ARVELLA FRUIT, et al.,

Grievants,

v. **Docket No. 04-HHR-040D**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT, and DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING DEFAULT

Grievants (See footnote 1) are requesting relief by default, pursuant to W. Va. Code § 29-6A-3(a)(2), alleging that the level three decision in this matter was not rendered within the statutory time limit. (See footnote 2) A hearing on the default issue was held in Westover, West Virginia, on July 26, 2004. Grievants Ruth Plum, Paulette Stewart, and Eleanor Totten appeared on behalf of Grievants, and the Department of Health & Human Resources ("DHHR") was represented by its counsel, B. Allen Campbell. The Division of Personnel did not appear. This matter became mature for decision at the close of the hearing.

Based upon a preponderance of the credible evidence adduced at the hearing, the following findings of fact are made.

Findings of Fact

1. Grievants are employed as Office Assistants for DHHR's Bureau for Child Support Enforcement in various locations throughout West Virginia.

2. A level one grievance was filed on August 29, 2003, requesting that a new classification be created for Grievants' positions.

3. The grievance proceeded to level three on September 1, 2003.

4. A level three hearing was conducted by Eunice Green, Grievance Evaluator, on November

18, 2003. At the conclusion of the hearing, the parties agreed that the statutory timelines would be extended, and that Ms. Green would issue a decision by January 9, 2004.

5. Ms. Green was a temporary employee, and her appointment ended in early January, 2004.

6. When Ms. Green left her position, she had conducted numerous hearings for which she had not yet written decisions, and many of her files were in disarray. Grievants' case was one of those which had not been written when Ms. Green left.

7. David Adkins, Chief Grievance Evaluator, was assigned the task of organizing and reviewing Ms. Green's files in order to determine what needed to be done in each case.

8. In Grievants' case, numerous grievances of individuals in various classifications had been combined, even though the employees worked in different bureaus. Mr. Adkins had difficulty ascertaining who all the grievants were, and he initially could not find the tapes from the level three hearing.

9. Upon finding the level three hearing tapes on or about January 15, 2004, Mr. Adkins discovered that only part of the hearing had been recorded. Upon being informedthat this had occurred, numerous Grievants filed a level four default claim on January 16, 2004.

10. Mr. Adkins communicated with one Grievant by email on approximately January 16, 2004, and inquired whether Grievants would like to have another hearing. This Grievant, Anna Sniffen, (See footnote 3) apparently informed Mr. Adkins that a new hearing was not desired. Mr. Adkins received Grievants' default claim prior to having an opportunity to notify all Grievants formally of the problems with their hearing record.

11. Mr. Adkins issued a level three decision, based upon the evidence available to him, on January 22, 2004. (See footnote 4)

Discussion

"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). The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article.

Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Respondent does not dispute that the level three decision was not issued by the agreed-upon date. Rather, Respondent contends that Ms. Green's exit, and the disarray in which her cases were left, was unavoidable and should excuse DHHR's default. "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." Woody v. Div. of Rehabilitation Services, Docket No. 02-RS-349D (Dec. 6, 2002).

"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." Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sept. 27, 2002). "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." Woody, *supra.*

In quite similar situations, this Grievance Board has found that the unexpected resignation of a hearing evaluator, followed by reassignment of cases to other individuals, constitutes unavoidable cause and will excuse a default by the agency. See Mitchem/Wymer v. Dep't of Health & Human Resources, Docket No. 01-HHR-584D (Jan. 8, 2002); Patteson v. Dep't of Health & Human Resources, Docket No. 98-HHR-326D (Oct. 6, 1998). As in the instant case, the newly-assigned hearing evaluator in Mitchem offered to set a new hearing as soon as he reviewed the file. There has been no showing of bad faith on the part of DHHR under these circumstances. Indeed, Mr. Adkins still issued a decision within a week of assembling the file in this case, demonstrating his good faith efforts to comply with the obligations of the agency. The following conclusions of law support this decision.

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). The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits

required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01-MCVTC-391D (Sept. 14, 2001).

2. Grievants have proven by a preponderance of the evidence that a default occurred at level three.

3. "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." Woody v. Div. of Rehabilitation Services, Docket No. 02-RS-349D (Dec. 6, 2002); Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sept. 27, 2002).

4. "'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))." Rosewell, *supra.* "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); Woody, *supra.*

5. The default at level three was the result of excusable neglect and unavoidable cause.

For the foregoing reasons, this request for a determination of default is **DENIED**. The parties are directed to confer with one another and provide the undersigned with at least three mutually agreeable dates for a level four hearing on the merits on or before **August 23, 2004**.

Date: August 13, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants include Arvella Fruit, Sandra Wallace, Brenda Martin, Anita Sleime, Joy Belcher, Shirley Jones, Christine Holton, Angela Price, Paulette Stewart, Ruth Plum, Eleanor Totten, and Lisa Pinkerman.

Footnote: 2

Numerous grievants filed separately at level four in January and February of 2004. After grievance forms were obtained from some and others withdrew, these grievances were consolidated by order dated April 14, 2004.

Footnote: 3

Apparently, Ms. Sniffen is no longer participating in this grievance.

Footnote: 4

Because numerous grievances have been filed recently as a result of restructuring of positions within DHHR's various bureaus, Mr. Adkins felt well-acquainted with the issues and was comfortable issuing a decision based upon the materials available.