GARLAND HOLLEY and

KRISTIN FULLER,

Grievants,

v. DOCKET NO. 04-HHR-108D

W. VA. DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/BUREAU

FOR PUBLIC HEALTH,

Respondent.

ORDER GRANTING DEFAULT

On March 15, 2004, Grievants filed a claim of default against Respondent, claiming that a default occurred in their grievances filed December 4, 2003, asserting they were misclassified. Grievants aver that a level two hearing was not timely held.

A level four hearing on the default claim was held in the Grievance Board's Charleston office on April 21, 2004. Grievants were represented by counsel, Jeffrey G. Blaydes of Donnelly & Carbone, PLLC. Respondent was represented by counsel, B. Allen Campbell, Senior Assistant Attorney General. The matter became mature for decision May 7, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant Holley filed a grievance at level one on December 8, 2004, seeking reclassification to Health and Human Resource Specialist Senior. He waived the time frames for processing this grievance while the agency was reorganizing. He filed a second grievance on the same issue February 20, 2004.

2. Grievant Fuller filed an essentially identical grievance (although seeking a different

classification) on February 20, 2004.

3. A level one informal conference was held for both grievances on February 20, 2004, and Grievants agreed to consolidate their grievances at that time. The level one decision denying the grievances was issued that same day by Grievants' supervisor, Christina Mullins.

4. The level one decision directed Grievants to make their level two appeal to Joe Barker, Director, Office of Epidemiology and Health Promotion. Grievants appealed to level two on February 25, 2004.

5. Grievants informed their supervisor they were going to appeal to level two, then took their appeals to Mr. Barker's office. Mr. Barker had taken leave that day and was not there at the time, so they gave the grievance forms to his secretary, Paula Legg.

6. Grievants informed Ms. Legg that they were filing level two appeals in their grievances with Mr. Barker, and she, as she usually does with important papers Mr. Barker needs to see immediately, placed them on his desk chair.

7. Mr. Barker returned to his office on February 26, 2004, and found the grievance forms on his chair. He looked at them and noted the February 25 filing date on each. 8. Mr. Barker determined that he would need to hold the level two conference by March 4, 2004, five days after he saw the appeals.

9. Early in the day on March 4, 2004, Grievants sent Mr. Barker written notices of default, claiming the level two conference should have been held by March 3, 2004.

10. Mr. Barker was surprised to get the default notice, and immediately called a meeting with Grievants.

11. At the meeting on March 4, the merits of the grievance were not discussed in detail, but Mr. Barker denied he was in default, and most of the discussion was about the default issue.

12. Mr. Barker had no reason for waiting to hold the level two conference, and could have held it on any day between February 26 and March 3.

13. Mr. Barker issued a level two decision denying the grievances on March 5, 2004.

DISCUSSION

"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). Because Grievants are claiming they prevailed by default under the statute, they bear 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).

Grievants argue that Mr. Barker's failure to hold the level two conference within five days of their appeal constituted a default. Respondent asserts Mr. Barker's failure to do sowas excusable neglect, because he simply miscalculated the time line and had a good faith intention to hold the conference on time.

At level two, “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.” *W. Va. Code* § 29-6A-4(b). In this case, grievants timely filed their appeal on February 25, 2004, but Mr. Barker did not actually receive the appeals until the following day. Mr. Barker calculated the five days as ending on March 4, and Grievants calculated the time period as ending on March 3. Grievants are correct that March 3 was the last day by which Mr. Barker should have held the level two conference.

“'Days' means working days exclusive of Saturday, Sunday or official holidays.” *W. Va. Code* § 29-6A-2(c). Not counting Wednesday, February 25, five days after the appeal was filed was March 3, 2004. However, the statute does not say the conference should be held within five days “after the appeal is filed,” instead it says “within five days of the receipt of the appeal.” This specification is no doubt to allow for appeals that had been mailed, but here, the appeal was filed in person.

There is no dispute that Mr. Barker himself did not actually receive the appeal until February 26, even though Grievants filed it the previous day by giving the grievance forms to his secretary. Nevertheless, the time period expired based on the filing date, because Grievants filed the appeal with Mr. Barker's secretary in his absence. Mr. Barker was not the respondent -- his office is -- and that office did receive the appeal on the day it was filed. Had the situations been reversed and Mr. Barker had been out of the office on the last day for Grievants to file their appeal, but they waited until he returned, their appeals would have been untimely because someone was there in his office to receive the appeal. In order to benefit from the "relief by default" provisions in subsection (a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997). Grievants

filed their default notice as soon as they were aware the default had occurred, complying with that requirement. Respondent argues that Mr. Barker made a good faith attempt to hold the conference within what he thought was the time limit, but this argument is belied by the fact that he did not even inform the grievants that he would hold a meeting until after he received the default notice, and held the conference later on what, by his count, was the last day. He evidenced no intention at all to hold the conference at any time. Mr. Barker testified there was no reason he did not hold the conference earlier, or at least to have given Grievants notice that he intended to hold it at a particular time. Had he informed Grievants earlier or consulted with them about when to hold a conference before he received their default claim, no doubt the time line issue could have been addressed.

Further, it is of little consequence to the default statute that Mr. Barker had no authority to grant the grievance at his level, as it was a reclassification issue. The purpose of the grievance procedure is not to simply grant or deny grievances, rather its is “a procedure for the equitable and consistent resolution of employment grievances.” *W. Va. Code* § 29-6A-1. While Mr. Barker could not grant the reclassifications sought, it was within his power to facilitate the resolution of the grievances by assisting Grievants in putting their reclassification requests before the Division of Personnel, and he could have held a conference to request additional time to do so, then lent the weight of his office to the effort. Since he generally agreed Grievants should be reclassed, there was nothing to prevent him from acting in furtherance of the resolution of the grievance. The Grievance Board 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 and some reasonable basis for noncompliance with the time frame 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) and quoting 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (1969))." *Bowe v. W. Va. Workers' Compensation Comm'n .,* Docket No. 04-WCC-054D (April 12, 2004). "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). Respondent has not shown that Mr. Barker's neglecting to hold the level two conference was excusable.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. Because Grievants are claiming they prevailed by default under the statute, they bear 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).

2. "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 thisarticle, 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).

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 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) and quoting 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (1969))." *Bowe v. W. Va. Workers' Compensation Comm'n*., Docket No. 04-WCC-054D (April 12, 2004). "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).

4. Grievants met their burden of proving a default occurred when the level two conference was not held within five days of their appeal, and Respondent's neglect to do so was not excusable.

Accordingly, Grievants' request of a determination of default is **GRANTED** . Respondent is hereby given **NOTICE OF DEFAULT.**

Pursuant to W. Va. Code § 29-6A-3(a)(2), **Respondent may, within five days of the receipt of this notice, request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievants is contrary to law or clearly wrong.** If no

hearing is timely requested, the relief requested will be granted based on the presumption that Grievant prevailed on the merits of the grievance.

Date: May 24, 2004 _____

M. Paul Marteney

Administrative Law Judge