THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JASON LEE FERRELL,

Grievant,

v. **DOCKET NO. 2013-1030-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/WESTERN REGIONAL JAIL,

Respondent.

ORDER DENYING DEFAULT

Jason Lee Ferrell ("Grievant") filed a written notice of default against his employer, the Regional Jail and Correctional Facility Authority, Western Regional Jail ("Respondent" or "Authority"), on January 30, 2013, in regard to a grievance he filed at Level One on January 11, 2013. The notice states that "[a] Level One conference was not had within ten (10) days as required by statute." A hearing was held on the issue of default at the Grievance Board's Charleston office on March 19, 2013. Grievant was represented by Mark Barney, Esquire, with the law firm of Bucci, Bailey & Javins. Respondent was represented by Assistant Attorney General Mary M. Downey. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on April 19, 2013.

Synopsis

Grievant contends that the Authority is in default because a Level One conference was not scheduled within ten days of the filing of his grievance. Respondent received this grievance on January 14, 2013, and was thus required to

schedule a Level One conference with Grievant not later than January 29, 2013. On January 29, 2013, following a series of unsuccessful attempts to communicate with Grievant's representative via telephone, Laura Fortson, Respondent's Legal Assistant responsible for scheduling grievance matters, had a telephone conversation with Grievant's counsel, Mark Barney. After being informed by Ms. Fortson that the Level One conference could not be scheduled for later that day, Mr. Barney asked that the conference be scheduled for the following day. When Ms. Fortson indicated that the next day was also not available, Mr. Barney requested written confirmation of that statement.

Ms. Fortson relayed Mr. Barney's request to her immediate supervisor, Travis Ellison, Respondent's General Counsel. Mr. Ellison indicated that he would speak to Mr. Barney. Later that day, Mr. Ellison told Ms. Fortson that he and Mr. Barney had agreed to schedule the Level One conference for the following day, and directed Ms. Fortson to issue a written notice to that effect. After Ms. Fortson issued the notice setting the Level One conference for January 30, 2013, Mr. Barney contacted Ms. Fortson requesting the e-mail address for Respondent's Administrator. The following morning, prior to the scheduled time for the Level One conference, Mr. Barney notified Respondent that Grievant was declaring a default for failure to hold the Level One conference within ten days.

Respondent demonstrated that it was justified in relying on Grievant's agreement to hold the conference on January 30, 2013. Accordingly, the request for default must be denied.

The following Findings of Fact are made based upon the record developed at the Level One Default hearing.

Findings of Fact

1. Grievant initiated his grievance on January 11, 2013, when his attorney and designated representative, Mark Barney, mailed a completed grievance form to Respondent and the West Virginia Public Employees Grievance Board, requesting a conference at Level One.

2. Respondent received its copy of the grievance on January 14, 2013. *See* G Ex 1.

3. As of January 16, 2013, counsel representing Respondent in a related grievance were aware that Grievant had filed the grievance at issue here with the Authority. *See* G Ex 2 at ¶ 6 of "Respondent's Motion for Continuance or to Suspend These Proceedings Pending the Outcome of Grievants' Newly-Filed Grievances Regarding Their Termination from Employment" in Docket No. 2013-1005-CONS, submitted by Assistant Attorney General Anthony Eates and Senior Deputy Attorney General Silas B. Taylor on January 16, 2013.

4. Laura Fortson is employed by Respondent as a Legal Assistant assigned to the Office of the General Counsel in the Authority's Central Office, which is located at 1325 Virginia Street, East, in Charleston, West Virginia.

5. One of Ms. Fortson's regular duties is to facilitate the scheduling of Level One conferences under the statutory grievance procedure for public employees.

6. When a grievant requesting a Level One conference has designated a representative, Ms. Fortson's ordinary practice is to initiate telephone contact with that representative on the first day she receives the grievance document requesting a conference. In this case, Ms. Fortson made her first call to Grievant's representative, Mr. Barney, on January 18, 2013, leaving a message with a receptionist for Mr. Barney to call her. *See* R Ex 1.

7. Ms. Fortson's usual practice is to call once each day until she reaches the Grievant's representative and obtains an agreement to a mutually acceptable date for holding the Level One conference.

8. On January 24, 2013, Ms. Fortson called Mr. Barney and left a message on his voicemail for him to call her back. *See* G Ex 4. Ms. Fortson's voicemail message made no reference to the grievance of Jason Ferrell or to the fact that she was calling to schedule a Level One conference.

9. On January 24, 2013, Mr. Barney returned Ms. Fortson's call and spoke with an employee named "Beverly" who informed him that Ms. Fortson was not in the office. Mr. Barney left a message with Beverly to notify Ms. Fortson that he had returned her call. *See* G Ex 4. Ms. Fortson was not told by Beverly that Mr. Barney had called.

10. Ms. Fortson called Mr. Barney's law firm on January 28, 2013, and left a message for Mr. Barney to return her call.

11. On January 29, 2013, Mr. Barney called Ms. Fortson. Ms. Fortson explained that she was trying to schedule the Level One conference for Mr. Ferrell.

Mr. Barney initially asked Ms. Fortson if the Level One conference could be held that day and she told him that was not possible. Mr. Barney then asked if the conference could be held on the following day, January 30. Ms. Fortson told Mr. Barney that the conference could not be scheduled for that day, and Mr. Barney asked that Ms. Fortson provide him an e-mail stating that a conference could not take place on January 30.

12. Ms. Fortson notified her supervisor, Respondent's General Counsel, Travis Ellison, of Mr. Barney's request for written confirmation. Mr. Ellison subsequently informed Ms. Fortson that he had called Mr. Barney, and they had agreed to hold the conference the following day, January 30.

13. Based upon her conversation with Mr. Ellison, Ms. Fortson issued notice of a Level One conference scheduled for January 30, 2013, sending a copy to the Grievance Board and Mr. Barney via e-mail. *See* R Ex 3 & G Ex 6.

14. Shortly after sending the notice via e-mail, Ms. Fortson received an e-mail message from Mr. Barney requesting the e-mail address for Respondent's Administrator. *See* R Ex 3.

15. An e-mail message was sent by Grievant's representative on January 30, 2013, attaching a notice of intent to claim a default in this matter. *See* R Ex 4.

16. The Notice of Intent to Enforce the Default simply notes that a Level One conference was not held within ten days of the date the grievance was filed. There is no mention of the Level One conference that was scheduled for later that same day.

17. In a subsequent e-mail message from Mr. Barney to General Counsel Ellison, sent at 9:02 AM on January 30, 2013, Mr. Barney stated:

> I write to memorialize our telephone conversation a moment ago. As I indicated, Grievant does not believe it is proper to go forward with a Level One conference given that a notice of intent to enforce the default has been filed. Accordingly, we agreed the Level One hearing [conference] set for January 30, 2013, at 9:30 a.m. is cancelled.

R Ex 4.

Discussion

When a grievant asserts that his employer has failed to respond to his grievance in a timely manner, resulting in a default, the grievant must establish such default by a preponderance of the evidence. *Frost v. Bluefield State College*, Docket No. 2010-1564-BSC (Mar. 4, 2011); *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Browning v. Logan County Bd. of Educ*., Docket No. 02-17-003 (Sept. 20, 2002).

"The grievant prevails by default if a required response is not made by the employer within the time limits established in this article . . . ." W. Va. Code § 6C-2-3(b)(1). Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct "result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. Va. Code § 6C-2-3(b)(1). Thus, the primary issues to be resolved are whether a default has occurred, and whether the employer has a statutory excuse for not responding within the time limit required by law. *Sawyers v. Dep't of Health & Human Res*., Docket No. 2011-0103-DHHR (Nov. 19, 2010).

Before addressing whether a default has occurred, or whether Respondent has established a *bona fide* defense to the default, Grievant is contending that Respondent did not file a proper objection to the default as required by the terms of the grievance procedure statute. W. Va. Code § 6C-2-3(b)(2) provides, in pertinent part:

> Within ten days of the default, the grievant may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default. If the chief administrator objects to the default, then the chief administrator may, within five days of the filing of the notice of intent, request a hearing before an administrative law judge for the purpose of stating a defense to the default, as permitted by subdivision (1) of this subsection, or showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law.

The required procedure for responding to a claim of default is further described in Section 7.1 of the Procedural Rule of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 (2008), which provides as follows:

> A grievant seeking to prevail by default must file with the chief administrator a written notice of intent to proceed to the next level or to enforce the default within ten days of the default. If the chief administrator objects to the default, the chief administrator may file a request for a hearing with the Board within five days. On receipt of the chief administrator's objection, the Board will set the matter for hearing. The issues to be decided may include whether a default has occurred, whether the employer has a statutory excuse for not responding within the time required by law, and whether the relief sought is contrary to law or contrary to proper and available remedies. The default proceeding is usually bifurcated into two hearings. Once a grievant files a written claim for relief by default with the Board, or the chief administrator files an objection, all proceedings at the lower levels are automatically stayed until all default matters have been ruled on unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

On January 30, 2013, the same day on which Grievant declared Respondent in default, Wayne Armstrong, Respondent's Director of Personnel, wrote to the Grievance Board as follows:

> The Regional Jail Authority respectfully requests a hearing be conducted in the matter of Ferrell v. WV Regional Jail Authority, Docket Number 2013-0801-MAPS (*sic*.). Attached is correspondence provided by the Grievant's Counsel requesting enforcement of the default provisions of the Grievance Statute.

Mr. Armstrong's letter failed to correctly state the docket number for this grievance. However, on Grievant's cover letter attaching the Notice declaring default, the docket number of the grievance is likewise incorrectly shown as "2013-0801-MAPS." In any event, the actual Notice from Grievant claiming default contains the correct docket number of this matter, "2013-1030-MAPS." Therefore, any ambiguity concerning which matter Respondent intended to contest can be satisfactorily resolved by critically examining these documents. Nonetheless, Grievant asserts that because the Administrator did not particularly set forth his defenses, the Grievant should prevail on his claim of default by default.

There is no requirement in the statute that the employer's objection to a grievant's claim for default provide specific reasons why no default has occurred, or that the objection articulate the specific defenses which the employer intends to assert to excuse a default. Similarly, the Grievance Board's Procedural Rule, 156 C.S.R. 1, does not supplement the statute by creating any such requirement. Even if this might represent the preferred practice, the undersigned Administrative Law Judge has no authority to unilaterally promulgate a new procedural hurdle for public employers to

surmount in order to avoid dismissal of their challenge to a claim of default. *See generally*, *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990); *Duruttya v. Bd. of Educ*., 181 W. Va. 203, 382 S.E.2d 40 (1989). Therefore, Grievant's assertion that this default challenge is not properly before the Grievance Board because Respondent did not specify the grounds for its appeal must be rejected.

Turning to the merits of the default challenge, Respondent had ten days from receipt of the grievance to hold a Level One conference.[1] W. Va. Code § 6C-2-4(a)(2). Under W. Va. Code § 6C-2-2(c), "days" means "working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." The record is clear that Respondent did not schedule a Level One conference on or before January 29, 2013, the last day on which to hold a timely conference. *See* G Ex 7. Respondent has made no effort to blame the delay on injury or illness. Respondent contends Grievant avoided returning phone calls from Respondent's Legal Assistant tasked with scheduling the conference, thereby deliberately trying to delay the grievance process. *See Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1425-PUTCHDEF (Dec. 8, 2011); *Long v. Div. of Veteran's Affairs*, Docket No. 2009-0933-MAPS (Apr. 12, 2010). Respondent further argues that Grievant, through his designated representative, agreed to schedule the

[1] W. Va. Code § 6C-2-4(a) grants employees who have been discharged the option of proceeding directly to Level Three of the grievance procedure, or initiating their grievance at Level One by requesting either a hearing or a conference. *See* W. Va. Code § 6C-2-4(a)(2) & (3). Grievant here elected to request a conference at Level One. In their correspondence and testimony the parties sometimes refer to this conference as a "hearing" even though they are separate and distinct activities. It should also be noted that an employer has ten days to hold a Level One conference and fifteen days to hold a Level One hearing. *Id*.

conference on January 30, thereby waiving the ten-day time limit. Thus, the outcome of this matter depends upon resolving the very narrow question of whether either of these actions represents "a justified delay not caused by negligence or intent to delay the grievance process." W. Va. Code § 6C-2-3(b)(1).

The evidence concerning Ms. Fortson's efforts to reach Grievant's representative, Mr. Barney, and Mr. Barney's effort to respond to Ms. Fortson, is inconclusive as to whether Grievant was deliberately attempting to delay the process by failing to respond. In the recording of the voice mail message which Ms. Fortson left for Mr. Barney, she was very professional in identifying herself, indicating she was calling on behalf of Respondent, and providing a number where she could be reached. However, she never stated that she was calling to schedule a Level One conference in this matter. Because Mr. Barney was representing Grievant in a separate matter involving Respondent, it was not unreasonable to conclude that Ms. Fortson wanted to address that issue, which was not shown to be time sensitive. In addition, there was credible evidence that Mr. Barney returned that particular call, spoke with another employee who sometimes answered the phone in Ms. Fortson's area but, for whatever reason, did not relay any message to Ms. Fortson regarding Mr. Barney's call. In these circumstances, Respondent has not met its burden to establish by a preponderance of the evidence that Grievant deliberately impeded the scheduling effort, thereby excusing Respondent from scheduling the Level One conference within the required time limits.

On January 29, 2013, the last possible day on which to hold a timely Level One conference, Mr. Barney and Ms. Fortson engaged in their first phone conversation since

the grievance was received by Respondent. According to Ms. Fortson, who testified candidly and credibly throughout the hearing in this matter, Mr. Barney initially demanded to have the conference that day. Once Ms. Fortson informed him that the necessary parties were not available, Mr. Barney then insisted that the conference be scheduled for the following day. Ms. Fortson again indicated that this would not be feasible because at least one of the participants, Respondent's General Counsel, Travis Ellison, would not be available.

At that point in their conversation, Mr. Barney requested that Ms. Fortson put this response in writing and e-mail him. Ms. Fortson agreed, and passed along Mr. Barney's request to Mr. Ellison. Ms. Fortson proceeded to explain how Mr. Ellison subsequently indicated to her that he had spoken with Mr. Barney, and they had agreed to schedule the conference for 9:30 a.m. on the next day, January 30, 2013. Consistent with those instructions, Ms. Fortson proceeded to prepare and issue a Notice scheduling the Level One conference for the following day. *See* R Ex 3. Shortly after this Notice was sent to Mr. Barney by e-mail, Mr. Barney contacted Ms. Fortson asking for the e-mail address of Respondent's Administrator, without indicating why he needed to communicate with the Administrator. *See* R Ex 3. Early the following morning, January 30, 2013, Mr. Barney sent notice to the Administrator that Grievant was declaring Respondent in default at Level One, because a conference had not been held within the statutory ten-day time limit.

Neither Mr. Ellison nor Mr. Barney testified at the Level One Default hearing. Whatever conversation took place between them on January 29 was related solely

through the testimony of Ms. Fortson. Because Ms. Fortson was not present to participate in that conversation, her version of what was discussed is based on what Mr. Ellison later said to her, and that is hearsay. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a grievance proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

Essentially, neither counsel for Grievant nor Respondent could testify about their conversation on January 29 in a matter in which they were appearing, or had appeared,

as an advocate for one of the parties, due to legal ethics limitations. Depending on the circumstances, this may make it more difficult for one side or the other to prove or defend against a default claim. In this situation, it appears that both sides are at an equal disadvantage.

Given that both Mr. Ellison and Mr. Barney were ethically precluded from testifying as witnesses in this proceeding, neither party may be faulted for failure to call one or both of them as a witness. Further, this means that no person with first-hand knowledge of any conversation that took place between them was "available" to testify at the hearing. Therefore, it is appropriate to consider Ms. Fortson's hearsay testimony, assessing the credibility of that testimony in accordance with the remaining factors in *Cale*, *supra*.

Consistent with Ms. Fortson's testimony regarding what she was told by Mr. Ellison, she immediately proceeded to prepare and issue a Notice setting Grievant's Level One conference for the next day. Given that the next day, January 30, was outside the time limit for scheduling a Level One conference, there was no cogent reason for scheduling an untimely conference, unless Grievant had either requested that date, or agreed to it. Further, Mr. Barney contacted Ms. Fortson shortly after the Notice was issued, not to challenge any aspect of the Notice, nor to find out why it had been sent, but to request an e-mail address for the Administrator. *See* R Ex 3. Finally, there was nothing in Grievant's Notice declaring a default which repudiated the parties' agreement to set the Level One conference for January 30. That Notice simply noted that the ten-day time limit had expired on the previous day, January 29, and

Respondent was alleged to be in default for that reason. The message clearly acknowledges that a Level One conference had been set for January 30, 2013. *See* R Ex 4.

Establishing a "justified delay" for failing to act within the established time limits in the grievance procedure is an affirmative defense, and Respondent has the burden of proving such defense by a preponderance of the evidence. *See Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008. In the matter at hand, the undersigned Administrative Law Judge finds that Respondent has met that burden. Ms. Fortson's testimony regarding what she was told by Mr. Ellison was just as straightforward and candid as other aspects of her testimony regarding her discussions with Mr. Barney, as well as her participation in other aspects of the scheduling process. The hearsay statement of Mr. Ellison she related is corroborated by the actions she took, as well as by documents generated by both parties.

Although Respondent could have unilaterally scheduled the Level One conference at some point before the expiration of the 10-day time limit, a date which would likely have resulted in continuing the conference to a later, mutually agreeable time, Respondent was not legally compelled to do so. Likewise, Respondent could have used e-mail or regular mail to communicate with Grievant's representative regarding scheduling of the Level One conference, but relying solely on telephone communications is not indicative of bad faith.[2]

[2] However, Respondent's decision to communicate exclusively by telephone, despite the fact that the Grievant's representative had listed his office mailing address and e-mail address on the grievance form, supports the earlier determination that Grievant was not deliberately failing to communicate with Respondent, and thereby impede the grievance process.

Ultimately, Respondent reasonably relied on Grievant's counsel asking, if not demanding, that the conference be scheduled for January 30, 2013, and was therefore "justified" within the meaning of W. Va. Code § 6C-2-3(b)(1) for not holding the conference within ten days. *See Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 57 S.E.2d 725 (1950). *See also Miller v. Fairmont State Univ.*, Docket No. 08-HE-005 (Jan. 8, 2009), which notes that a party to a proceeding may not acquiesce in, or be the source of, an error in a proceeding before a tribunal, and then complain of that error at a later date. By agreeing to schedule the Level One conference for the following day, Grievant also waived the requirement to give at least five days' notice of the conference. It would clearly be inequitable to find a waiver of the ten-day rule for holding a conference without concluding that Grievant's waiver also encompassed the five-day notice rule. Based upon the finding that Respondent established by a preponderance of the evidence that Grievant agreed to schedule the Level One conference for January 30, 2013, any claim that Respondent failed to provide the required five-day notice of that conference must necessarily be subsumed by the parties' agreement to proceed on that date. Accordingly, Grievant's request for default must be denied.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has the burden of proving it by a preponderance of the evidence. *Donellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). The generally accepted

meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his burden. *Leichliter, supra*.

2. "The grievant prevails by default if a required response is not made by the employer within the time limits established in this article, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. Va. Code § 6C-2-3(b)(1). The issues to be resolved are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

3. If Respondent demonstrates that a default has not occurred because it was prevented from meeting the time lines for one of the reasons listed in W. Va. Code § 6C-2-3(b)(1), Grievant is not entitled to relief. If there is no default, or the default is excused, the grievance will be remanded to the appropriate level of the grievance process. *Sawyers v. Dep't of Health & Human Res*., Docket No. 2011-0103-DHHR (Nov. 19, 2010).

4. "Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure." *Dunlap*, *supra*. "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 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).

5. Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See Simpson*, *supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).

6. The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when

they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

7. Respondent established, by a preponderance of the credible evidence of record, that Grievant, through his representative, agreed to schedule a Level One conference in this grievance one day beyond the expiration of the statutory time limit. Thus, Respondent has demonstrated that Grievant affirmatively waived any failure to schedule the Level One conference within the 10-day time limit, thereby creating a justified delay not caused by negligence or intent to delay the grievance process, and excusing any purported default.

Accordingly, the request for default is **DENIED**. This grievance is remanded to Level One for a conference before the chief administrator or designee. Respondent is **ORDERED** to schedule a Level One conference within ten (10) days of receipt of this Order.

_____

LEWIS G. BREWER
Administrative Law Judge

Date: April 26, 2013