ALLEN CODY,

Grievant,

v. **Docket No. 02-DJS-127D**

WEST VIRGINIA DIVISION OF JUVENILE SERVICES/INDUSTRIAL HOME FOR YOUTH,

Respondent.

ORDER DENYING DEFAULT

Allen Cody ("Grievant") filed a "Claim for Relief by Default" at level four of the grievance procedure on May 6, 2002, alleging a default occurred at level two. A hearing on the issue of whether a default occurred was held before the undersigned in the Grievance Board's office in Westover, West Virginia, on August 19, 2002. Grievant was represented by counsel, Michael J. Romano, and Respondent was represented by Assistant Attorney General Barbara F. Elkins. This matter became mature for consideration upon receipt of the parties' final post-hearing submissions on September 16, 2002. (See footnote 1)

Procedural Issues

On August 28, 2002, Grievant's counsel requested permission to file alleged newly discovered evidence bearing "directly upon the veracity of the testimony of the Division'srepresentative at the hearing." This request was filed seemingly in response to the undersigned's granting of permission to Respondent's counsel to file a post-hearing brief (which Respondent did not request until after the conclusion of the level four hearing), to which Grievant's counsel did not object until after Respondent's brief was filed on August 27, 2002. It appeared from Grievant's counsel's correspondence requesting permission to present new evidence that he believed Respondent had presented new evidence in its post-hearing memorandum. By letter dated August 30, 2002, from the undersigned, the parties were advised that, if in fact Respondent's brief contained evidence or

matters not presented at the default hearing, they would not be considered. The parties were also advised that no new evidence from any party would be considered regarding the default issue, and that Grievant could respond to Respondent's brief by September 13, 2002.

In response to the undersigned's denial of his motion to introduce new evidence, Grievant's counsel, on September 9, 2002, filed a “Motion for Reconsideration of the Court's Ruling Barring Newly Discovered Evidence Relevant to Issue of Default and Proffer of Evidence.” In this submission, Grievant's counsel proffered that Division of Juvenile Services (“DJS”) Director Manfred Holland had mischaracterized his role in the decision- making process regarding the EEOC investigation against Grievant. However, as will be discussed later in this Order, this alleged “new” evidence has no bearing upon the issue of default or default relief, and Grievant's motion is, once again, denied.

The following findings of fact, pertinent to the issue of default in this matter, are made based upon a preponderance of the evidence submitted at the level four hearing.

Findings of Fact

1. Prior to May 29, 2002, Grievant was employed by DJS at the West Virginia Industrial Home for Youth (“IHY”) as Deputy Superintendent.

2. On February 6, 2002, Grievant was informed in writing by DJS Director Manfred Holland that an Equal Employment Opportunity (“EEO”) complaint had been filed against him by a subordinate, accusing him of harassment, creating a hostile work environment, and retaliation.

3. Upon receiving the complaint against Grievant, Director Holland appointed two individuals, one employed by the West Virginia State Police, and one employed by the Bureau of Employment Programs, as investigators. These two individuals were responsible for taking statements from all concerned parties, including Grievant, and compiling a report of their investigation for Director Holland's review.

4. The investigative report was completed on February 20, 2002, and submitted to Director Holland. The report contained detailed discussion of the statements of all witnesses interviewed, but did not specifically state whether or not Grievant was deemed “guilty” of the conduct alleged.

5. Based upon the information contained in the report and discussions with the investigators, Director Holland advised Grievant, in a letter dated March 12, 2002, that the investigation had been completed and that the allegations had been “sustained/substantiated.” The letter further advised Grievant that, within fifteen days, he would receive Director Holland's decision regarding the charges.

6. In a letter dated March 27, 2002, Director Holland advised Grievant as follows:

> The purpose of this letter is to inform you of my decision **to hold in abeyance disciplinary action against you** consequently of the [EEO investigation]. The two (2) allegations substantiated are:
>
> 1. You created a hostile work environment for the complainant by using intimidation and your position to cause her to comply with your unauthorized orders and/or inquiries while working at [IHY]; and
>
> 2. You used retaliation against the complainant.
>
> As you will recall in a letter dated March 12, 2002, I informed you this letter would be forthcoming.
>
> After reviewing the completed investigation, **I find it appropriate and necessary to conduct further review of the impending impact my decision may have** on the operations of [IHY] and this Division.
>
> **Your conduct is unacceptable; therefore you are hereby fully advised that any continuance of this conduct, or conduct similar in nature shall subject you to increased disciplinary sanctions, to include dismissal.**
>
> You may respond to the matters in this letter in writing or in person, provided you do so within fifteen (15) calendar days of the date of this letter.
>
> **Upon rendering my decision of disciplinary action against you, you may refer to the WV Code § 29-6A-4-4(e) [sic] Expedited Grievance Process.**

(Emphasis added).

7. On April 10, 2002, Grievant's attorney directed a letter to Director Holland, which began:

> This firm represents Allen Cody with regard to the above referenced adverse employment decision as well as certain continuing employment issues regarding his position as Deputy Superintendent with [DJS]. As you offered in your letter of March

> 27, 2002, to Deputy Superintendent Cody, please consider this letter a Level II grievance pursuant to West Virginia Code § 29-6A-4, under the time frames set forth for Level I. A completed "State Employees' Grievance Board Form For State Employees" is attached as **Exhibit A**, and this letter is incorporated by reference and made an integral part thereof for purposes of this grievance.

(Emphasis in original.) The letter continued for five pages, stating why Grievant believed Director Holland's "decision" was incorrect. The attached grievance form referred to the letter dated April 10, 2002, in place of the statement of grievance and request for relief.

8. By correspondence dated April 18, 2002, to Grievant's counsel, Director Holland responded as follows:

> We are acknowledging your letter dated April 10, 2002, regarding Deputy Superintendent Allen Cody.
>
> The State Employees Grievance Board states that proper procedures must be followed in filing a grievance. The [Grievance Board] Form for state employees must be completed.
>
> Equal Employment Opportunity (EEO) guidelines will allow Mr. Cody a transcript of his statement or a copy of his tape.
>
> If you have any further questions or comments, please feel free to contact me at (304) 558-6029.

9. In a letter to Director Holland dated April 22, 2002, Grievant's counsel advised him that the completed grievance form was, in fact, attached to the letter of April 10, 2002, and asked the director to advise him if that form was not sufficient to comply with Grievance Board procedures.

10. Director Holland responded by letter dated April 24, 2002, advising Grievant's counsel that DJS had retained an attorney to represent it in this matter, and any future correspondence should be forwarded to him at his address.

11. On May 6, 2002, Grievant filed a claim for relief by default with this Grievance Board.

12. On May 29, 2002, Director Holland issued a letter to Grievant, demoting him from his position as Deputy Superintendent to Corrections Program Supervisor, effectiveJune 1, 2002. This correspondence also contains a detailed discussion of the basis for the charges against Grievant and

the Director's decision to demote him. (See footnote 2)

13. Grievant's requested remedy, if he should prevail in this default claim, is to have the demotion rescinded and be restored to his prior position with DJS.

Discussion

The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). If a default occurs, the grievant is presumed to have prevailed. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If the employer can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A-3(a), or the remedy requested is either contrary to law or clearly wrong, the grievant will not receive the requested relief. Carter, supra; Williamson, supra. If there is no default, the grievant may proceed to the next level of the grievance procedure. "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 theevidence equally supports both sides, the party bearing the burden has not met its burden. Id.

W. Va. Code § 29-6A-3(a) provides, in pertinent part, that a grievant shall prevail 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(a) provides that a grievance may be filed with the employee's immediate supervisor within ten days following the event upon which it is based, and an informal conference shall be held, upon Grievant's request, within three days of receipt of the written grievance. Then, the supervisor must issue a written decision within six days of receipt of the written grievance. Subsection (e) of the same statute states that “a grievance involving suspension without pay, demotion or dismissal or loss of wages may be initiated at level two with the administrator of the grievant's work location.” Further, that subsection provides that a dismissal, demotion, or suspension

exceeding twenty days may be filed directly at level four of the grievance procedure. In turn, subsection (b) of W. Va. Code § 29-6A-4, governing level two of the grievance procedure, states that the administrator of the grievant's work location shall hold a conference within five days of receipt of the grievance and issue a written decision within five days of the conference.

Obviously, none of the above timeframes were met, whether level one or level two is applicable to the instant case. Rather, this case involves a situation where DJS argues that its failure to comply with the statute was caused by excusable neglect. Respondentcontends that the confusion caused by Grievant's unorthodox method of filing his grievance through a letter from an attorney--with the grievance form attached as an “exhibit”, his filing of it with the wrong individual, and the fact that Grievant had not yet been disciplined, all contributed to Director Holland's failure to respond appropriately.

"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." Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 11, 2001); Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001). In Parsons v. McCoy, 157 W. Va. 183, 101 S.E.2d 632 (1973), the West Virginia Supreme Court of Appeals, in discussing whether a finding of default should be upheld, stated "the majority of cases appear to holdthat where an insurance company has misfiled papers, this amounts to excusable neglect . . . ." (Citations omitted). The Court found the misfiling was the result of a "misunderstanding" and

"inadvertence" and no default was found. In Wood County Comm'n v. Hanson, 187 W. Va. 61, 415 S.E.2d 607 (1992), the Court repeated the Parsons language and again found the misplacement of a complaint and the resulting failure to file an answer in a timely fashion was due to excusable neglect and would not result in a default.

It should also 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., 186 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 § 29-6A-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.

If there were ever a case where excusable neglect has been demonstrated, the instant case is unequivocally it. First and foremost, despite Grievant's counsel's zealous argument to the contrary, Grievant attempted to file a grievance before the grievable event took place. It is not difficult to understand why Director Holland was confused when hereceived a long, detailed correspondence from Grievant's attorney, discussing why his “decision” was unfair and incorrect. Director Holland had not yet made a decision, and had, in fact, told Grievant as much in his March 27, 2002, letter.

While it is true that Grievant's counsel's correspondence states that he is filing a grievance at level two, Director Holland was justifiably confused by this correspondence.
By the terms of the statute, filing at level two is only permitted when the grievance concerns a suspension without pay, demotion or dismissal or loss of wages. How could Grievant have known at this stage of the proceedings that he could invoke this portion of W. Va. Code § 29-6A-4, when he had not yet been disciplined, and it was unknown whether the grievance concerned one of these issues? "A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date. See e.g. State v. Crabtree, 198 W. Va. 620,

627, 482 S.E.2d 605, 612 (1996) ('Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.); Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993) ('It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.' (Citation omitted).)." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

As stated above, Grievant has insisted throughout this proceeding that the March 27, 2002, letter was an adverse, disciplinary employment decision. At best, some of the language in this letter, which in its own words is an informational letter telling Grievant the disciplinary decision is being held in abeyance pending further consideration, could possibly be construed as a warning. “Written warnings are low-level disciplinary measures,providing some documentation of problems and the employer's response thereto. Written warnings often follow verbal warnings or reprimands, and also provide some basis for escalated disciplinary action should problems continue. They are a step in the disciplinary process.” Runyon v. Dep't of Corr., Docket No. 95-CORR-414 (Jan. 31, 1996). However, key elements of disciplinary action are missing from Director Holland's March 27, 2002, correspondence. First, while it states, in brief, that the charges of creating a hostile work environment and retaliation have been substantiated, it does not provide any detailed documentation of what those charges were based upon, i.e. Grievant's specific alleged misconduct. Second, and logically flowing from the documentation of misconduct, this letter, although placed in Grievant's personnel file, could never realistically be used against Grievant for purposes of future discipline. Once again, by its own language, it is a letter informing Grievant that the decision as to what discipline would be imposed was going to be delayed. Grievant contends that, because the letter states that the two charges had been substantiated, other employees could potentially use it to make claims against him in the future of retaliation or creation of a hostile work environment. However, this argument is speculative at best; this Grievance Board does not address speculative claims. Pascoli/Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).

Finally, and perhaps most importantly, a finding of default in this case would result in a preposterous result, because Grievant has requested as relief that the subsequent demotion, which occurred **after the alleged default**, be rescinded. The requested remedy in a default matter must “flow from” the infraction committed by the employer. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994). In the instant case, if Grievant were correct in his belief that the

March 27, 2002, letter was an “adverseemployment decision,” the appropriate relief would be removal of that letter from his personnel file. This would not alter the fact that, subsequent to the claim for default, and as Director Holland had informed Grievant, the demotion was imposed on May 29, 2002. Director Holland's efforts to provide Grievant procedural notice that discipline was forthcoming should not entitle Grievant to “short circuit” the grievance process by having subsequent discipline rescinded. Grievances in which the relief, if provided, would have no practical effect on either party are abstract propositions and are not properly cognizable in the grievance procedure. Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-87- 102-1 (June 30, 1987).

For all of the foregoing reasons, Grievant's request for a finding of default is denied. As discussed earlier, Grievant's counsel argued subsequent to the default hearing that he should be allowed to present evidence regarding whether Director Holland actually made the “decision” that Grievant was “guilty” of the conduct alleged in the EEO complaint. As the saying goes, that is “neither here nor there,” because the March 27, 2002, letter was the correspondence which sparked Grievant's attempt to initiate the grievance process, regardless of whether Director Holland maintains that he or the investigators “decided” Grievant's guilt. The fact remains that, because of the unusual circumstances under which Grievant attempted to file his grievance, the manner in which he filed it, and the resulting confusion, Grievant is not entitled to prevail by default in this matter.

In an ordinary default matter, the grievance would be remanded so that it could be properly processed through the lower levels of the grievance procedure. In this case, as discussed above, it would be a meaningless exercise in futility, because Grievant has requested relief that he cannot obtain. Moreover, Grievant's claim regarding the demotionwhich was imposed by Director Holland on May 29, 2002, had been filed and accepted at level four, and should be allowed to proceed on the merits. Any relief which Grievant could possibly have obtained in the instant default claim would be absorbed and encompassed by his grievance regarding the demotion, so the instant grievance must be dismissed.

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. 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. The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998).

3. "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)). 4. Respondent has proven that it was prevented from responding to this grievance due to excusable neglect.

Accordingly, Grievant's claim of default at level two is **DENIED**, and this matter is **DISMISSED** and **STRICKEN** from the docket of the Education and State Employees Grievance Board.

Date: September 23, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

At the conclusion of the default hearing, the parties had elected not to file post- hearing memoranda. However, two days after the hearing, Respondent's counsel phoned the undersigned and expressed the desire to file a brief. Counsel was advised that she could file a brief if opposing counsel did not object and that Grievant's counsel would be allowed to respond to her submission. The undersigned received no objection from Grievant's attorney, Respondent's brief was received on August 27, 2002, and Grievant was given until September 13, 2002, to file a response, which was timely received on September 16, 2002.

Footnote: 2

In response to the demotion, Grievant's counsel argued to the undersigned that DJS was not authorized to take

disciplinary action against Grievant while he had an ongoing default claim. The undersigned has determined that DJS was permitted to take this action, and the demotion has been docketed by this Grievance Board as a separate grievance, held in abeyance until this default matter is resolved.