THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

HAROLD CRINER,

Grievant,

v. **Docket No. 06-DOH-274D**

Department of Transportation/
Division of Highways,

Respondent.

ORDER DENYING DEFAULT

Harold Criner, Grievant, filed a claim of default against Respondent on August 10, 2006, alleging default at Level II of the grievance process. The underlying grievance deals with work assignment. A Level IV default hearing was held on October 2, 2006, at the Grievance Board's Charleston office. Grievant represented himself, and Respondent was represented by Barbara Baxter, Esq., General Counsel. This case became mature on November 2, 2006, upon the parties' submissions of findings of fact and conclusions of law.

The following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2, Equipment Operator. He is located at the Braxton County Headquarters.

2. On July 11, 2006, Grievant filed a grievance relating to work assignment.

3. On July 18, 2006, Grievant had a Level I conference, and on July 19, 2006, a response was issued denying the grievance.

4. On July 24, 2006, Grievant appealed to Level II. It was received by RonHooten, District

Administrator for District 7, on July 26, 2006. Mr. Hooten then assigned the appeal to Ron Smith, District 7 Maintenance Engineer. Mr. Smith is located at Weston.

5. A Level II conference was held on August 2, 2006. At that time, Mr. Smith informed Grievant it would take longer than five days to draft the response because Mr. Smith was scheduled to attend a seminar in Atlanta, Georgia, from August 3-9, 2006. Mr. Smith also explained to Grievant that this issued needed researched.

6. Grievant did not sign a time waiver. When Mr. Smith asked Grievant to sign a waiver, Grievant indicated he would prefer not to do that.

7. Mr. Smith attended his seminar in Atlanta, Georgia from August 3-9. Whenhe returned, he spent several days researching the issues raised in this grievance.

8. On August 10, 2006, Grievant filed a claim of default at Level IV.

9. Mr. Smith wrote the Level II response on August 18, 2006, and Grievant received the decision on August 21, 2006.

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).

If a default occurs, the grievant is presumed to have prevailed. *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). If DOH can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the time lines 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 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). ___*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.

It is settled that Respondent provided Grievant with the Level II response to his grievance outside the statutorily prescribed time frame. Grievant asserts he never agreed to waive the time lines of this grievance. Respondent asserts Grievant indicated during the Level II conference that an extension of the time line was agreeable.

The concept of an actual waiver of one's established rights implies a voluntary act. *Smith v. Bell*, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). It has been held by this Grievance Board that time lines may be extended by the actions of the grievant and by the agreements of the parties. *Gerencir v. Kanawha County Bd. of Educ*., Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ*., Docket No. 01-20-038D (Apr. 10, 2001). There was no evidence that Grievant desired to waive the time frame for the Level II response. Grievant did not sign a waiver, and when asked, indicated he preferred not to do that. However, Mr. Smith assumed there was a gentleman's agreement between the two because Mr. Smith informed Grievant the issues raised would require some research and because Mr. Smith was leaving the next day for a seminar. This did not constitute a valid waiver.

It should be clear that a signed waiver is not necessarily required to show a grievant waived the time lines. However, a grievant must take some affirmative step to clearly indicate he/she wishes to waive the time frames. Otherwise, there is only a presumption of waiver, and under the law, a waiver is never implied. To find Grievant has waived the time frames, there must be clear, unmistakable

proof, and that has not been presented in this case.

While there has been no waiver, Respondent has proved that its failure to provide a response within the statutorily prescribed time frame is excusable neglect. 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 foundwhere 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).

In this particular instance, there were two events that were outside of Respondent's control. The first event was the seminar Mr. Smith attended in Atlanta, Georgia. Mr. Smith explained to Grievant his schedule. *W. Va. Code* § 29-6A-3(o) states: “Grievances shall be processed during regular working hours. Attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the employer.” Clearly, the seminar, which was already scheduled, was an event outside Mr. Smith's control, and he had to attend.

The second event that occurred outside Mr. Smith's control was the need for research. When he returned from his conference in Atlanta, he and several others attempted to research the issues raised by Grievant. The Legislature designed the grievance procedure with the specific intent that “Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure.” *W. Va. Code* § 29-6A-7(e). Mr. Smith was doing his job and researching the issues before rendering a decision. If the lower levels are to have meaning, as intended by the Legislature, supervisors must be given the opportunity to take the steps needed to allow them to make an intelligent and informed decision.

Respondent substantially complied with its requirement. This Court has held that “where there is substantial compliance on the part of the employer in regard to a procedure, a mere technical error will not invalidate the entire procedure.” *West Virginia Alcohol Beverage Control Admin. v. Scott,* 205

W. Va. 398, 402, 518 S.E.2d 639, 643(1999) *(per curiam)*. *See also State ex rel. Catron v. Raleigh County Bd. of Educ.*, 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (*per curiam*) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure).

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

Conclusions of Law

1. 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). 2. If a default occurs, the grievant is presumed to have prevailed. *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). If DOH can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the time lines 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 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). 3. The concept of an actual waiver of one's established rights implies a voluntary act. *Smith v. Bell*, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of

an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). It has been held by this Grievance Board that time lines may be extended by the actions of the grievant and by the agreements of the parties. *Gerencir v. Kanawha County Bd. of Educ*., Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ*., Docket No. 01-20-038D (Apr. 10, 2001).

4. Grievant proved Respondent failed to reply within the required time frame.

5. Respondent did not prove Grievant waived the time frames with which it had to respond. 6. 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).

7. This Court has held that "where there is substantial compliance on the part of the employer in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ*., 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc*., 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203,382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by

employer was merely technical and that there was substantial compliance with the procedure).

8. Respondent proved it was prevented from following the statutorily prescribed time frame because of excusable neglect.

9. Respondent substantially complied with the requirements set forth in the statute.

Accordingly, this default is **DENIED**. This case is remanded to Level III where it is instructed to hold a hearing within the statutorily prescribed time frames.

DATE: January 24, 2007

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Wendy A. Campbell

Administrative Law Judge