ANTHONY F. MARASCIO, JR.,

Grievant,

v. Docket No. 03-DOH-265D

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

Order Denying Default

Anthony F. Marascio, Jr. ("Grievant") filed a default claim with Division of Highways ("DOH") District Engineer Robert Whipp on September 2, 2003, alleging that a level two conference had not been conducted within the statutory time lines. The following day, DOH filed a request with this Grievance Board for a hearing to determine whether a default occurred. A hearing was conducted by telephone on March 16, 2004, and concluded in the Grievance Board's Wheeling office on April 30, 2004. Grievant represented himself, and Respondent was represented by Barbara L. Baxter, Esq. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature for consideration at the close of the hearing.

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

Findings of Fact

1. Grievant, employed by DOH as an Inspector II in District VI, filed a level one grievance on August 18, 2003, in which he alleged that another employee had been hired for the position of Highway Administrator III as a result of favoritism and outside influence. Grievant requested instatement to the position with back pay and benefits.

2. Grievant and Robert DeVaul filed a joint grievance on August 18, 2003, in which they alleged they had been deprived of their due process rights regarding reallocation of their positions. For relief, they requested reinstatement to their previous pay grade, back pay, and other entitlements, effective from August 1, 2001.

3. Level one grievance decisions were issued for both grievances on August 18, 2003, stating that the immediate supervisor lacked authority to grant the requested relief.

4. Grievant filed a level two appeal of the Marascio/DeVaul grievance on August 18, 2003.

5. Grievant filed a level two appeal of his nonselection grievance on August 19, 2003.

6. Christine Lavensky, Secretary to the District Engineer, receives and logs in level two grievances.

7. When Ms. Lavensky received Grievant's documents on August 19, 2003, she did not recognize them as a separate level two appeal. She assumed she was only receiving a copy of the Marascio/DeVaul grievance, and did not log it in.

8. When Mr. Whipp did not schedule a level two conference, Grievant filed a notice of default.

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 thegrievance 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 two conference was not scheduled within five days of receipt of the appeal, as required by W. Va. Code §29-6A-4(c). However, Respondent argues the failure was due to excusable neglect. The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon 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 [of time] and some reasonable basis for noncompliance with the time specified 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)). The Court has further 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.

Ms. Lavensky credibly testified that she mistakenly determined the August 19, 2003 appeal to be a copy of the grievance filed the prior day. A comparison of the two documents reveals that only Grievant's name appears on both. Additionally, “See attached” was written in the

"Statement of Grievance" and "Relief Sought" sections on both forms. While Grievant did not provide his signature at the bottom of the August 19, 2003, document, and did on the August 18 form, a cursory review such as Ms. Lavensky wouldcomplete could reasonably lead to a conclusion that it was a copy. Although Grievant's frustration with the delay is understandable, his suggestion that a failsafe procedure should be implemented is simply not feasible. Human error cannot be totally eliminated, and Respondent's noncompliance with the time lines in this case was due to excusable neglect.

Accordingly, 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 two, W. Va. Code § 29-6A-4(c) provides that a conference must be held within five 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 [of time] and some reasonable basis for noncompliance with the time specified 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)). 5. Respondent's failure to timely schedule a level two conference 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 two for a conference to be held within five days of receipt of this Order. Further, this matter is DISMISSED and STRICKEN from the docket of this Grievance Board.

DATE: MAY 25, 2004 _____

Sue Keller

Senior Administrative Law Judge