THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

WILLIAM BONE,

Grievant,

v. **Docket No. 06-WWV-100D**

WORKFORCE WEST VIRGINIA/
MANAGEMENT ANALYSIS,

Respondent.

ORDER DENYING DEFAULT

William Bone, Grievant, filed a claim of default against his employer, Workforce West Virginia, on March 23, 2006, alleging default at Level III of the grievance process. The underlying grievance deals with Grievant's non-selection for three administrative positions. A Level IV default hearing was held on May 23, 2006, at the Grievance Board's Charleston office. Grievant was represented by Marsha Bone, and Respondent was represented by Jeffrey G. Blaydes, Special Assistant Attorney General. This case became mature on June 30, 2006, upon the parties' submissions of findings of fact and conclusions of law.

The following material facts have been proven:

Findings of Fact

1. Grievant is employed by Workforce West Virginia.

2. Grievant filed a grievance on January 20, 2006. This grievance progressed through Levels I and II.

3. On February 28, 2006, Grievant appealed the Level II decision to Level III.

4. The grievance form was date stamped "Received Employment ProgramsFebruary 28,

2006." However, a cover sheet in the form of an interoffice memorandum to Tom Rardin, Assistant Director of Human Resources/Training, was attached to the actual grievance form. The cover sheet stated:

ATTACHED IS A LEVEL III GRIEVANCE FILED BY William Bone

DATED January 28, 2006

RECEIVED IN COMMISSIONER'S OFFICE January 28, 2006

PLEASE REVIEW THE GRIEVANCE AND DETERMINE THE APPROPRIATE ACTION TO BE TAKEN.

Respondent's Exhibit 3.

5. The Level III appeal was received on February 28, 2006, as indicated by the date stamp. The date on the cover sheet was a clerical error.

6. When Mr. Rardin received the document, his office was operating with half of his staff on medical leave. Mr. Rardin was also seriously ill, was hospitalized for four days, and was off work for three weeks starting about March 17, 2006. Mr. Rardin had been ill in the weeks prior to taking off from work. Mr. Rardin's illness, along with the illnesses of his staff, caused his office to be unable to effectively operate at full capacity.

7. Because the cover sheet inadvertently listed the date as January 28, 2006, Mr. Rardin, Assistant Director of Human Resources/Training, believed the document was related to a grievance filed by Grievant on November 14, 2005, on an unrelated issue. Mr. Rardin placed the document in the already existing file for the November 14, 2005, grievance.

8. A Level III hearing was never scheduled.

Discussion

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). 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.

There is no dispute in this case that a timely Level III hearing was not scheduled within seven days of receipt of the appeal, as required by W. Va. Code §29-6A-4©). However, Respondent argues the failure was due to excusable neglect.

The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon its interpretation under the Federal Rules of Civil Procedure. "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement [of time] and some reasonable basis for noncompliance with the time specified 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)). The Court has further noted, "while fraud, mistake and unavoidable cause are fairly easy to spot, excusable neglect is a more open-ended concept. In general, cases arising under the civil rules arecomparatively 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. See 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. See White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, supra, n. 8.

Clearly, Mr. Rardin received the appeal within the appropriate time. However, do to illness, neither he nor his office was operating at full capacity. The cover sheet was dated incorrectly, and as a result, Mr. Rardin filed the document inappropriately. This action was not malicious or fraudulent.

“In Parsons v. McCoy, 157 W. Va. 183, 101 S.E.2d 632 (1973), the Court 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.” Treadway, supra. The facts in this case are sufficiently close to this type of inadvertent

neglect that no default should be found here.

The following conclusions of law support the decision to deny Grievant's default claim.

Conclusions of Law

1. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

2. 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.

3. The West Virginia Supreme Court of Appeals has adopted a definition of excusable neglect based upon its interpretation under the Federal Rules of Civil Procedure. "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement [of time] and some reasonable basis for noncompliance with the time specified 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)). The Court has further noted, "while fraud, mistake and unavoidable cause are fairly easy to spot, excusable neglect is a more open-ended concept. 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 defaultingparty's control, and contribute to the failure to act within the specific time limits. See 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. See White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, supra, n. 8.

4. “In Parsons v. McCoy, 157 W. Va. 183, 101 S.E.2d 632 (1973), the Court 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

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5. Grievant proved Respondent defaulted by not scheduling a Level III within the statutory time frame. However, Respondent proved the default was as a result of excusable neglect.

Accordingly, this default is hereby **DENIED**. This case is remanded back to Level III where Respondent is instructed to schedule a hearing on the merits of this case within five days of receipt of this order.

DATE: August 16, 2006

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Wendy A. Campbell

Administrative Law Judge