DEANA STANLEY,

Grievant,

v. **Docket No. 01-HEPC-503D**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION GRANTING DEFAULT

Grievant, Deana Stanley, employed by West Virginia University (WVU or Respondent) as a Food Service Assistant, filed a level one grievance on August 13, 2001, following the termination of her employment. Grievant seeks reinstatement with back pay and benefits. A level one decision was issued on August 17, 2001, and a level two appeal was filed on August 22, 2001. On August 31, 2001, Respondent notified Grievant's WVEA representative by electronic mail that a level two hearing was scheduled for September 5, 2001. By letter dated September 4, 2001, Grievant notified Respondent that a hearing had not been scheduled within the statutory time lines entitling her to a default judgment. Grievant subsequently filed a level four appeal. A hearing on the default claim was conducted on November 27, 2001, at the Grievance Board's Westover office. Grievant was represented by James B. Zimarowski, Esq., and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The matter became mature for decision on December 3, 2001, the due date for filing proposed findings of fact and conclusions of law.

The following facts of this matter are undisputed.

Findings of Fact

1. Grievant was employed by WVU as a Food Service Assistant until her dismissal effective August 2, 2001. 2. Until July 1, 2001, employees at institutions of higher education were covered by the education employees' grievance procedure set forth in W. Va. Code §§ 18-29-1, et seq. After July 1, coverage was transferred to the state employees' grievance procedure set forth in W. Va. Code §§ 29-6A-1, et seq. The time lines for processing grievances differ in the two procedures.

3. Grievant filed a level one grievance on August 13, and a decision was issued on August 17,

and was received by Grievant on August 21, 2001.

4. Grievant filed a level two appeal on August 22, 2001.

5. On August 31, 2001, David Master, Assistant Director of Dining Services, and the level two administrator in this matter, notified Mary Linn, Grievant's WVEA representative by electronic mail (e-mail) that a hearing had been scheduled for September 5, 2001, subject to her availability. Prior to this time Mr. Master did not schedule level two proceedings.

6. By letter dated August 31, 2001, to Ms. Linn and Grievant, Mr. Master confirmed the level two hearing would be held on September 6, 2001, to accommodate Ms. Linn's schedule.

7. On September 4, 2001, Ms. Linn filed a Notice of Default with WVU.

8. A level two conference was conducted on September 6, 2001, and a decision denying the grievance was issued on the same day.

Discussion

Because Grievant is claiming she prevailed by default under the statute, she bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).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).

A default claim is based on the employer's alleged procedural violation of failing to respond to the grievance within the time limits contained in W. Va. Code § 29-6A-4. (See footnote 1) The default provision applicable to employees of institutions of higher education, is contained in W. Va. Code § 29-6A-3(a), and states 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.

W. Va. Code § 29-6A-4 provides the following directions regarding when Respondent must act at 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 or her 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.

It should be noted that this Grievance Board has been directed in the past that "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). The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure. See W. Va. Code § 18-29-1. Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

Grievant asserts that she filed the level two appeal on August 22, 2001, with Mr. Master, and the WVU Human Resources office, and that a conference was not conducted within five days. Respondent argues that there was no violation of the time lines, but if a finding is made that a default did occur, it was the result of excusable neglect.

Respondent's first argument is based upon an assumption that had it received the appeal on August 23, 2001, the very next day after it was filed by Grievant, it responded and scheduled a level two conference within five days, and a written decision was issued within ten days of that date. However, Ms. Linn states in her September 4, 2001 letter to WVU's General Counsel that the appeal was filed via facsimile. Respondent did not dispute that statement, therefore, appeal was made on August 22, 2001. The documents entered into the record establish that on August 31, 2001, Mr. Master notified Ms. Linn by e-mail that a conference had been scheduled for September 5, 2001. Five working daysfrom August 22, 2001, was August 30, 2001. Clearly, a conference was not held within five days of receipt of the appeal.

Respondent next asserts that the level two decision was issued on September 10, 2001, within the statutory time frame. Because of the Labor Day holiday, Respondent did issue a decision on the tenth working day after the appeal was filed. It is not the date of the decision that is in dispute,

however. The West Virginia Supreme Court of Appeals has held that the statutory language of the grievance procedure “makes mandatory the time periods within which grievances . . . must be filed, heard, and decided. If a grievance evaluator does not comply with the hearing and decision time periods, and his/her inactions does not come within one of the enumerated statutory exceptions, 'the grievant shall prevail by default'”. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). (See footnote 2) Thus, the fact that Respondent issued a decision within ten days does not avert a default in this instance.

Having determined a default occurred, it is necessary to address Respondent's claim that the delay was due to excusable neglect. 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).

This Grievance Board has found excusable neglect in instances where a level three 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 three 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 Respondent acted in bad faith. However, the undersigned cannot find excusable neglect or unavoidable cause under thecircumstances presented here. The only reason given for the failure to conduct a level two conference in a timely manner was that institutions of higher education transferred from the education to the state employees grievance procedure, and Mr. Master was unaware of his responsibility to schedule a conference. Respondent had a duty to notify its employees of the change in procedure, and by August 22, 2001, there was ample opportunity to have instructed first and second level supervisors of their responsibilities. Mr. Master's lack of information is insufficient reason to excuse Respondent from compliance with the statute, and does not amount to excusable neglect or unavoidable cause. Hamilton v. Bureau of Employment Programs/Legal Serv. Div., Docket No. 01-BEP- 348D (June 27, 2001); 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 four 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).

3. Absent an agreement by the parties to extend the statutory time lines, a level two conference must be conducted within five working days from the date the level two grievance was filed. W. Va. Code § 29-6A-4(a). 4. The language of the grievance statute “makes mandatory the time periods within which grievances . . . must be filed, heard, and decided. If a grievance evaluator does not comply with the hearing and decision time periods, and his/her inactions does not come within one of the enumerated statutory exceptions, 'the grievant shall prevail by default'”.Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County

Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). Grievant has proven by a preponderance of the evidence that Respondent defaulted when a level two conference was not conducted within five days of the appeal being filed.

5. 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. Noggy v. Div. of Corr./Northern Regional Jail and Corr. Facility, Docket No. 99-CORR-487D (May 26, 2000).

6. "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).

7. The supervisor's lack of knowledge regarding his responsibilities under the state employees' grievance procedure does not constitute excusable neglect for the failure to timely conduct a level two conference. Accordingly, Grievant's claim of default is **GRANTED**, and the parties Ordered to 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.

DATE: December 20, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

W. Va. Code § 18B-2A-4(k), effective July 1, 2001, provides that the grievance procedure set forth in W. Va. Code §§ 29-6A-1 et seq., "shall be the exclusive mechanism for hearing prospective employee grievances and appeal".

Footnote: 2

Although both of these cases involved the grievance procedure for education employees, the language of W. Va. Code § 29-6A-3 is substantially similar.