WILLIAM NELSON, et al.,

Grievants,

v. Docket No. 01-BEP-061D

BUREAU OF EMPLOYMENT PROGRAMS/
WORKERS' COMPENSATION DIVISION,

Respondent.

ORDER GRANTING DEFAULT

On February 26, 2001, Grievants, William Nelson, James Washington, Candra Hinkley, Evelyn Reed, Ruth Workman, Kathy Johnston, Cheryl Pringle, Bonita Meadows, Patricia Allen, Anthony Peters, Karen Allen, Joyce Beard, Andy Jensen, Darlene Cain, and Angela Lilly, filed a default claim against their employer, Respondent, Bureau of Employment Programs/Workers' Compensation Division ("BEP"), alleging a default occurred when the Level III decision was not issued within five days of the Level III hearing. A Level IV hearing was held on May 16, 2001, solely for the purpose of taking evidence on the issues of whether a default had occurred, and whether Respondent had a statutory excuse to default. Grievants were represented by Grievant Nelson, and BEP was represented by Patricia Shipman, Esquire. The parties declined to submit written argument, and this default claim became mature for decision at the conclusion of the Level IV hearing.

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

Findings of Fact

1. BEP had a contract with the law firm of Taylor and James, P.L.L.C., to provide grievance evaluator services on an hourly basis. The two lawyers in the law firm who were to provide the services were Jennifer Taylor and Janet James.

2. Up until the time this grievance was heard at Level III, Ms. Taylor had provided all the

grievance evaluator services to BEP. She scheduled a Level III hearing on the grievance filed by Grievants for February 15, 2001. On February 14, 2001, Ms. Taylor determined that she would not be able to conduct the hearing.

3. A Level III hearing was held on the grievance on February15, 2001, by Ms. James.

4. The parties did not agree to extend the time period for rendering a decision, nor did Ms. James ask them to do so. She was not aware of the practice of Level III grievance evaluators to ask the parties to waive the time frames, but she was aware of the statutory time periods for issuing a decision. The Level III decision was required by statute to be issued and transmitted to Grievants by no later than February 23, 2001.

5. Ms. James sent Grievants her proposed Level III decision, placing it in the mail on March 7, 2001. The proposed decision had not been approved by the Commissioner of BEP.

6. The Level III decision was not issued within five days of the Level III hearing.

7. Ms. James did not issue her proposed decision earlier because she was working full time for the West Virginia House of Delegates' Banking and Insurance Committee, and worked extensive hours. In addition, she continued to represent clients in her private law practice during this period, which left her little time for her obligation to issue the grievance decision.

8. Georgia Cisco of BEP was aware of Ms. James' obligations to the House Committee.

Discussion

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.

The burden of proof is upon the grievant who files his default claim at Level IV to prove by a preponderance of the evidence that a default has occurred. (See footnote 1) Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence. Grievants' default claim is based upon the fact that a Level III decision was not issued within five days of the Level III hearing, as is required by W. Va. Code § 29-6A-4(c). W. Va. Code § 29-6A-4 provides as follows regarding when Respondent must act at Level III:

> (c) Level three.
>
> Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.
>
> The chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.
>
> The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

Respondent agreed that the Level III decision was not issued within five working days of the Level III hearing, but argued it was excused from issuing the decision within five days due to unavoidable cause. Respondent argued that had Ms. James not substituted for Ms. Taylor, there would have been considerable delay in scheduling the hearing, and that counsel for BEP had no prior knowledge of Ms. James' obligations prior to the hearing. Respondent pointed out that Ms. James was unaware of the practice of Level III grievance evaluators to ask the parties to waive the time frames, and

suggested that, had Ms. James asked for an extension of the time period for issuing a decision, Grievants would have agreed to the extension. Respondent urged that the circumstances here were unusual, and the default provisions were not intended to apply to such unusual circumstances. Respondent also argued that the factors set forth in Parsons v. Consolidated Gas Supply Co., 163 W. Va. 464, 256 S.E.2d 758 (1979), should be applied here, noting that there was no harm in the delay, because this was a classification grievance where, should Grievants ultimately prevail, they would be entitled to back pay, and that there was no intransigence on the part of BEP. While this Grievance Board applied the Parsons analysis to default claims prior to the decision of the Supreme Court of Appeals of West Virginia in Harmon and Chiles v. Fayette County Board of Education, 205 W. Va. 125, 516 S.E.2d 748 (1999), the Court indicated in that decision that the Parsons analysis is not applicable to claims of default filed under the grievance procedure, and this argument will not be addressed.

Grievants pointed out that the hearing was originally scheduled in December 2000, and was continued to February 15, 2001, and that they were not made aware of Ms. James' other obligations.

Grievants have proven a default occurred. The only remaining issue is whether Respondent has demonstrated a statutory excuse to the default.

Although BEP argued it had demonstrated unavoidable cause, this Grievance Board has found that circumstances similar to those here may 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 successfulassertion 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, substantial compliance 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 BEP did not act in bad faith. The events here were not orchestrated by BEP with the intent to thwart Grievant's entitlement to a timely Level III decision.

Nonetheless, the undersigned cannot find excusable neglect or unavoidable cause under the circumstances presented here. The only reason a Level III decision was not issued in a timely manner was that the Level III grievance evaluator was extremely busy, and in prioritizing her work, she assigned a higher priority to her other work, and a lower priority to the statutory requirement that a decision be issued within five days. While the undersigned certainly sympathizes with the time constraints upon the grievance evaluator, the statute is clear on when a decision must be issued. The evidence presented did not address exactly what the grievance evaluator was doing on a daily basis which prevented her from compliance with the statute. The testimony was that she was working "full time" and "extended hours," and was also trying to work in her private practice, so that she was too busy to issue the decision. This is insufficient to excuse Respondent from compliance with the statute. The reasons offered for the delay in issuing the Level III decision do not amount to excusable

neglect or unavoidable cause. It will be noted that BEP did not address the extent of its contractual control over the grievance evaluator, and this issue is not before the undersigned.

In addition, it is appropriate to make 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. The burden of proof is upon the grievant who files his default claim at Level IV to prove by a preponderance of the evidence that a default has occurred. Harmon v.Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

3. Absent an agreement by the parties to extend the timelines, the Level III grievance evaluator must issue a written decision within five working days of the Level III hearing. W. Va. Code § 29-6A-4.

4. Respondent defaulted by failing to issue the Level III decision within five days of the Level III hearing.

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)). 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).

6. The failure of the Level III grievance evaluator to assign priority to the Level III decision in juggling her busy schedule does not amount to excusable neglect or unavoidable cause.

Accordingly, Grievants' request that a default be entered is **GRANTED**. **IT IS ORDERED** that the Division of Personnel be joined as an indispensable party, and that the parties confer and provide to the Grievance Board five dates when all parties and witnesses will be available for a hearing on the issue of whether the relief requested is contrary to law or clearly wrong.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 25, 2001

Footnote: 1

If the respondent is the party appealing to 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).