HAROLD CLIFTON,

Grievant,

v. Docket No. 01-HHR-078D

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

ORDER DENYING DEFAULT

On March 6, 2001, Grievant, Harold Clifton, the Community Service Manager for Clay District, sent a copy of his “Motion for Default”, addressed to Thomas Gunnoe, Regional Director, and Robert Rodak, Level III Hearing Evaluator, to the Grievance Board. This was treated as a filing of a default claim by Grievant at Level IV, against his employer, Respondent, Department of Health and Human Resources/Bureau for Children and Families ("HHR"). A Level IV hearing was scheduled for April 6, 2001, and a telephonic conference was scheduled for March 30, 2001. The telephonic conference was rescheduled and held on April 5, 2001, at which time Grievant stated he did not intend to file his default claim at Level IV, and provided a copy of his Motion to the Grievance Board only because both Mr. Rodak and Mr. Gunnoe's secretary told him to do so. He was allowed to withdraw his filing, and Respondent then requested a hearing at Level IV on the default claim. The hearing scheduled for April 6 was continued to May 8, 2001.

The Level IV hearing was held as scheduled on May 8, 2001, solely for the purpose of taking evidence on the issue of whether a default had occurred. Grievant represented himself, and Respondent was represented by Anthony D. Eates, II, Esquire. The parties declined to submit written argument, and this matter became mature for decision at the conclusion of the Level IV hearing.

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which provides, in pertinent part:

(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. 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.

When the respondent requests a hearing at Level IV, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no default occurred, due to the presumption set forth in W. Va. Code § 29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

Grievant's default claim is based upon the fact that the Level III hearing was not held within seven days of his appeal of his Level II grievance decision to Level III, as is required by W. Va. Code § 29-6A-4(c). Respondent agreed that the Level III hearing was not held within seven days, but argued first, the default provision does not remove from the grievance evaluator the authority to continue the hearing for good cause. Alternatively, HHR argued it was excused from holding the hearing within seven days because the essential witness was ill, relying upon the statutory excuse of sickness, and also that therewas unavoidable cause for delay because of the work demands upon the essential witness.

The following findings of fact are made based upon the procedural record and the evidence presented at the Level IV hearing.

Findings of Fact

1. Grievant filed his appeal of the Level II decision on his grievance on February 23, 2001.

2. A Level III hearing was scheduled by grievance evaluator Robert Rodak for 10:00 a.m., Monday, March 5, 2001, and a Notice of Hearing, dated February 26, 2001, was sent to the parties, and to Joe Smith, Acting Director of the Division of Personnel. The Notice set the hearing at HHR's Clay District Office, where Grievant is employed.

3. On Friday, March 2, 2001, Grievant telephoned Mr. Rodak to tell him it would probably be easier for everyone if the hearing was held in Charleston, rather than at the Clay District Office. Mr. Rodak told Grievant he would contact Thomas Gunnoe's office about this, and would get back with him later. Mr. Gunnoe is the Regional Director for Region Two, and Grievant's supervisor. Grievant told Mr. Rodak he would be in a meeting all afternoon, and he could send him an e-mail, which he could check from home.

4. Mr. Gunnoe was off work on sick leave with bronchitis one-half day on February 26 and 27, and all day on February 28, March 1, and March 2, 2001.

5. Mr. Gunnoe had a previously scheduled all day meeting for March 5, 2001, with HHR's Office of Family Support, and he was to make a presentation. He also had a previously scheduled meeting at 10:00 a.m. on Tuesday, March 6, 2001.

6. Mr. Gunnoe was an essential witness for HHR in the grievance, because the grievance is about Grievant's salary as compared to another employee's salary, and Mr. Gunnoe was the person who made the decisions to hire both employees and at what salary. 7. After speaking with Mr. Gunnoe's secretary and learning of Mr. Gunnoe's commitment for Monday, on March 2, 2001, Mr. Rodak sent Grievant an e-mail stating that he was unable to speak with Mr. Gunnoe as he had been off work due to illness all week; that Mr. Gunnoe's secretary was trying to determine if Mr. Gunnoe needed to attend the hearing; that Mr. Gunnoe's schedule was “pretty full” on Monday, March 5; and that Mr. Gunnoe's secretary felt that Tuesday would be a better day if that was okay with Grievant. The e-mail message then states, “[a]t any rate, we tentatively scheduled a hearing for 1:30 p.m. at Tom's office. If this is ok or if you would prefer another time, please let me know. Nonetheless, it appears that the hearing for Monday morning needs to be continued. Thanks.” Mr. Rodak thought that he would be able to talk to Grievant about this at a later point, but he believed Respondent had demonstrated good cause for a continuance of the hearing.

8. Grievant did not respond to Mr. Rodak's e-mail of March 2, 2001, to indicate whether he was agreeable to continuing the hearing, whether 1:30 on Tuesday was okay; or to suggest a different time.

9. Grievant appeared at Mr. Rodak's office on Monday, March 5, 2001, prior to 8:30 a.m., and before Mr. Rodak arrived at work, and inquired about the hearing. He left a telephone number for Mr. Rodak to call him. Mr. Rodak tried to contact Grievant by telephone at this number, and was told that

he had left, and he would call Mr. Rodak later.

10. Mr. Gunnoe returned to work on March 5, 2001. He had not been able to prepare for the grievance hearing due to his illness. He attended the meeting with the Office of Family Support, but he was not physically able to make his presentation, and was not able to stay at the meeting very long due to his illness. That morning he received a telephone call from the Secretary of HHR, Paul Nusbaum, who told him to meet with State Senate President Earl Ray Tomblin at 2:00 p.m. that day to discuss a matter of interest to the Senate President involving a situation being handled by HHR. Mr. Gunnoe was theonly employee available who was sufficiently knowledgeable to be able to respond immediately to any questions. That meeting was later canceled.

11. The meeting with the Senate President was rescheduled by Ramey Barker, the Senate President's administrative assistant, from March 5, 2001, to 3:30 p.m. on March 6, 2001. Mr. Gunnoe believed he was obligated to attend the meeting as scheduled. Debbie Nauman, who was filling in for Mr. Gunnoe's ill secretary, called Mr. Rodak to tell him that Tuesday afternoon was not a good time, and asked if the hearing could be moved. Mr. Rodak replied that he thought it could be moved, because another problem had arisen anyway. Tim Basford of the Division of Personnel had gone to Clay for the hearing that morning, and although Mr. Rodak had not been aware that the Division of Personnel was planning to be involved in this grievance, he needed to contact Mr. Basford before rescheduling the hearing.

12. On March 5, 2001, Mr. Rodak sent Grievant another e-mail, telling him that March 6, 2001, “may not be a good day for the hearing for Mr. Gunnoe. Also, it appears that Tim Basford is trying to attend (“I'm not sure why) and I need to confirm a date with him if he still wants to attend. Tom is supposed to call me later today to arrange a good date. At any rate, again, we need to continue the hearing to either later this week or sometime next week. I'll contact you with some passible [sic] dates once I talk to Tom so we can set hearing. If you have any questions, please contact me. Thank-you.” Mr. Gunnoe was copied on the e-mail.

13. Mr. Gunnoe provided Mr. Rodak with dates he would be available for hearing that week, and the following week. He was available on March 7, the afternoon of March 9, March 12, and March 15, 2001.

14. On March 6, 2001, Grievant called Mr. Rodak and asked him about how to file a default. 15. The Level III hearing was not held on March 5 or 6, 2001. The hearing was not

rescheduled, as Grievant notified his employer on March 7, 2001, that he was claiming a default had occurred.

Discussion

Absent a statutory excuse, the Level III hearing had to be held within seven working days after February 23, 2001, which was March 6, 2001. However, in this case, the hearing was, in fact, scheduled to be held on March 5, 2001, and again on March 6, 2001, but the Level III grievance evaluator determined that the hearing should be continued on both occasions. HHR argued that the default provision does not remove the authority of a grievance evaluator to continue a hearing for good cause. This Grievance Board has ruled that an order by the Level III grievance evaluator continuing a hearing, and placing a grievance in abeyance is a procedural matter, the validity of which is appealable to Level IV; but such an order is not a default. Stanley v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-155D (June 10, 1999). “The default provision contemplates a situation where the grievance process has been aborted due to the inaction of the employer and/or its grievance evaluator.” Id. Likewise, the decision of a Level III grievance evaluator that a hearing scheduled within the statutory time frame should be continued for cause is a procedural matter, which a Grievant may appeal to Level IV. The undersigned finds Mr. Rodak's decision that HHR demonstrated good cause for a continuance to be supported by the evidence, and it should be upheld. Not only was there good cause for a continuance demonstrated; HHR demonstrated unavoidable cause. Mr. Gunnoe, the key witness was ill; he then had a prior commitment involving a number of people; and he then was told by the Commissioner to meet with the Senate President, a directive which could not be ignored or scheduled at Mr. Gunnoe's convenience.

Even were the continuance of the hearing by Mr. Rodak found to be a default issue, Respondent has proven a valid statutory excuse for the failure to hold the Level III hearingwithin seven days. First, the statute provides that the time periods are not applicable if the grievance evaluator is prevented from taking the required action “directly as a result of sickness.” Grievant argued in this regard only that this was not the reason given to him by Mr. Rodak for continuing the hearing, and that a memorandum from Virginia Tucker, HHR's Assistant Secretary for Operations, dated June 10, 1998, which Grievant insisted was a binding procedural rule, required that the hearing be held the same day the ill employee returned to work.

Mr. Rodak's rationale is of no relevance in determining whether a statutory excuse to default has been proven. Mr. Rodak was not evaluating statutory excuses for not holding a hearing within seven days when he decided to continue the hearing. He was evaluating whether there was good cause for a continuance at that time.

Ms. Tucker's memorandum is not a procedural rule; it is simply a memorandum directed to HHR Administrative Staff. While it certainly contains some directives to staff regarding their obligations to process grievances without delay, it is primarily an informational document, informing staff of the new default provision, as well as other changes in the law. With regard to the statutory excuse of illness, Ms. Tucker states if the Level I conference must be held by July 9, 1998, and the Level I evaluator is absent from work on sick leave that day, “a conference shall be held on July 10, 1998 or immediately upon his/her return to work.” Ms. Tucker's interpretations of the law are merely directives to HHR employees. She has no authority to interpret the default provisions, and her interpretations are not binding upon the undersigned.

Mr. Gunnoe was Respondent's key witness in this grievance, and he is Region Two's Regional Director. He was not available for the hearing due to his illness the first five days after this grievance was submitted to Level III. When he returned to work after this extended absence, he still was not feeling up to par, and needed time to prepare forthe hearing. Mr. Gunnoe's absence due to illness extended the time period for holding a hearing, and no default occurred when the hearing was not held by March 6, 2001.

Second, although HHR argued it had demonstrated unavoidable cause, this Grievance Board has found that circumstances similar to those here constitute 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).

Additionally, "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). Further, Duruttya, supra, noted that in the absence of bad faith, substantialcompliance is deemed acceptable. Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

This Grievance Board has recently found excusable neglect in instances where a Level III hearing was not held within the statutory time frames due to the difficulty in scheduling a hearing at the end of the year, during the Christmas holiday season, when multiple parties were involved. Hager, supra. Excusable neglect was also found where the state agency had only one Level III grievance evaluator, and he could not schedule the hearing within seven days due to his full schedule. Darby v. W. Va. Dep't of Health and Human Resources, Docket No. 00-HHR-336D (Dec. 28, 2000). In both cases the Administrative Law Judge found no indication that the employer had acted in bad faith.

Likewise, in this case HHR did not act in bad faith. First, Mr. Gunnoe was sick; then he had a prior all day commitment; and then he was called upon to drop everything and meet with the Senate President. These events were not orchestrated by HHR with the intent to thwart Grievant's request for a timely Level III hearing. Indeed, had Grievant and Mr. Basford been available and a default claim not been filed, it appears that Grievant's hearing would have been held on March 7, 2001. The delay in the hearing in this instance can be placed within the category of excusable neglect.

Finally, Grievant repeatedly stated that Mr. Rodak's action in continuing the hearing was "arbitrary". An arbitrary action is one which is willful and unreasonable and without consideration of the facts. Black's Law Dictionary, at 55 (3d Ed 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." Id. While Grievant may disagree

with Mr. Rodak's decision to continue the hearing, this decision certainly was not arbitrary. Mr. Rodak was presented with a situation where he could not reach Grievant to ask him whether he would agree to a continuance of the hearing, and he was presented with valid reasons why Mr. Gunnoe could not be at thehearing. He then made a reasoned determination, not an arbitrary one, to continue the hearing to another day later in the week.

In addition, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. When a Level III grievance evaluator continues a hearing for cause, this is a procedural matter, the validity of which is appealable to Level IV. It does not constitute a default. Stanley v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-155D (June 10, 1999). “The default provision contemplates a situation where the grievance process has been aborted due to the inaction of the employer and/or its grievance evaluator.” Id.

2. The Level III grievance evaluator had good cause for continuing the Level III hearing.

Accordingly, Grievant's request that a default be entered is **DENIED** and the Level III grievance evaluator's decision to continue the hearing is upheld. This grievance should be, and the same hereby is, **ORDERED REMANDED TO LEVEL III** of the grievance procedure for state employees for hearing within seven days of receipt of this Order. This grievance is **ORDERED DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 1, 2001