HUBERT BRYANT,

Grievant,

v.

DOCKET NO. 02-DOH-333D

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

On or about October 1, 2002, Grievant, Hubert Bryant, filed a grievance against his employer, the Department of Transportation/Division of Highways ("Highways") challenging his non-selection for a Craftsworker III position. Grievant's supervisor timely responded on October 1, 2002, denying the grievance. Grievant appealed to Level II on October 2, 2002, and met with Wilson Braley, District Engineer, on October 3, 2002, for his Level II conference. Grievant did not receive his Level II decision until he called Barbara King, Mr. Braley's Secretary, to inquire about it. The decision had been issued on October 9, 2002, but was sent to Grievant's old address. On October 11, 2002, Grievant filed a claim of default at Level IV. Ms. King provided Grievant with a copy of the decision on October 15, 2002.

A Level IV hearing was held on November 18, 2002, solely for the purpose of determining whether a default had occurred at Level II. Grievant was represented by Mary Bryant, his wife, and Highways was represented by Barbara Baxter, Esq. The parties didnot wish to submit written argument, and the issue of whether a default occurred became mature for decision at the conclusion of the hearing.

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.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. 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(b) provides as follows regarding when Respondent must act at Level II:

> 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 herdesignee 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.

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 Grievant, however, is not addressed by the statutory scheme. Harmon, supra. In this case, the decision was issued and transmitted to Grievant at his old address in a timely fashion. Grievant argued the decision was not transmitted to him because it was sent to his old address, when his new address was clearly printed on his grievance form. Ms. King relied upon Highways' computer personnel file which had not yet been updated with Grievant's new address, and did not look at the grievance form. Ms. King's reliance on the computer file was in substantial compliance with the statutory requirements. 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. There was no evidence of bad faith. The problem here was that the institution was late in updating its personnel files, but clearly, the decision had been issued in a timely manner. Highways argues its mistake was the result of excusable neglect.

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, 202 S.E.2d 632 (1973). The mailing of the Level II decision to Grievant's old address the decision was excusableneglect. See Carter v. W. Va. Div. of Corrections, Docket No. 00-CORR-221D (Aug. 5, 2000).

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 II, and a Level II conference is held, a written decision must be issued and transmitted to the grievant within five working days of the Level II conference. W. Va. Code §§ 29-6A-4(b) and 29-6A-3(i).

3. The Level II grievance decision was transmitted to Grievant in a timely manner, as it was mailed to him at his old address, 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, 202 S.E.2d 632 (1973).

5. The inadvertent mailing of Grievant's copy of the Level II grievance decision to the wrong address amounts to excusable neglect. See Carter v. W. Va. Div. of Corrections, Docket No. 00-CORR-221D (Aug. 5, 2000). 6.

Highways is not in default.

Accordingly, Grievant's request that a default be entered is **DENIED**. This grievance is remanded to Level III, and the parties are hereby **ORDERED** to schedule a Level III hearing promptly at a mutually agreeable date and time.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 2, 2002