PAMELA ROCKWELL,

Grievant,

v. **Docket No. 02-HHR-392D**

DEPARTMENT OF HEALTH & HUMAN RESOURCES,

Respondent.

ORDER DENYING DEFAULT

On July 29, 2002, Grievant, Pamela Rockwell, filed a grievance against her employer, Respondent, the Department of Health and Human Resources ("DHHR"). By letter dated November 26, 2002, Grievant filed a claim at level four alleging a default occurred at level three. Grievant, appearing *pro se*, and DHHR counsel B. Allen Campbell, Assistant Attorney General, ageed to submit the matter for decision based upon an affidavit filed by the level three hearing evaluator, and proposed findings of fact and conclusions of law, filed on or before June 18, 2003.

The following findings of fact are undisputed.

Findings of Fact

1. Grievant initiated these grievance proceedings at level one on July 29, 2002.

2. After the grievance was denied at levels one and two, Grievant advanced her claim to level three.

3. A level three hearing was conducted by DHHR Chief Hearing Examiner Jerry A. Wright on September 10, 2002. At the conclusion of the hearing, the parties were given the opportunity to submit proposed findings of fact and conclusions of law, due on or before September 24, 2002.

4. A level three decision was to be issued on or before October 1, 2002.

5. On or about September 25, 2002, Mr. Wright suffered an epileptic seizurewhich, coupled with other medical problems, required his hospitalization for most of the month of October, 2002.

6. At Mr. Wright's direction, a relative returned a number of files to his office, including Grievant's.

7. Grievant's file was inadvertently placed in the office “closed files.”

8. Mr. Wright did not discover the error in filing until Grievant filed a default claim in November.

9. The level three decision has been placed in abeyance pending the outcome of the default decision.

Discussion

W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure. The time lines for level three require the chief administrator, or his or her designee, to hold a hearing in accordance with section six of this article within seven days of receiving the appeal, and to 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 employees grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998).

Generally, the burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002). However, in this case, Respondent concedes the decision was not issued within the statutory time lines, but asserts that thefailure was due to excusable cause. 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. A preponderance of the evidence is 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). 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:

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.

Respondent asserts that the level three decision was not timely issued due to Mr. Wright's illness, which constitutes excusable neglect. Grievant argues that Respondent did not prove excusable cause in the absence of information from Mr. Wright's health care providers, or his attendance records. Grievant asserts that the information provided by Mr.Wright was sketchy, and that he had numerous opportunities to take some action, at least to extend the time period in which the decision would be issued.

Mr. Wright's affidavit states, in pertinent part:

4) On or about September 25, 2002, I suffered an epileptic seizure. The seizure, coupled with other health problems I had been experiencing for approximately five weeks effectively rendered me disabled for a period of seven weeks.

5) I attempted to work on the decision in the above-styled case and other work-related matters from my home from September 26, 2002, to October 1, 2002, but was unable to make any significant progress. I was hospitalized for most of the month of October 2002.

6) At the onset of my hospitalization or shortly thereafter, a relative, at my request, delivered case files on which I had been working, including the file in the above-styled case and a number of cases which were closed, to my secretary.

7) I cannot discern the reason therefor, but I apparently designated the file in the above-styled case as closed. It was not until I returned to work during early November 2002, that I discovered that it had been placed in our closed file cabinet, and that the grievant had filed a notice of default.

Respondent has proven a statutory excuse to the default. The clear statutory language which tolls the time period for a response when "a grievance evaluator required to respond to a grievance at any level . . . [is] prevented from doing so directly as a result of sickness . . .". See Lewis v. Bureau of Employment Programs, Docket No. 00-BEP-382D (Jan. 19, 2001). While Respondent did not provide specific leave data for Mr. Wright, his affidavit establishes that he was unable to complete any meaningful work beginning September 25, 2002, and continuing throughout the month of

October. As to the delay after Mr. Wright returned to work, the Grievant's file had mistakenly been placed with the closed cases. "In Parsons v. McCoy, 157 W. Va. 183, 101 S.E.2d 632 (1973), theCourt in discussing whether a finding of default should be upheld, stated 'the majority of cases appear to hold that where an insurance company has misfiled papers, this amounts to excusable neglect . . . .' (Citations omitted). The Court found the misfiling was the result of a 'misunderstanding' and 'inadvertence' and no default was found. In Wood County Comm'n v. Hanson, 187 W. Va. 61, 415 S.E.2d 607 (1992), the Court repeated the Parsons language and again found the misplacement of a complaint and the resulting failure to file an answer in a timely fashion was due to excusable neglect and would not result in a default." Brackman v. Div. of Corr., Docket No. 02-CORR-019D (June 26, 2002); Treadway v. Dep't of Health and Human Resources/Pinecrest Hospital, Docket No. 01-HHR-537D (Jan. 11, 2002). The facts in this case are sufficiently close to this type of inadvertent neglect that no default should be found here, either.

The following conclusions of law support the decision reached.

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).

2. A written decision must be issued at level three within five working days of the date the level three grievance hearing. W. Va. Code §§ 29-6A-4(a).

3. Respondent has proven by a preponderance of the evidence that it was prevented from issuing a decision within five working days as a direct result of the hearing evaluator's illness,one of the reasons specified by W. Va. Code § 29-6A-3(a)(2), and due to misfiling the file, a type of excusable neglect. Accordingly, Grievant's request that a default be entered is **DENIED**, and Respondent is Ordered to issue a level three decision within five days from receipt of this Order.

DATE: JULY 22, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE