EVERETT HEADLEY,

Grievant,

v. **Docket No. 04-DOH-397D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

Order Granting Default

Everett Headley ("Grievant"), employed by the Division of Highways ("DOH") in District Six, filed a level one grievance on October 26, 2004, in which he alleged discrimination occurred when he did not receive a merit raise. For relief, Grievant requested a merit raise. Grievant's immediate supervisor lacked authority to grant the requested relief at level one, and Grievant filed an appeal to level two on November 3, 2005. District Engineer Lloyd Adams conducted a level two grievance conference on November 8, 2004. By letter dated November 19, 2004, Grievant notified DOH's Human Resources Department and the Grievance Board that he had not received a level two decision, and had not signed a waiver extending the time lines.

A hearing on the default issue was conducted by telephone on January 19, 2005. Grievant represented himself, and DOH was represented by counsel, Barbara Baxter, Esq. The parties waived the opportunity to file proposed findings of fact and conclusions of law, and the claim became mature for decision at the conclusion of the hearing.

The following facts are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been employed by DOH in District Six at all times pertinent to this grievance. 2. Grievant filed a level one grievance on October 26, 2004, after he was bypassed for a merit raise.

3. A level one decision was issued on November 3, 2004, and Grievant advanced his appeal to level two the same day.

4. District Six Engineer Lloyd Adams conducted a level two grievance conference with Grievant

on November 8, 2004.

5. November 11 was a holiday. Mr. Adams was out of the office on DOH business November 12. November 13 and 14 were weekend days. Mr. Adams was again out of his office on November 15, 16, and 17. November 20 and 21 was again a weekend, and the level two decision was issued on November 22.

6. Grievant filed a claim for default on November 19, 2004.

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 contraryto 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. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002). 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 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.

Grievant's default claim is based upon the fact that a level two decision was not issued within five

days of the level two conference, as is required by W. Va. Code § 29-6A- 4(c). W. Va. Code § 29-6A-4(b) provides as follows regarding when Respondent must act at level two:

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 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.

Respondent concedes that the level two decision was not issued within five working days of the level two hearing, but argues the default was due to excusable neglect. Mr. Adams testified that he was aware that a decision had to be issued within five days, but he was also aware that certain days were not included in that period of time. In addition to holidays and weekends, Mr. Adams stated he believed that days he was out of the office on agency work were also not counted as part of the response period. Respondent argued that Mr. Adams' mistaken belief constitutes excusable neglect, a statutory exception to default claims.

"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." Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001). Although there is no indication that the employer acted in bad faith, the undersigned cannot find excusable neglect under the circumstances presented here. The only reason a level two decision

was not issued in a timely manner was that the grievance evaluator held an incorrect belief regarding days which are exempt from the statutory time lines. This is insufficient to excuse DOH from compliance with the statute.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

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 asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002).

3. Absent an agreement by the parties to extend the time lines, the level two grievance evaluator must issue a written decision within five working days of the level two hearing. W. Va. Code § 29-6A-4.

4. Respondent defaulted by failing to issue the level two decision within five days of the level two hearing.

5. 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. 6. "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." Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001).

7. The failure of the level two grievance evaluator to issue the level two decision within five working days based upon an incorrect belief that days out of the office are not counted in the statutory time line does not amount to excusable neglect.

Accordingly, Grievant's request that a default be entered is **GRANTED**. It is **ORDERED** that the

parties confer and provide to the Grievance Board five dates when all parties and witnesses will be available for a hearing on the issue of whether the relief requested is contrary to law or clearly wrong.

DATE: JANUARY 27, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE