under the terms of the statute. This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Because Grievant is claiming she prevailed by default under the terms of the statute, Grievant bears the burden of establishing such default by a preponderance of the evidence.

According to the undisputed facts in this matter, Grievant advanced her grievance to Level III no later than August 13, 1998. In accordance with W. Va. Code § 29-6A-4(c), "[t]he chief administrator or his or her designee shall hold a hearing . . . within seven days of receiving the appeal." In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that

"days" means working days exclusive of Saturday, Sunday or official holidays. Thus, DHHR was obligated by the grievance statute to hold a Level III hearing in this grievance not later than August 25, 1998, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

DHHR argues that Ms. Wheeler's failure to schedule a Level III hearing within the time limits specified in the statute was "excusable neglect" because she reasonably assumed that Grievant was being represented by Ms. Belcher with WVSEU, and Ms. Belcher was not available for a hearing due to a labor dispute between WVSEU and its bargaining unit employees. Grievant submits that Ms. Wheeler's actions were not reasonable in the circumstances, and do not, in any event, rise to the level of excusable neglect.

As 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." Bailey v. Workman's Comp. Comm'r, 170 W. Va. 771, 296 S.E. 2d 901 (1982). 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 specified 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.

W. Va. Code § 29-6A-3(f) provides:

> A grievant may be represented by an employee organization representative, legal counsel or any other person, including a fellow employee, in the preparation or presentation of the grievance. At the request of the grievant, that person or persons may be present at any step of the procedure: Provided, That at level one of the grievance, as set forth in section four of this article, a grievant may have only one representative.

DHHR's contention that Ms. Wheeler's action was reasonable is unacceptable because Grievant never indicated that she wanted anyone to represent her in this particular matter. Unlike her earlier grievance, where Grievant wrote a letter declaring her desire to be represented by Ms. Belcher, Grievant never put Ms. Belcher's name on any correspondence or documentation related to this grievance. Sending a courtesy copy of grievance-related correspondence to Mr. Bielski with the WVSEU was, at best, ambiguous. Indeed, it would be more reasonable to consider Grievant's inclusion of Mr. Bielski's name on her correspondence an indication Grievant expected someone other than Ms. Belcher to be provided as her representative at Level III. In any event, Ms. Wheeler was obligated to clarify Grievant's representation, rather than assume Ms. Belcher would be representing Grievant in this matter, and to further assume that this matter could be continued in accordance with an understanding she had reached with Grievant and/or Ms. Belcher in a separate grievance.[3]

Although Ms. Wheeler became aware of her mistake when Grievant declared a default on September 1, 1998, the record indicates that Ms. Wheeler was prepared to leave this matter in limbo until Grievant or Ms. Belcher contacted her to advise that they

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[3] Acceptance of DHHR's explanation as "excusable neglect" would be inconsistent with the apparent legislative purpose of amending W. Va. Code § 29-6A-3 to expedite the grievance process at Levels I through III.

were ready to proceed. In these circumstances, DHHR failed to demonstrate it was prevented from providing a timely Level III hearing in compliance with W. Va. Code § 29-6A-4(c) "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud" as provided by W. Va. Code § 29-6A-3(a)(2). Therefore, it is hereby determined Respondent is in default in regard to this grievance seeking restoration of Grievant's prior salary, and Respondent must proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2) that the remedy sought is contrary to law or clearly wrong. Accordingly, a Level IV hearing will be scheduled to provide the parties an opportunity to present evidence on the issue of whether the remedy Grievant has obtained by default is clearly wrong or contrary to law.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

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. 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." W. Va. Code § 29-6A-3(a).

2. When a grievant asserts that their 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 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).

3. Grievant established, by a preponderance of the evidence, that Respondent DHHR failed to schedule a timely Level III hearing on this grievance. DHHR failed to demonstrate that such failure was a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud which precluded DHHR from scheduling a timely hearing at Level III of the grievance procedure for state employees. Id.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is **GRANTED**. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order.

LEWIS G. BREWER
ADMINISTRATIVE LAW JUDGE

Dated: November 25, 1998