CHARLES HAMILTON,

Grievant,

v. **Docket No. 01-BEP-348D**

BUREAU OF EMPLOYMENT PROGRAMS/
LEGAL SERVICES DIVISION,

Respondent.

ORDER GRANTING DEFAULT

On May 18, 2001, Grievant, Charles Hamilton, filed a default claim against his employer, Respondent, Bureau of Employment Programs/Legal Services Division ("BEP"), alleging a default occurred when a written Level II decision was not issued within five days of the Level II conference. A Level IV hearing was held on May 25, 2001, solely for the purpose of taking evidence on the issues of whether a default had occurred, and whether Respondent had a statutory excuse to default. Grievant represented himself, and BEP was represented by William Ballard, Esquire. The parties were given until June 1, 2001, to submit written argument, both declined to do so, and this default claim became mature for decision on that date.

The following findings of fact are made based upon the evidence presented at the Level IV hearing.

Findings of Fact

1. Grievant is employed by BEP in the Legal Services Division.

2. Grievant filed a grievance against BEP, and a Level I decision was issued on May 1, 2001. (See footnote 1) The next day, Grievant filed his appeal to Level II with his supervisor, William Ballard.

3. By letter dated May 2, 2001, Mr. Ballard acknowledged receipt of the appeal, and stated he would forward it on to Grievant's second-level supervisor, William Steele, Director of Legal Services.

4. Mr. Steele met briefly in the hallway with Grievant on May 9, 2001. Both parties consider this

meeting to have been the Level II conference. Mr. Steele told Grievant at that time that he was going to deny his grievance.

5. Mr. Steele issued a written Level II decision on May 22, 2001.

6. Five working days from May 9, 2001, was May 16, 2001.

Discussion

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which 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.

The burden of proof is upon the grievant who files his default claim at Level IV to prove by a preponderance of the evidence that a default has occurred. (See footnote 2) Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

Grievant's default claim is based upon the fact that a written Level II decision was not issued within five days of the Level II conference, as is required by W. Va. Code § 29- 6A-4(b). W. Va. Code § 29-6A-4 provides as follows regarding when Respondent must act at Level II:

(b) Level two.

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

BEP agreed that a written Level II decision was not issued within five working days of the Level II conference. BEP's counsel stated at the Level IV hearing that, in addition to his role at the Legal Services Division, Mr. Steele is also Deputy Commissioner for BEP. Counsel stated that Mr. Steele is in his office only a few hours a day, is extremely busy, considered the matter closed after he told Grievant he was going to deny the grievance, and the necessity for a written Level II decision “slipped his mind.” Mr. Steele did not testify. (See footnote 3)

Grievant has proven a default occurred. The only remaining issue is whether Respondent has demonstrated a statutory excuse to the default.

This Grievance Board has found that, in certain instances when the respondent was unable to comply due to other obligations, this constituted excusable neglect. "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. 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. White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, n. 8.” Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001).

Additionally, "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). Further, Duruttya, supra, noted that in the

absence of bad faith, substantial compliance is deemed acceptable. Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

This Grievance Board has recently found excusable neglect in instances where a Level III hearing was not held within the statutory time frames due to the difficulty in scheduling a hearing at the end of the year, during the Christmas holiday season, when multiple parties were involved. Hager, supra. Excusable neglect was also found where the state agency had only one Level III grievance evaluator, and he could not schedule the hearing within seven days due to his full schedule. Darby v. W. Va. Dep't of Health and Human Resources, Docket No. 00-HHR-336D (Dec. 28, 2000). In both cases the Administrative Law Judge found no indication that the employer had acted in bad faith.

Likewise, in this case, there is no indication that BEP acted in bad faith. However, the undersigned cannot find excusable neglect or unavoidable cause under the circumstances presented here. The only reason given for the failure to issue a written Level II decision in a timely manner was that the second level supervisor was extremely busy. No evidence was presented to address what Mr. Steele was doing on a daily basis which prevented him from compliance with the statute. In fact, no evidence was presented to substantiate the assertion that Mr. Steele was extremely busy during the time period in question. This is insufficient to excuse Respondent from compliance with the statute. The reasons offered for the delay in issuing the written Level II decision do not amount to excusable neglect or unavoidable cause. Nelson v. Bureau of Employment Programs, Docket No. 01-BEP-061D (June 25, 2001).

In addition, it is appropriate to make 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. The burden of proof is upon the grievant who files his default claim at Level IV to prove by a preponderance of the evidence that a default has occurred. Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). Where Respondent asserts a statutory excuse to the default, the

burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

3. Absent an agreement by the parties to extend the statutory time lines, a written Level II decision must be issued within five working days of the Level II conference. W. Va. Code §§ 29-6A-2(c) and 29-6A-4.

4. Respondent defaulted by failing to issue a written Level II decision within five working days of the Level II conference.

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)). 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. 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. White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, n. 8." Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001).

6. Respondent has not demonstrated a statutory excuse for the delay in issuing a written Level II decision.

Accordingly, Grievant's request that a default be entered is **GRANTED**. **IT IS ORDERED** that the parties confer and provide to the Grievance Board five dates when all parties and witnesses will be available for a hearing on the issue of whether the relief requested is contrary to law or clearly wrong.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 27, 2001

Footnote: 1

Grievant initially claimed a default had occurred at Level I, but withdrew that claim during a telephonic conference held on May 18, 2001. That default claim was dismissed from the Grievance Board's docket by Order dated May 21, 2001, Docket Number 01-BEP- 136D. Respondent did not contend that this prior default claim caused a delay in the issuance of the Level II decision in any way.

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).

Footnote: 3

W. Va. Code § 29-6A-3(i) requires that:

> *Decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted to the grievant and any representative named in the grievance within the time prescribed. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.*

BEP did not argue that the statutory time lines were met by Mr. Steele's verbal response to Grievant that he was denying the grievance, and this issue will not be addressed. It will be noted, however, that the delay in issuing a written decision unnecessarily delayed the processing of the grievance at Level III, because, without a written decision, Grievant had nothing which he could appeal to the next level of the grievance procedure.