JOSEPH JEFFERSON,

Grievant,

v. Docket No. 05-HE-209D

SHEPHERD UNIVERSITY,

Respondent.

ORDER GRANTING DEFAULT

Joseph Jefferson ("Grievant"), employed by Shepherd University ("Shepherd") as a member of the faculty, filed a level one grievance on June 8, 2005, in which he stated, "I received a disciplinary letter in my personnel file for contacting a candidate." For relief, he requested to have the letter removed from his file. Grievant filed a second grievance on June 15, 2005, in which he alleged, "I received a letter in my file for slamming my door." Removal of the letter was again his requested relief.

By e-mail dated Friday, June 24, 2005, Grievant notified several Shepherd administrators that a default had occurred since an informal conference had not been conducted within three days of receipt of the written grievance. Shepherd promptly requested a hearing on the default claim. By agreement of both parties the default hearing was conducted telephonically on July 28, 2005. Grievant represented himself, and Shepherd was represented by Elaine Skorich, Assistant Attorney General. The claim became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by Shepherd on August 16, 2005.

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

Findings of Fact

1. Grievant has been employed by Shepherd University as the Director of Cooperative Education at all times pertinent to this grievance. 2. On June 7, 2005, Dr. John Adams, Assistant Vice President of Student Affairs, issued Grievant a progressive disciplinary letter reprimanding him for two incidents. The first incident involved Grievant's improper contact with a candidate for the position of Director of Career Services. The second incident, conduct in an unprofessional manner, occurred during a discussion of the improper contact, when Grievant became agitated, raised his voice to a level that could be clearly heard in other

offices, and slammed the door so hard it was heard by employees on the ground floor.

3. Grievant filed a grievance on June 8, 2005, regarding his contact with the candidate, and requested the letter be removed from his file. Grievant indicated on the form that "a level one informal conference is requested."

4. Grievant filed a second grievance on June 15, 2005, addressing the issue of slamming the door, again requesting the letter be removed from his file.

5. Grievant requested the grievances be consolidated, and claimed that a default had occurred, by e-mail of June 24, 2005.

6. Shepherd timely requested a hearing on the alleged default.

Discussion

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).

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); 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). However, if the employer can demonstrate that a default has not occurred, or that it was prevented from meeting the time lines for one of the reasons listed in W. Va. Code § 29-6A- 3(a),the grievance will be remanded to the appropriate level for review of the merits.

W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure. Subsection (a) of that section identifies the required procedure at level one:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the

grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Shepherd's in-house counsel, Alan Perdue, concedes that he reviewed the grievance form, but did not notice the request for a level one conference until after Grievant filed the claim of default. Notwithstanding this admission, Shepherd asserts that the errorwas corrected the same day that it was discovered, and absent any bad faith, the delay was simply excusable neglect.

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 an informal conference was not conducted in a timely manner was that counsel overlooked the request on the grievance form. This does not constitute excusable neglect, and is insufficient

cause to excuse Shepherd 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 immediate supervisor must conduct an informal conference to discuss the grievance within three working days of receipt of the written grievance. W. Va. Code § 29-6A-4. 4. Respondent defaulted by failing to conduct the informal conference within three days of receipt of the written grievance. 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 immediate supervisor to conduct an informal conference within three working days based upon an oversight that the conference was requested, 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: SEPTEMBER 8, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE