PATRICIA A. WHITE, et al.,

Grievants,

v. **Docket No. 99-T&R-003D**

WEST VIRGINIA DEPARTMENT OF
TAX AND REVENUE,

and

DEPARTMENT OF ADMINISTRATION,
DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING DEFAULT

On January 5, 1999, Patricia A. White, Cynthia R. Hoover, and Karen S. Boatwright (Grievants) appealed to Level IV of the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., alleging they were entitled to prevail by default in a grievance filed against their employer, Respondent West Virginia Department of Tax and Revenue (T&R). On January 12, 1999, the West Virginia Department of Administration, Division of Personnel, was joined as an indispensable party. Following a series of continuances, a Level IV hearing was conducted on July 14, 1999, in this Grievance Board's office inCharleston, West Virginia. (See footnote 1) That hearing was limited to the question of whether or not a default had occurred. In accordance with a briefing schedule established at the conclusion of the hearing, this matter became mature for decision on August 11, 1999.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

FINDINGS OF FACT

1. Grievants are employed by Respondent Department of Tax and Revenue (T&R) in its Property Tax Division.

2. Jerry A. Knight is Director of T&R's Property Tax Division, and serves as Grievants' second-level supervisor.

3. On October 22, 1998, Mr. Knight met with Grievants White and Hoover to discuss Grievants' concerns that they and Grievant Boatwright were improperly classified. Grievant Boatwright did not attend this meeting as she was on leave that day.

4. During their meeting on October 22, 1998, Mr. Knight agreed to submit position description forms for Grievants to the West Virginia Division of Personnel (DOP).

5. Following the meeting with Grievants on October 22, 1998, Mr. Knight sent a request to DOP that same day requesting a review of Grievants' positions and a recommendation as to their proper classification. R Ex 2. 6. On October 23, 1998, Grievant White filed a consolidated grievance pursuant to W. Va. Code § 29-6A-2(i), alleging that she and Grievants Boatwright and Hoover were not properly classified.

7. A Level I decision was issued to Grievants on October 29, 1998.

8. Grievants appealed to Level II on October 29, 1998.

9. A Level II decision was issued on November 6, 1998, without a conference being held.

10. Grievants appealed to Level III, and a Level III hearing was set for December 10, 1998.

11. Grievants appeared for the Level III hearing on December 10, 1998, and elected to withdraw their grievance without prejudice, based on a belief that they had to file separate Level I grievances challenging their respective classifications with their immediate supervisors.

12. On December 10, 1998, Grievants filed separate grievances with their immediate supervisors, challenging their current classifications. Each Grievant seeks to be reclassified as an Appraiser with back pay to September 1, 1996.

13. A timely Level I decision was issued to Grievant White by her immediate supervisor, Charles A. Barlow, on December 15, 1998. J Ex 1A.

14. A timely Level I decision was issued to Grievant Boatwright by her immediate supervisor, Jeff Amburgey, on December 11, 1998. J Ex 1B.

15. A timely Level I decision was issued to Grievant Hoover by her immediate supervisor, Betty Evans, on December 17, 1998. J Ex 1C. 16. Grievants Boatwright and White appealed to Level II on December 17, 1998. J Exs 1A & 1B. Grievant Hoover appealed to Level II on December 18, 1998. J Ex 1C.

17. Mr. Knight did not schedule a Level II conference with Grievants within five working days.

18. Grievants submitted a declaration of default pursuant to W. Va. Code § 29- 6A-3(a) on January 4, 1999.

19. Mr. Knight issued Grievants' Level II decision on January 5, 1999, less than ten working days after each Grievant appealed to Level II.

DISCUSSION

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board last year. On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998. (See footnote 2) That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> (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. Inmaking 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.

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A- 5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless T&R is able to demonstrate that the remedy requested is either contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there was no default, Grievant may proceed to the next level of the

grievance procedure. T&R contends no default occurred in this matter, as contemplated under the terms of the statute.

This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Because Grievants are claiming they prevailed by default under the statute, they bear the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidenceis 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).

In this matter, it is undisputed that the employer was in default at Level II by failing to hold a conference with Grievants within five working days. Therefore, Grievants are entitled to a presumption that they prevailed on the merits of their grievances unless T&R demonstrates by a preponderance of the evidence that it was prevented from responding in a timely manner “as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud.” W. Va. Code § 29-6A-3(a)(2); Friend, supra; Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998).

T&R argues that the failure to hold a Level II conference within five days was based upon “excusable neglect” on the part of Mr. Knight. As 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.” Bailey v. Workman's Comp. Comm'r, 170 W. Va. 771, 296 S.E.2d 901 (1982). However, our Supreme Court further observed in Hanlon v. Logan County Board of Education, 201 W. Va. 305, 496 S.E.2d 447 (1997), “we do not profess to require grievance proceedings to adhere to the procedural rules and specific objection requirements applicable to circuit court proceedings.” Ultimately, whether a particular set of factsand

circumstances constitutes excusable neglect must be decided on a fact-specific, case by case basis.

Clearly, Mr. Knight's failure to recognize that a Level II conference was mandatory does not rise to the level of “excusable neglect,” because such misinformation represents nothing more than a simple mistake, and “simple inadvertence or a mistake regarding the contents of the procedural rule will not suffice to excuse noncompliance with time limits.” Friend, supra, citing White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, supra, n.8. However, T&R's contention that Mr. Knight did not see a need to hold another conference with Grievants, when he had just met with them on the same issue less than two months earlier, and he had no new information to present at that time, is more persuasive. Grievants did not describe any new information pertinent to this grievance which they intended to share with Mr. Knight during their Level II conference. Moreover, Mr. Knight did not have authority to grant the relief Grievants were seeking, because authority to classify state employees, based upon the duties they are assigned by their employing agency, rests with the Director of DOP, who is only required to “consult” with the head of the employing agency in making such determinations. See Parsons v. W. Va. Bureau of Employment Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993); Administrative Rule of the W. Va. Div. of Personnel, 143 C.S.R. 1 § 4.1 (1998).

T&R further established that Mr. Knight forwarded Grievants' position descriptions to DOP as promised during their meeting on October 22, 1998. In addition, he issued a Level II decision on January 5, 1999, less than ten working days after Grievants appealedto Level II. Had he held a timely conference with Grievants on the fifth day following their appeal, his written response would not have been due until January 6, 1999. (See footnote 3)

Given all of these circumstances, T&R met its burden of establishing “excusable neglect” by demonstrating that Grievant's second-level supervisor was acting in good faith, and he had a reasonable basis for noncompliance which involved more than a simple misinterpretation of the statutory time limit. See Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997); Toth v. W. Va. Div. of Corrections, Docket No. 98-CORR-344D (Dec. 10, 1998); Friend, supra.

Because T&R's failure to comply with the specified time limits is excused under one of the exceptions in the default provision, Grievants are not entitled to a determination of default in accordance with W. Va. Code § 29-6A-3(a)(2).

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

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. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearingexaminer for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong." W. Va. Code § 29-6A-3(a).

2. When grievants assert that their employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievants must establish such default by a preponderance of the evidence. Once the grievants establish that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. See W. Va. Code § 29- 6A-3(a)(2).

3. Grievants established, by a preponderance of the evidence, that Respondent T&R failed to schedule a timely Level II conference on this grievance. T&R demonstrated that such failure was a direct result of excusable neglect by Grievants' second-level supervisor. Id.

Accordingly, Grievants' request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is **DENIED**. This matter is hereby **REMANDED TO LEVEL III** of the grievance procedure for state employees for further processing. This matter is hereby **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

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LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 20, 1999

Footnote: 1

Grievants were represented by Fred Tucker with the United Mine Workers of America. T&R was represented by Assistant Attorney General Joy M. Cavallo. The Division of Personnel did not participate in this hearing.

Footnote: 2

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins- Martin v. Bureau of Employment

Programs, Docket No. 98-BEP-285 (Sept. 24, 1998). As these grievances were initiated in December 1998, they fall under the new statute.

Footnote: 3

Because Grievant Hoover filed her appeal to Level II on December 18, 1998, a day later than the other Grievants, her Level II conference, if held separately, could have been a day later. Thus, Mr. Knight would not have been required to issue a Level II decision to Grievant Hoover until January 7, 1999.