CECIL PRITT, et al.,

Grievants,

v v.

Docket No. 02-CORR-064D

WEST VIRGINIA DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

ORDER DENYING DEFAULT

On March 13, 2002, seventy-eight Grievants filed this claim at level four, seeking to prevail by default pursuant to the provisions of W. Va. Code § 29-6A-3(a)(2). Grievants allege a default occurred at level three of the grievance procedure. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on May 22, 2002, for the purpose of determining whether a default occurred. Grievants were represented by counsel, Thomas M. Regan, and Respondent was represented by counsel, Leslie K. Tyree. The parties elected not to file fact/law proposals, so this matter became mature for consideration at the conclusion of the hearing.

The following findings of fact pertinent to resolution of this matter are made based upon a preponderance of the evidence of record.

Findings of Fact

1. On January 21, 2002, twenty-three correctional officers employed at Huttonsville Correctional Center ("HCC") filed a grievance regarding pay increases related to completion of the Officers Apprenticeship Program. The grievance was denied at levels one and two. 2. Upon appeal to level three, a hearing was held before Hearing Evaluator Paula Gardner on February 26, 2002.

3. On February 27, 2002, Ms. Gardner received a telephone call from Tim Murphy, Associate Warden at HCC, who informed her that fifty-five additional officers wanted to join the grievance. Ms. Gardner asked Mr. Murphy to make sure this was all right with Grievant Cecil Pritt, and also advised him to tell the new grievants to provide her with their names, addresses and signatures. Ms. Gardner told Mr. Murphy during this conversation that her decision would be “on hold” until she received the requested information.

4. Mr. Murphy called Ms. Gardner back on the same day, February 27, 2002, and informed her that Grievant Pritt did not mind having the additional employees join the grievance.

5. Mr. Murphy was not a grievant, nor did he represent the grievants at any time during the processing of this case.

6. Ms. Gardner received the list of the signatures and addresses of the additional grievants by fax on February 28, 2002.

7. Ms. Gardner delivered her recommended decision to Division of Corrections (“DOC”) Commissioner Rubinstein's office on February 28, 2002.

8. Cindy Quillen is employed as a paralegal in DOC's central office and is the only person who processes level three grievances.

9. When Ms. Quillen receives a recommended level three decision, it has normally been reviewed by the commissioner. It is placed on her desk, and she is responsible for preparing a cover letter for the commissioner's signature, making allnecessary copies, and mailing the decision to all parties.

10. Ms. Quillen was on unexpected sick leave on Friday, March 1, and Monday, March 4. She returned to the office on Tuesday, March 5, 2002.

11. When Ms. Quillen returned from sick leave on March 5, Ms. Gardner's recommended decision in this grievance was on her desk. It had been reviewed by the commissioner and was ready to be issued.

12. Ms. Quillen does not know what day the recommended decision was placed on her desk for mailing.

13. When she returned to work on March 5, Ms. Quillen prepared a cover letter, had the commissioner sign it, and began making copies for the fifty-five grievants and other parties.

14. Because of the numerous copies which had to be made, and also because she was

required to spend several hours dealing with other matters, Ms. Quillen failed to finish preparing the decision for mailing on March 5.

15. The recommended decision, with a cover letter from the commissioner adopting the decision, was mailed to Grievants on March 6, 2002.

16. Grievant Pritt did not receive the entire decision in the envelope that was mailed to him on March 6. However, Ms. Quillen checked with several other grievants, who did receive the entire decision and all attachments in the March 6 mailing. Apparently, Ms. Quillen made an error when she was filling the envelopes for mailing, neglecting to place all materials in Grievant Pritt's envelope. The entire decision was mailed to him after he called and informed the central office about the error.

17. The final level three decision in this matter was mailed to Grievants on thesixth working day after the level three hearing.

Discussion

The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). 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 the employer can demonstrate it was prevented from meeting the timelines 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, the grievant will not receive the requested relief. Carter, supra; Williamson, supra. If there is no default, the grievant may proceed to the next level of the grievance procedure. "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.

W. Va. Code § 29-6A-3(a) provides, in pertinent part, that a grievant shall prevail 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-4(c) provides, in pertinent part, as follows regarding when Respondent must act at level three:

> The chief administrator or his or her designee shall hold a hearing in accordance with section six . . . of this article within seven days of receiving the appeal. . . .
>
> 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.

In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Williamson, supra. Therefore, excluding the weekend of March 2 and 3, the level three decision in this case was issued on the sixth working day after the hearing. However, Respondent contends that its late issuance of the decision should be excused for two reasons. First, Ms. Gardner testified that she believed that she was required by law to “hold” the decision while waiting for the names and addresses of the additional grievants and for Grievant Pritt's approval of their joinder. Second, DOC argues that Ms. Quillen's illness and inability to get the decision ready for mailing also excuses the late issuance.

Respondent has not stated what portion of the grievance statute required Ms. Gardner to hold the level three decision while additional grievants were being added. However, even if this were viewed as “unavoidable cause” as set forth in the statute, it simply was not the cause of the late issuance of the decision. Even after the additional grievants were added, Ms. Gardner's recommended decision was final on February 28, the second day after the hearing. Although it is unclear from the testimony presented what day the commissioner actually reviewed the decision and placed it on Ms. Quillen's desk for final preparation and mailing, it must be presumed that this could have occurred at any time after February 28. Since Ms. Quillen was on sick leave on March 1 and March 4, itis possible, if not probable, that the decision was sitting on her desk and could have been mailed on either of those days, and it would not have been issued beyond the statutory five-day deadline.

Therefore, the question at issue is whether Ms. Quillen's absence and other job duties are sufficient excuse for Respondent's failure to issue a timely response, pursuant to the provisions of W. Va. Code § 29-6A-3(a). Ms. Quillen provided detailed testimony about how very busy she was on

March 5 after returning from sick leave, specifically regarding her duties related to dealing with a Pruntytown inmate who needed a liver transplant. Apparently, the governor's office was involved in dealing with the matter, and Ms. Quillen was in contact with several different entities in efforts to get the inmate's health care needs met. She testified that she had been told this matter was “of the highest priority” and spent several hours dealing with it on March 5, preventing her from completing the copies and mailing the decision in this case.

This Grievance Board has found that, in certain instances when the respondent was unable to comply with the statutory time limits due to other obligations, this constituted 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-endedconcept. 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, 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 three 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 three 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 bothcases the Administrative Law Judge found no indication that the employer had acted in bad faith.

Likewise, the undersigned finds that Respondent made a good faith effort to issue its level three decision on time. The intervening causes, including Ms. Quillen's illness, the inmate matter which required her attention, and the huge number of grievants in this case, were beyond DOC's control. Additionally, in spite of these obstacles, the level three decision was issued only one day late, which is impressive under the circumstances. Accordingly, DOC has demonstrated that it was prevented from complying with the statutory timelines at level three due to sickness, unavoidable cause, and excusable neglect.

Consistent with 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 hearing examiner 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. The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). 3. Grievant has proven by a preponderance of the evidence that Respondent failed to respond within the statutory time frame at level three.

4. Respondent was prevented from issuing a timely level three response due to sickness, excusable neglect, and unavoidable cause.

Accordingly, Grievants' request for a determination of default is **DENIED.** This matter will now be scheduled for a level four hearing on the merits, and **the parties are advised to confer with each other and provide this office with at least three mutually agreeable dates for the hearing no later than June 17, 2002.**

Date: June 7, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge