RICHARD LINGER,

Grievant,

v. **Docket No. 05-DOH-358D**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER GRANTING DEFAULT

Richard "Kevin" Linger, Grievant, filed a claim of default against his employer, the Division of Highways ("DOH"), on September 28, 2005, alleging a default occurred at Level III of the grievance process. There are eight underlying grievances dealing with a myriad of issues. A Level IV default hearing was held on January 9, 2006, at the Grievance Board's office in Charleston, for the purpose of determining whether default occurred. Grievant represented himself, and Respondent was represented by counsel, Barbara Baxter, Esq. This case became mature for decision on that date, as the parties did not wish to submit proposed findings of fact and conclusions of law.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed by DOH. On February 14, 2004, his last day of work for DOH, he turned in 13 grievances. Because of repetition, this number was reduced to eight.

2. There were no time frame problems with the Level I and II responses.

3. Grievant appealed to Level III on April 5, 2005, and Grievant's Level III hearing was held on June 29, 2005. 4. At the Level III hearing, the parties agreed the Level III Decision would be issued on September 15, 2005.

5. On or about July 25, 2005, Grievant was asked if he would agree to an extension of this time frame because the transcript was going to be a week late. Grievant signed a time frame waiver which stated above the signature line, "This waiver is with the understanding that my decision will be mailed no later than September 26, 2005." (See footnote 1) Resp. No. 1, at Level IV.

6. Because of an extremely heavy work load during this period, the Level III Grievance Evaluator's Office tried several times to call Grievant to obtain another extension. Although messages were left, Grievant did not return these calls. (See footnote 2) During the week Grievant's Decision was due, the Grievance Evaluator, Brenda Craig Ellis, had numerous decisions she was required to issue.

7. The Level III Decision was not mailed until September 29, 2005, three days after the agreed upon date.

8. In setting priorities during this busy time and realizing a Level III Decision was going to be late, Ms. Ellis, elected this grievance because Grievant was no longer an employee of DOH, thus, the impact would not be as great as on a current employee.

9. Grievant received this Level III Decision on or about October 1, 2005, but had already filed for default on September 28, 2005.

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the Level II decision within five days of the hearing. (See footnote 3) The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Huston v. W. Va. Dep't of Tax and Revenue/Div. of Personnel, Docket No. 99-T&R 469D (Feb. 29, 2000); Parker v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-296D (Nov. 30, 1999). This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

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., DocketNo. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

If a default occurs, Grievant is presumed to have prevailed. W. Va. Code § 29-6A- 3(a)(2); Carter v. W. Va. Div. of Corr., 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). Of course, if DOH can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A- 3(a), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter, supra; Williamson, supra.

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> 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.

Grievant asserts a default occurred because DOH did not issue the Level III decision within the agreed upon time frames. Grievant concedes he agreed to waive the statutory timelines for the Decision one time, but he did not agree to another extension. DOH admits it did not issue a Level III Decision within the required timelines, but contends this failure should be forgiven because of excusable neglect. DOH maintains that giventhe number of decisions that had to be issued within the time period, it was impossible to issue Grievant's Decision within the time frames. DOH notes Grievant's Decision was only issued three days late.

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 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." Perdue, supra. 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.

This Grievance Board has found excusable neglect, constituting grounds for denying a claim of default, where misfiled documents resulted in the agency's failure to schedule a Level III hearing in a timely manner; (McCauley, Jr. v. Div. of Corr., Docket No. 99- CORR-101D (May 11, 1999) and Thaxton v. Div. of Veterans' Affairs, Docket No. 98-VA-426D (Dec. 30, 1998)); and where an agency employee, who lacked authority to resolve the grievance, failed to schedule a Level II hearing because he had just met with grievants on the same issue fewer than two months earlier, and had no new information to present. White v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-003D (Aug. 20, 1999).

A similar issue regarding excusable neglect was addressed in, Darby v. Department of Health and Human Resources, Docket No. 00-HHR-336D (December 28, 2000). In Darby, the administrative law judge found excusable neglect when the only Grievance Evaluator employed by the Department of Health and Human Resources was unable to hold the hearing within the timelines because of his busy schedule, and the grievants would not agree to an extension. That administrative law judge found the Department of Health and Human Resources acted in good faith in attempting to hold the hearing as soon as possible even though the hearing date would fall after the statutory deadlines.

This Grievance Board adheres to the doctrine of stare decisis (See footnote 4) in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-132 (July 24, 1992)(citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974)). See also Belcher v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is based upon a determination that the employees and employers whose relationships are decided by this Board are best guided in their actions by a system that provides for

predictability, while retaining the discretionnecessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.

After a review of the Darby Decision and the law explaining excusable neglect, the undersigned Administrative Law Judge finds Darby to be clearly wrong and not in keeping with rules governing the grievance process. This situation does not fit within the definition of excusable neglect as DOH's failure to issue the Decision was within its control. Monterre, supra.

This holding is no reflection on Ms. Ellis, as she can only do so much within a time frame, and it is clear she and her staff are working many hours of overtime. Given the work load described by DOH, it is clear Ms. Ellis did not have the legal support she needed to complete her duties effectively, and she did the best she could to issue a large number of decisions within a short amount of time. There is also no evidence Ms. Ellis simply ignored Grievant's case, but rather was aware that it looked like there would be a problem and sought to resolve it before the default occurred. Given no response to the multiple phone calls, and no ability to obtain another extension, the default occurred.

But this is DOH's problem, not Grievant's problem. The burden on Respondent to issue timely decisions, not just the Grievance Evaluator. It should also be noted that Grievant had already agreed to one extension for the Decision in writing and apparently had agreed to an extension in the hearing date as he appealed to Level III on April 5, 2005, and his Level III hearing was not held on June 29, 2005. The Level III Decision was dueSeptember 26, 2005, and was not issued until September 29, 2005. Accordingly, Darby and its progeny are overruled.

The above-discussion will be supplemented by 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).

2. A Level III decision must be issued within five days of the Level III hearing. W. Va. Code § 29-6A-4(a).

3. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Huston v. W. Va. Dep't of Tax and Revenue/Div. of Personnel, Docket No. 99-T&R 469D (Feb. 29, 2000); Parker v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-296D (Nov. 30, 1999).

4. Grievant has proven Respondent failed to issue the Level III Decision in a timely manner.

5. "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)).

6. Excusable neglect is not found with this set of facts. DOH defaulted at Level III.

7. Darby v. Dep't of Health and Human Res., Docket No. 00-HHR-336D (Dec. 28, 2000) and its progeny are overruled.

Accordingly, this default is **GRANTED**. As noted in the Level III Decision, some of the grievances cannot survive Grievant's resignation, and this issue can either be sorted out in a pre-hearing conference or at the start of the default remedy hearing. The parties are directed to send to the Grievance Board five mutually agreed upon dates for the default remedy hearing.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 20, 2006

Footnote: 1

At Level IV, Grievant asserted this waiver was only for the receipt of the transcript. This testimony is contradicted by the statement on the form above Grievant's signature.

Footnote: 2

Grievant testified he had always granted any request for extensions, but did not receive these phone calls.

Footnote: 3

W. Va. Code § 29-6A-3(g) discusses what happens in the event an employee retires or resigns and states, "[i]f a grievance is filed which cannot be resolved within the time limits set forth in section four of this article prior to the end of the employment term, the time limit shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time."

Footnote: 4

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dep't of Admin. v. W. Va. Dep't of Health & Human Resources, 192 W. Va. 202, 451 S.E.2d 768, 771 (1994).