BILLY CARTER,

Grievant,

v. **Docket No. 00-CORR-221D**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

ORDER DENYING DEFAULT

On or about January 3, 2000, Grievant, Billy Carter, filed a grievance against his employer, Respondent, the Division of Corrections/Huttonsville Correctional Center ("Corrections"), challenging his five day suspension without pay. Grievant's supervisor timely responded on January 5, 2000, apparently denying the grievance. Grievant appealed to Level II on January 10, 2000, and a response was received on January 11, 2000, that he could proceed to Level III. A Level III hearing was held on June 6, 2000. Grievant did not receive his Level III decision until he called Hilda Williams, Corrections' Director of Human Resources, on June 27, 2000, to inquire about it. A copy of the decision was sent to him using an overnight delivery service, and he received the Level III decision denying his grievance at his home, on June 28, 2000. On July 3, 2000, Grievant filed a claim of default at Level IV.

A Level IV hearing was held on July 26, 2000, solely for the purpose of determining whether a default had occurred at Level III. Grievant was represented by Troy McCauley, Sr., and Respondent was represented by Leslie Kiser-Tyree, Esquire. The parties did not wish to submit written argument, and the issue of whether a default occurred became mature for decision at the conclusion of the hearing.

The facts of this matter are not in dispute, and the parties entered into a stipulation of facts at the beginning of the Level IV hearing. Grievant had been off work on a leave of absence since April 15, 2000. Prior to that, he had been on sick leave since February 10, 2000. Nonetheless, his copy of the

Level III decision was timely mailed to him at Huttonsville Correctional Center by a clerk in Corrections' Central Office, rather than to his home address. Decisions typically are mailed to the grievant's home address, but sometimes they are mailed to the institution. When Grievant's copy of the decision was received in the warden's office, it was not forwarded to Grievant, but was instead filed by the warden's secretary in Grievant's personnel file. As soon as Grievant made Corrections aware that he had not received the decision, it was sent to him at his home. Thus, although the decision was mailed to Grievant within the statutory time frames, the address used was not the correct address for the purposes of getting the decision to him while he was on a leave of absence, the institution did not forward it, and the decision was not received by Grievant until well past the statutory time frames. (See footnote 1)

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> (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 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. Respondent did not challenge whether Grievant could pursue his allegation of default at Level IV, and this Grievance Board has determined that a grievant may come to Level IV asking for a ruling on the lower level procedural issue of whether a default has occurred, in order to know how to proceed with his grievance. Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998).

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. (See footnote 2) Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

W. Va. Code § 29-6A-4 provides as follows regarding when Respondent must act at Level III:

> (c) Level three.
>
> Within five days of receiving the decision of the administrator of the grievant's work

> location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.
>
> The chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.
>
> The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

W. Va. Code § 29-6A-3(i) requires that the decision be transmitted to Grievant within the statutory time lines. When the decision must be received by the Grievant, however , is not addressed by the statutory scheme. Harmon, supra.

In this case, the decision was issued and transmitted to Grievant at his place of employment in a timely fashion. Grievant argued the decision was not transmitted to him because it was sent to his place of employment, and Corrections knew he was not working. While Corrections knew Grievant was on a leave of absence, and had been provided with Grievant's home address on the grievance form, the mailing of the form to Grievant's place of employment by a clerk in Corrections' Central Office was in substantial compliance with the statutory requirements. See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). Grievant is still an employee, and the grievance is about his employment. The undersigned sees nothing wrong with sending such a decision to Grievant's place of employment. “[I]n the absence of bad faith, substantial compliance is deemed acceptable.” Dilley v. W. Va. Div. of Corrections, Docket No. 00-CORR-008D (Aug. 18, 2000), citing Duruttya, supra. There was no evidence of bad faith. The problem here was that the institution took no action to forward the decision to Grievant.

Grievant questioned how anyone could think the copy of the decision mailed to the institution would be the file copy. Had the employee who opened the mail containing Grievant's decision been careful and thorough, she may have realized that she had Grievant's copy and needed to forward it to him. Instead, she determined that it was the copy for the personnel file and filed it. The Supreme Court of Appeals of West Virginia has specifically found excusable neglect in instances where papers have been misfiled due to a misunderstanding or inadvertence, or misplaced. Wood County Comm'n

v. Hanson, 187 W. Va. 61, 415 S.E.2d 607 (1992); Parsons v. McCoy, 157 W. Va. 183, 101 S.E.2d 632(1973). The misfiling of Grievant's copy of the decision was excusable neglect.

The following findings of fact are based upon the stipulations of fact agreed to by the parties.

Findings of Fact

1. The Level III hearing was held on June 6, 2000.

2. The Level III decision was mailed to Grievant on June 12, 2000, by a clerk in Corrections' Central Office in Charleston. The address used for Grievant was that of Huttonsville Correctional Center. Grievant's home address was on the grievance form.

3. When Grievant's copy of the decision arrived at Huttonsville Correctional Center it was not forwarded to him at his home. It was filed by the warden's secretary at Huttonsville Correctional Center in Grievant's personnel file.

4. Grievant was on a leave of absence at the time the decision was issued, and had been since April 15, 2000.

5. Grievant contacted Hilda Williams, Corrections' Director of Human Resources, on June 27, 2000, to inquire as to why he had not received a Level III decision. She immediately had a copy of the decision sent to him at his home address.

6. Grievant did not receive the Level III decision until June 28, 2000.

The following conclusions of law support the decision reached.

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. Once a grievance progresses to Level III, and a Level III hearing is held, a written decision must be issued and transmitted to the grievant within five working days of the Level III hearing. W. Va. Code §§ 29-6A-4(c) and 29-6A-3(i). 3. The Level III grievance decision was transmitted to Grievant in a timely manner, as it was mailed to him at his place of employment, in substantial compliance with the requirements of the statute. See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382

S.E.2d 40 (1989). "[I]n the absence of bad faith, substantial compliance is deemed acceptable." Dilley v. W. Va. Div. of Corrections, Docket No. 00-CORR-008D (Aug. 18, 2000), citing Duruttya, supra.

4. Excusable neglect has been found in instances where papers have been misfiled due to a misunderstanding or inadvertence, or misplaced. Wood County Comm'n v. Hanson, 187 W. Va. 61, 415 S.E.2d 607 (1992); Parsons v. McCoy, 157 W. Va. 183, 101 S.E.2d 632 (1973).

5. The inadvertent misfiling of Grievant's copy of the Level III grievance decision amounts to excusable neglect.

6. Respondent is not in default.

Accordingly, Grievant's request that a default be entered is **DENIED**. As a Level III decision has already been issued, this grievance will remain on the docket of the Grievance Board as Docket No. 00-CORR-221. The parties are **ORDERED** to confer and to provide the Grievance Board, by September 6, 2000, with five dates agreeable to both parties for a Level IV hearing on the merits of the grievance. Respondent is **FURTHER ORDERED** to provide the lower level record by no later than September 6, 2000.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 25, 2000

Footnote: 1

Grievant did not explain why he waited until after he received the Level III decision to claim default; however, as Corrections did not raise this as an issue, it will not be addressed.

Footnote: 2

If the respondent is the party appealing to Level IV, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no default occurred, due to the presumption set forth in W. Va. Code § 29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).