KIRISSA SILER,

Grievant,

v v.

Docket No. 03-CORR-301D

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

ORDER DENYING DEFAULT

Kirissa Siler ("Grievant") filed a request for default judgment with this Grievance Board on September 30, 2003, alleging a default occurred at level three of the grievance procedure. A hearing was conducted in Elkins, West Virginia, on December 2, 2003, for the purpose of determining whether a default occurred. Grievant represented herself, and Respondent was represented by Assistant Attorney General Charles Houdyschell Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 18, 2003.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant filed a grievance on August 25, 2003, which proceeded through levels one and two of the grievance process. 2. Grievant sent a grievance form to the office of the Commissioner of the Division of Corrections ("DOC") by certified mail on September 11, 2003, as her level three appeal.

3. Attached to the grievance form Grievant sent to the Commissioner's office were the level

one and two responses.

4. The grievance form which Grievant sent as her level three appeal was unsigned in the appropriate space for level three, and contained no information indicating that it was a level three appeal.

5. Grievant's level three documents were received in the capitol complex central mail room on September 12, 2003.

6. Wayne Armstrong, DOC's Human Resources Director, receives and processes level three grievances. As part of his normal activities, he receives copies of level one and two responses from the agency prior to the grievances' appeal to level three.

7. When Mr. Armstrong received Grievant's documents, he did not recognize them as a level three appeal. He assumed he was only receiving copies of lower level documents, and filed them away.

8. When DOC did not schedule a level three hearing, Grievant filed a notice of default.

9. After receiving Grievant's notice of default, Mr. Armstrong phoned Grievant and requested that she submit a properly executed level three appeal form, so he could schedule a level three hearing.

10. Grievant did not respond to Mr. Armstrong's request, and pursued her default claim at level four.

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 claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). 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. 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. There is no dispute in this case that a timely level three hearing was not scheduled within seven days of receipt of the appeal, as required by W. Va. Code §29-6A-4(c). Although Respondent has not specifically articulated the specific legal reasoning for denial of default in this case, it appears that Respondent's arguments are tantamount to excusable neglect.

However, as a preliminary matter, the undersigned does feel compelled to address Respondent's claims that Grievant has committed fraud. DOC contends that, at the level four hearing on this issue, Grievant knowingly submitted into evidence an altered grievance form, which was signed in the level three section, in an attempt to claim that she did in fact submit a signed grievance form to the Commissioner's office. Grievant testified that the grievance form she submitted at the hearing was her own copy, and never disputed that the original form was sent to the Commissioner. Under cross examination, she explained that she had filled in the level three information on her own copy at a later date, after she had mailed the original.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity

or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 1) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The undersigned finds Grievant's testimony to be credible. When confronted with the original grievance form which was received in the Commissioner's office, she made no attempt to deny that it was, in fact, the form she submitted. In addition, she seemed genuinely surprised to discover that she had inadvertently failed to sign the level three section on the form. The evidence indicates that Grievant made an honest mistake, and I do not believe that she intentionally attempted to defraud this Grievance Board. Accordingly, Respondent's request that Grievant be assessed its attorney fees and costs, pursuant to W. Va. Code § 29-6A-7(e), (See footnote 2) is denied.

As to whether Respondent's default in this case should be excused, the West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect basedupon its interpretation under the Federal Rules of Civil Procedure. "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. See 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. See White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, supra, n. 8.

Clearly, this case involves honest mistakes on the part of both parties. Grievant neglected to

complete the level three section of her grievance form, which caused Mr. Armstrong to conclude that it was not a level three appeal, and merely copies of lower level responses, which he commonly receives. Accordingly, the undersigned finds that Respondent's failure to schedule a level three hearing in this case was the result of excusable neglect, so a finding of default would be inappropriate.

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. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

___3. At level three, W. Va. Code § 29-6A-4(c) provides that a hearing must be held within seven days of receipt of the appeal.

4. "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)).

5. Respondent's failure to timely schedule a level three hearing in this matter was the result of excusable neglect.

Accordingly, Grievant's request for relief by default is **DENIED**. This matter is hereby **REMANDED** to level three for a hearing to be held **within five days of receipt ofthis Order**. Further, this matter is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

Date: January 12, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Dep't of Justice, 5 MSBP 150 (1981).

Footnote: 2

That statute provides that an assessment of costs against a party who has acted in bad faith is reserved for "extreme instances" and must also be "based on the relative ability of the party to pay the costs."