EMILY RUTHERFORD, et al.,

Grievants,

v. **Docket No. 03-BEP-124D**

WEST VIRGINIA BUREAU OF

EMPLOYMENT PROGRAMS,

Respondent.

ORDER DENYING DEFAULT

On May 8, 2003, Grievants, Emily Rutherford, Dawn Graybeal, Janet Shelton, Robert Bittinger, and Leslie Miller filed a Motion for Default with this Grievance Board, stating their employer, the Bureau of Employment Programs ("BEP"), had defaulted at Level III. The underlying grievance deals with a hiring decision.

A Level IV default hearing was held October 27, 2003, at the Grievance Board's Beckley office. Additionally, after this hearing, an affidavit by Respondent was submitted at the request of the undersigned Administrative Law Judge on November 6, 2003. Further, Grievants requested to present additional evidence, and a telephone conference was held on December 11, 2003. This case became mature for decision after that telephone conference. (See footnote 1)

Issues and Arguments

Grievants assert a default occurred when a Level III hearing was not held within the required time frame. Respondent maintains it did not receive notice Grievants had appealed the Level II ruling until it received the Notice of Default. Grievants believe BEP is untruthful about not receiving the Level III appeal. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants filed this grievance on January 2, 2003.
2. Grievants filed a Motion for Default at Level II, and this Motion was denied by decision dated

March 24, 2003. Rutherford v. W. Va. Bureau of Employment Serv., Docket No. 03-BEP-040D (Mar. 24, 2003).

3. After this default decision, Grievants appealed to Level III by certified letter mailed April 16, 2003.

4. The green card attached to this certified letter was stamped as received by an Information Services and Communications ("IS&C") employee, Susanna Hall, on April 18, 2003.

5. BEP did not receive this certified letter, did not know it had been sent, and it is unknown what happened to it.

6. BEP first became aware Grievants had appealed to Level III when it received the Motion for Default.

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven days of receiving the appeal, and to issue awritten decision affirming, modifying, or reversing the level two decision within five days of the hearing.

The burden of proof is upon a 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). 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.

If a default occurs, Grievants are 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). Of course, if BEP can demonstrate a default has not occurred, or 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, Grievants will not receive the requested relief. 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).

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 mayrequest 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.

(Emphasis added).

Grievant asserts a default occurred because BEP did not schedule a Level III hearing within the required time frame. BEP contends it cannot have defaulted when it was unaware a Level III grievance had been filed, and there was a need to schedule a Level III hearing.

I. Credibility

The first issue to address is the credibility of Respondent's witness as Grievants assert Respondent is lying about not receiving the certified letter. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 2) See Holmes v. Bd. of Directors/W.Va. State

College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

In this case the undersigned Administrative Law Judge finds no evidence to support Grievants' allegation. The Director of Human Resources is Mr. Thomas Rardin, and his statements he did not receive the certified notice were clear, consistent, and plausible. Additionally, there is no reason why this grievance would be processed in other than the ordinary manner if it had been received. Additionally, although not really a form of evidence, BEP's now-deceased former attorney filed a Motion to Dismiss the default claim stating Grievants had not filed to Level III. Accordingly, the undersigned Administrative Law Judge finds Mr. Rardin's testimony that he did not receive the certified letter appealing the grievance to be truthful.

II. Merits

The merits of the case will be addressed next. Although Respondent did not specify which of the reasons listed in W. Va. Code § 29-6A-3(a) it was asserting, Respondent's key assertion is it never received the appeal; therefore, it could not schedule this grievance for hearing, and it could not be in default.

The issue is one of unavoidable cause. Black's Law Dictionary defines unavoidable cause as "[a] cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate. . . ." Black's Law Dictionary 792 (abr. 5th ed. 1983). Another source defines unavoidable cause as "[a] cause which reasonable prudence and care could not have prevented, such as death, illness, the mail, etc." http.//www.debt-glossary.co.uk/loans-advice/u/u-unavoidable-cause.html (accessed on Feb. 6, 2004)(Emphasis added). Failure to receive mail, both U.S. and interdepartmental, has been viewed as both unavoidable cause and excusable neglect by this Grievance Board. Dilly v. W. Va. Div. of Corrections, Docket No. 00-CORR-008D (Aug. 8, 2000); Robinson v. W. Va. Div. of Corrections, Docket No. 00-CORR-013D (Mar. 24, 2000); Sauchuck, v. Parkways Economic Dev. And Tourism Auth., Docket No. 99-PEDTA-297D (Dec. 14,1999). While it is clear IS&C received the appeal, the evidence demonstrates BEP did not.

In Dilly, this Grievance Board found no default occurred, due to excusable neglect and/or unavoidable cause, when a Recommended Decision was not received by the Commissioner's Office for review and signature. That administrative law judge found the respondent's reliance on the mail service was not unreasonable, and held "the apparent loss of this item in the mail is a matter outside

[the Respondent's] control." Dilly at 9. In this case there is no evidence BEP took other than "reasonable prudence and care" in the receipt of its mail, and the failure to receive this certified mail was a "circumstance" BEP "would not ordinarily anticipate," and a matter outside BEP's control. Accordingly, the undersigned Administrative Law Judge finds there is no default due to unavoidable cause.

The facts of this case are similar to the recent case of Higgins v. Division of Corrections, Docket No. 03-CORR-295D (October 31, 2003), appeal docketed Civil Action No. 03-AA-180 (Kanawha County Cir. Ct. Nov. 26, 2003). In that case, like here, Corrections did not receive the certified mail sent by a grievant to appeal to Level III, and the agency did not set the case for hearing. That administrative law judge found a default had occurred, but did not refer to the Grievance Board's prior cases dealing with mail delivery. (See footnote 3)

This Grievance Board adheres to the doctrine of stare decisis (See footnote 4) in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992)(citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974)). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent withthis approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). The cases of Dilly, Sauchuck, and Robinson were not overruled in the Higgins decision and are still valid. The Higgins case is not in keeping with precedent and is hereby **overruled**.

However, it appears there is a problem with the delivery of certified mail within the Capitol Complex. BEP is directed to work with IS&C to ensure that all future mail deliveries are received.

The above-discussion will be supplemented by 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).

2. A Level III hearing must be scheduled within seven working days of the date of receipt of the Level III appeal. W. Va. Code § 29-6A-4(a).

3. Unavoidable cause is defined as "[a] cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate. . . ." Black's Law Dictionary 792 (abr. 5th ed. 1983). 4. Failure to receive mail, both U.S. and interdepartmental, has been viewed as both unavoidable cause and/or excusable neglect by this Grievance Board. Dilly v. W. Va. Div. of Corrections, Docket No. 00-CORR-008D (Aug. 8, 2000); Robinson v. W. Va. Div. of Corrections, Docket No. 00-CORR-013D (Mar. 24, 2000); Sauchuck, v. Parkways Economic Dev. And Tourism Auth., Docket No. 99-PEDTA-297D (Dec. 14,1999). 5. An agency's reliance on the mail service was not unreasonable, and held "the apparent loss of [an] item in the mail is a matter outside [the Respondent's] control." Dilly at 9.

6. This Grievance Board adheres to the doctrine of stare decisis in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992)(citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974)). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

7. The undersigned Administrative Law Judge finds the cases of Dilly, Sauchuck, and Robinson were not overruled in the Higgins decision and are still valid. The Higgins case is not in keeping with precedent and is hereby **overruled**. 8. Unavoidable cause is found in this set of facts, as BEP could not set a hearing for an appeal it did not receive.

Accordingly, Grievant's request that a default be entered is **DENIED**, and this case is **REMANDED** to the agency to hold a Level III hearing within the specified time limits.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: February 27, 2004

Footnote: 1

Grievants were represented by Grievant Shelton, and Respondent was represented by Christie Utt, Esq., Assistant Attorney General.

Footnote: 2

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 3

The case of Allison v. W. Va. Dep't of Highways, Docket No. 98-DOH-425D (Dec. 30, 1998), was discussed, but this case was about the failure of an agency to ask for a default hearing after the notice was received, the failure to deliver the mail to the proper person once it was received, and to have a person assigned to open the mail for an ill employee.

Footnote: 4

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of lawn as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1414 (7th ed. 1999). See W. Va. Dep't of Admin. v. W. Va. Dep't of Health & Human Resources, 192 W. Va. 202, 451 S.E.2d 768, 771 (1994).