YVETTE BARRETT, *et al.*,

Grievant,

v. **Docket No. 04-HHR-306D**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU
FOR CHILDREN AND FAMILIES
and WEST VIRGINIA DIVISION
OF PERSONNEL,

Respondents.

ORDER GRANTING DEFAULT

This default proceeding arises out of a grievance filed by Yvette Barrett, Margaret Vandall, Leona Huffman, Cathleen Wells, and Lois J. Plumley (collectively "Grievants"). All of the grievants are employed in the classification of Office Assistant II by respondent Department of Health and Human Resources ("DHHR"). They are all assigned to the Bureau for Children and Families ("the Bureau"). Grievants claim that a default occurred at Level III in the underlying grievance because the Level III decision was not issued until six working days after the Level III hearing, rather than within the five-day period required by West Virginia Code section 29-6A-4(c). The merits of the underlying grievance, in which Grievants challenge whether they are properly classified, are not in issue at this stage of the proceeding.

A default hearing was held before the West Virginia Education and State Employees Grievance Board on January 26, 2005. The matter matured for decision on February 15, 2005, by which date both parties had submitted proposed findings of fact and conclusionsof law. During the default hearing, Margaret Vandall represented herself and her fellow grievants. DHHR was represented by Landon R. Brown, Senior Assistant Attorney General.

Issues and Arguments

There is really no factual dispute in this grievance. A Level III hearing was held on July 23, 2004. DHHR acknowledges that the Level III decision was mailed on August 2, 2004, which is six working days after the Level III hearing. There is no dispute that, pursuant to West Virginia Code section 29-6A-4(c), the decision should have been issued within five working days of the hearing.

Grievants claim that this constitutes a default, within the meaning of West Virginia Code section 29-6A-3(a)(2), that entitles them to a presumption that they prevailed on the merits of their grievance. DHHR points out that the Level III decision was not mailed out within the required five-day period because the Level III Grievance Unit's paralegal unexpectedly left work because he was sick. DHHR attempts to invoke the statutory exceptions of either sickness or excusable neglect to excuse the resulting default.

After careful review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1. Grievants are all employees of the Department of Health and Human Resources ("DHHR") who are assigned to the Bureau.

2. On July 23, 2004, a Level III hearing in the underlying grievance was held before Grievance Evaluator Bonnie Sue Fleming ("Evaluator Fleming"). III 3. Evaluator Fleming typed a draft of the ensuing Level III decision and, consistent with her usual practice, she forwarded the same to paralegal E. Allan Pennington ("Mr. Pennington") on July 29, 2004, for proofreading and cite checking.

IV 4. Mr. Pennington, who serves as the paralegal for the Level III Grievance Unit for DHHR, proofread the document and checked the legal citations. He left a copy of the draft decision, with his proposed alterations, on Evaluator Fleming's desk on Thursday, July 29, 2004.

V 5. In the ordinary course of events, Mr. Pennington submits the edited version of the draft decision to Evaluator Fleming. She reviews and approves proposed changes. At this point, Evaluator Fleming does not have any further role except to sign the certificate of

service that is prepared by Mr. Pennington after he obtains the commissioner's signature on the decision.

VI 6. Mr. Pennington worked three and a half hours on the morning of July 29, 2004, but then went home because he was sick.

VII 7. Evaluator Fleming was out of the office all day on Thursday, July 29, 2004, conducting a hearing in Weston.

VIII 8. The Level III decision could not be issued before Mr. Pennington left the office on July 29 because, as noted, Evaluator Fleming was out of town and would not be able to review the proposed edits until the following day.

8.9 9.
On Friday, July 30, 2004, Mr. Pennington was still out on sick leave.

8.10 10.
Evaluator Fleming returned to the office on Friday, July 30, 2004.
(See footnote 1)

8.11 11.
When Mr. Pennington returned to work on Monday, August 2, 2004, he contacted Evaluator Fleming and ascertained that the Level III decision had not been issued.

8.12 12. Mr. Pennington then took all of the steps necessary to complete the process of preparing the Level III decision for distribution to the parties.

8.13 13. The Level III decision was placed in the mail on August 2, 2004.

8.14 14. Ordinarily, if Mr. Pennington is aware that there will be delay in mailing a decision, he asks the grievant to agree to an extension of time.

8.15 15. Mr. Pennington did not ask Grievants to agree to extend the deadline for the Level III decision in this case because he did not anticipate the delay that was caused by his unexpected illness.

8.16 16. Ordinarily, the secretary for the Level III Grievance Unit provides back-up support in case of an unanticipated absence on the part of Mr. Pennington.

8.17 17. The secretary for the Level III Grievance Unit was on extended leave due to surgery throughout the time Mr. Pennington and Evaluator Fleming were working on the Level III decision in this grievance.

Discussion

The resolution of this grievance is controlled by West Virginia Code section 29-6A- 3(a), which provides, in pertinent part, that "[t]he 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 resultof sickness, injury, excusable neglect, unavoidable cause or fraud." Pursuant to West Virginia Code section 29-6A-4(c), the Level lll decision should have been issued within five work days after the Level III hearing. (See footnote 2) **It was not. This constitutes a default.**

Ordinarily, Grievants would be required to prove by a preponderance of the evidence that the default occurred. However, that burden has already been met because DHHR conceded that the Level III decision was not issued until one day after the statutory deadline expired.

DHHR argues that the untimely issuance of the Level III decision was the result of either "sickness" or "excusable neglect" and, as such, should be excused under the provisions of West Virginia Code section 29-6A-3(a). The burden falls to DHHR to prove, by a preponderance of the evidence, that one or more of the statutory exceptions applies in this case. If DHHR meets this burden, Grievants will not be entitled to prevail by default.

Sickness was certainly a contributing factor in the untimely issuance of the Level III decision in this grievance. It was, however, not the grievance evaluator who was sick. Rather, it was Mr. Pennington. The grievance evaluator is required to comply with the statutory deadline for issuing a decision "unless prevented from doing so directly as a result of sickness[.]" W. Va. Code § 29-6A-3(a).

It cannot be said that Mr. Pennington's absence from work due to illness directly prevented Evaluator Fleming from complying with the five-day deadline. On Thursday, Mr. Pennington had left an edited version of the Level III decision on Evaluator Fleming's desk with the expectation that she would review and approve the edits he had made. AlthoughMr. Pennington was absent on Friday, Evaluator Fleming was in the office. She would have been able to take care of the final steps to ensure that the decision was issued timely. Alternatively, she could have contacted Grievants and requested a waiver of the five-day time limit due to Mr. Pennington's absence.

Evaluator Fleming testified that she turns her draft decisions over to Mr. Pennington and relies upon him to pay attention to the deadlines. This practice does not absolve Evaluator

Fleming of her responsibility to issue the Level III decision within five work days of the Level III hearing in cases such as this, where Grievants have not agreed to waive the five-day time limit. Because the duty lies with Evaluator Fleming, who was not on sick leave on the day the decision was due, she was not directly prevented by sickness from meeting the deadline. Therefore, DHHR has failed to prove that the sickness exception excuses the untimely issuance of the Level III decision in this case.

DHHR argues, in the alternative, that the failure to meet the five-day deadline in issuing the Level III decision falls under the "excusable neglect" exception to the default statute. Unfortunately, the statutes relating to the state employee grievance process do not define the term "excusable neglect." Many judicial discussions regarding what constitutes excusable neglect appear in cases relating to granting or setting aside default judgments. Such discussions provide little guidance in the grievance context because they must be read against the backdrop of the well-established preference for resolving cases on their merits, with the concomitant bias against granting defaults. *Coffman v. W. Va. Div. of Motor Vehicles*, 209 W. Va. 736, 740 n.13, 551 S.E.2d 658, 662 n.13 (2001)(citing Syl. pt. 2, *Hamilton Watch Co. v. Atlas Container, Inc.*, 156 W. Va. 52, 190 S.E.2d 779 (1972)). The Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court")formulated a four-factor test for a trial court to consider when ruling on whether to vacate a default judgment in a civil action. (See footnote 3) Subsequently, the West Virginia Supreme Court deemed those four factors ("the *Parsons* factors") to be inapplicable to the default statute relating to education employees. *Harmon v. Fayette County Bd. of Educ*., 205 W. Va. 125, 134, 516 S.E.2d 748, 757(1999)(quoting *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 305 n.7, 465 S.E.2d 399, 407 n.7 (1995)).

The default statute for education employee grievances (See footnote 4) differs from the default provisions for state employees, which are at issue herein, in that "'sickness' and 'illness', by the employer's grievance evaluator are the only statutory grounds for excusing an untimely response by the grievance evaluator." *Harmon*, 205 W. Va. at 135, 516 S.E.2d at 758 (internal citations omitted). By contrast, under the default statute for state employees, "the list of legitimate reasons to excuse an employer default is somewhat expanded . . . to include 'excusable neglect, unavoidable cause or fraud," in addition to sickness. *Harmon*, 205 W. Va.

at 136, 516 S.E.2d at 759 (internal citations omitted). The grounds for excusing a default in the state employee context do not, however, include the *Parsons* factors. *Harmon*, 205 W. Va. at 136, 516 S.E.2d at 759 (internal citations omitted). Furthermore, the *Harmon* Court spoke disparagingly of "venturing into the highly questionable waters of applying general equitable principles disfavoring defaults to employer defaults in grievance proceedings." *Harmon*, 205 W. Va. at 137, 516 S.E.2d at 760 (internal citations omitted). This caution against importing principles that disfavor defaults, combined with the rejection of the *Parsons* factors, makes it clear that the liberality that applies to setting aside default judgments is inapplicable to the default provisions of the grievance process. "[T]he determination of excusable neglect 'is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission[.]'" *Delapp v. Delapp*, 213 W. Va. 757, 584 S.E.2d 899 (2003)(quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). In analyzing whether excusable neglect has been proven in the grievance context, however, all of the relevant circumstances need to be viewed against the requirement that the statutory exceptions to a default must be narrowly drawn.

Viewed from this stringent standpoint, it cannot be said that Evaluator Fleming was unable to meet the five-day deadline as the result of excusable neglect. At the Level III hearing, she told Grievants that her decision would be issued by Friday, meaning July 30, 2004. She was in the office on that date. A draft of the Level III decision had already been proofread, cite checked, and returned to Evaluator Fleming for her approval by then. Although the Level III Grievance Unit is undoubtedly very busy, Evaluator Fleming was quite candid about the fact that, once she submits a draft decision to Mr. Pennington, she does not pay any further attention to the five-day time limit. No explanation other than her work load was offered as to why Evaluator Fleming did not pay attention to the deadlines for her decisions. This abdication of responsibility is not consistent with her obligation to issue a decision within the statutory deadline. Providing Mr. Pennington a draft is not synonymous with issuing a decision. Therefore, Evaluator Fleming has not discharged her duty at that point. It is clear from the testimony that the Level III Grievance Unit has developed an efficient system for processing what is, undoubtedly, a heavy case load in a very efficient manner. It is commendable that the Level III Grievance Unit has anticipated and addressed the need for Mr.

Pennington to have someone to rely upon as a back-up. This role is assigned to the secretary for the Level III Grievance Unit, who happened to be on extended leave when this grievance was being processed. Admittedly, her absence combined with Mr. Pennington's illness to create a glitch in an otherwise good process.

According to Evaluator Fleming, the Level III Grievance Unit is small. Therefore, it is reasonable to assume that the secretary's extended absence was known by Evaluator Fleming on July 30, 2004. It is clear that Mr. Pennington plays an important role in helping Evaluator Fleming issue timely decisions. In light of the extended absence of his back-up person, Evaluator Fleming should have been even more diligent than usual in paying attention to the applicable statutory deadlines for her decisions.

The question is whether this set of facts rises to the level of excusable neglect. It does not. As previously noted, Evaluator Fleming was responsible for meeting the statutory deadline for issuing the Level III decision. She was aware that the secretary who provide back-up for Mr. Pennington was off on extended leave. Evaluator Fleming was in the office on July 30, 2004, when the decision was due. The cite checks and proofreading had been completed and provided to Evaluator Fleming by that date. Nothing prevented her from issuing the decision on the date it was due or, in the alternative, seeking a waiver from Grievants.

Given that the West Virginia Supreme Court seems to demand a strict construction of the default exceptions in the grievance context, the foregoing factors prevent a findingof excusable neglect in this case. Therefore, DHHR has not met its burden to establish that the default in this case can be excused.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

<u>Conclusions of Law</u>

1. Grievants bear the burden of proving their claim of default by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002).

2 2. 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).

3 3. West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that "[t]he 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."

2. The Level III decision was issued on August 2, 2004, when it was placed in the mail. The date of receipt by Grievants is irrelevant for purposes of determining whether the decision was timely issued. 3 3. The statutory deadlines for processing grievances are measured in working days, which do not include "Saturday, Sunday or official holidays." W. Va. Code § 29-6A- 2(c).

4 4. There was a default, within the meaning of West Virginia Code section 29- 6A-3(a), as a result of the Level III grievance evaluator's failure to issue the Level III decision within five work days after the Level III hearing.

5 5. An employer who seeks to rely upon one of the statutory exceptions to a default must prove the applicability of the exception by a preponderance of the evidence. *Rockwell v. Dep't of Health & Human Res.*, Docket No. 02-HHR-392D (July 22, 2003); *Lewis v. West Virginia Bureau of Employment Programs*, Docket No. 00-BEP-382D (Jan. 19, 2001).

6 6. Where the failure to comply with the statutory deadline is a direct result of sickness, there is no default within the meaning of West Virginia Code section 29-6A-3(a)(2). *Rockwell v. Dep't of Health & Human Res.*, Docket No. 02-HHR-392D (July 22, 2003); *Lewis v. West Virginia Bureau of Employment Programs*, Docket No. 00-BEP- 382D (Jan. 19, 2001).

7 7. Because the delay in issuing the Level III decision until one day after the statutory deadline was not directly attributable to sickness on the part of the grievance evaluator, DHHR has failed to prove that the sickness exception excuses the default.

8 8. DHHR failed to establish that the delay in issuing the Level III decision resulted from excusable neglect.

9 9. DHHR failed to establish the applicability of any of the statutory exceptions identified in West Virginia Code section 29-6A-3(a) as grounds for excusing a default. Accordingly, Grievant's request that a default be entered is GRANTED. DHHR is hereby given notice of the default and is ORDERED to presume that Grievants prevailed on

the merits of the grievance. Pursuant to West Virginia Code section 29-6A-3(a)(2), DHHR may, within five days of the receipt of this notice, request a hearing before a Level IV hearing examiner for the purpose of showing that the relief sought by Grievants is contrary to law or clearly wrong. If no hearing is timely requested, the relief requested must be granted based on the presumption that Grievants prevailed.

Dated: March 31, 2005

Jacquelyn I. Custer

Administrative Law Judge

Footnote: 1

At one point, Evaluator Fleming apparently misspoke, stating that she was out of the office on the 30th. However, this remark was inconsistent with her earlier, more specific testimony that she was in Weston on the 29th but returned to the office on the 30th. Mr. Pennington had also noted that Evaluator Fleming was out of the office on the 29th.

Footnote: 2

Time limits under the state grievance procedure are counted in terms of work days rather than calendar days. W. Va. Code § 29-6A-2(c).

Footnote: 3

Syl. pt. 3, Parsons v. Consol. Gas Supply Corp., 163 W. Va. 464, 256 S.E.2d 758 (1979).

Footnote: 4

W. Va. Code § 18-29-3.