ROBIN DARBY, et al.,

Grievants,

v.

DOCKET NO. 00-HHR-336D

WEST VIRGINIA HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

ORDER DENYING DEFAULT

Grievants, Robin Darby, Brenda Keaton, and Brenda Scheilbelhood, have alleged a default occurred in the processing of their grievance at level three of the grievance procedure, specifically, failure of the level three grievance evaluator to schedule a level three hearing within the time limits prescribed by W. Va. Code § 29-6A-3(a)(1998). A level four hearing on the default issue was held in the Grievance Board's Charleston, West Virginia, office on December 20, 2000, and this issue became mature for decision at the conclusion of that hearing. Grievants Darby and Keaton represented the Grievants, and West Virginia Health and Human Resources ("DHHR") was represented by Anthony D. Eates, III., Esq., Assistant Attorney General.

FINDINGS OF FACT

The material facts underlying the claim for default are not in dispute, and are set forth in the following findings.

1. Grievants filed a grievance against their employer, DHHR, on August 31, 2000. The grievance proceeded through levels one and two, and a level two decision was issued by Carol

Wellman, Administrator of Mildred Mitchell-Bateman Hospital on September 26, 2000.

2. Grievants filed their appeal of the level two decision with the West Virginia Division of Personnel (“DOP”) and the Grievance Board on October 3, 2000.

3. Grievants did not file their appeal with the level three grievance evaluator of DHHR on October 3, 2000.

4. On October 12, 2000, the level three grievance evaluator, Robert Rodak, traveled to Mildred Mitchell-Bateman Hospital in Huntington for two previously scheduled hearings in two different grievances.

5. While in Huntington on October 12, 2000, Mr. Rodak was informed by Kieth Ann Worden, Director of Human Resources, that the instant grievance dealt with similar issues as the two grievances scheduled that day.

6. October 12, 2000, was the first day Mr. Rodak became aware that the instant grievance had been appealed to level three.

7. That same day, Ms. Worden informed Grievants that Mr. Rodak had not received their level three appeal. This was confirmed with Mr. Rodak's secretary, JudyMullins, and Grievants faxed a copy of their level three appeal to Mr. Rodak's office on October 12, 2000.

8. As Mr. Rodak was in Huntington all day on October 12, 2000, it was not until the next day, October 13, 2000, that he first saw Grievants' level three appeal.

9. Seven days from October 13, 2000, was Monday, October 23, 2000.

10. On October 19, 2000, Grievants called Ms. Mullins to inquire about the status of their grievance. Mr. Rodak instructed Ms. Mullins to ask Grievants if they would agree to have their level three hearing on October 27, 2000, even though it was outside the seven-day time limits for scheduling a hearing. Grievants did not agree to the extension of time.

11. On October 19, 2000, Mr. Rodak issued a Notice of Hearing for October 27, 2000, anyway, as that was the first available day he had for hearing the instant appeal.

12. Grievants filed their claim for default with the Grievance Board on October 23, 2000.

13. Subsequently, Grievants requested the October 27, 2000 hearing be held in abeyance pending the outcome of their claim for default.

DISCUSSION

W. Va. Code § 29-6A-3(a) provides as follows:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. 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 awritten 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. (Emphasis added)

In addition, it added the following language to W. Va. Code § 29-6A-5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

Grievants allege they should be awarded the relief requested in their grievance, and have prevailed by default at level three, because DHHR failed to comply with level three time lines. DHHR argues that it's failure to timely respond to Grievants' appeal to level three was the result of excusable neglect.

W. Va. Code § 29-6A-4(c) provides as follows regarding when DHHR must act at Level III:

> Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.
>
> The chief administrator of his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.
>
> The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing. (Emphasis added).

If a default has occurred, Grievants are presumed to have prevailed on the merits of the grievance, and DHHR may request a ruling at level four to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, the grievance may be remanded to level three for a hearing on the merits of the grievance. Because Grievants claim they prevailed by default under the terms of the statute, they bear the burden of establishing such default by a

preponderance of the evidence. Patteson v. Dep't of Health and Human Resources, Docket No. 98-HHR-326 (Oct. 6. 1998).

The facts in this matter are undisputed. Grievants appealed their grievance to level three on October 12, 2000, and their level three hearing was not set within seven working days of that date, nor did Grievants agree to waive the time lines, either orally or in writing. The notice of level three hearing was not sent until October 19, 2000, setting the date of the hearing as October 27, 2000. It becomes DHHR's burden to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at level three in compliance with W. Va. Code § 29-6A-4(b) "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud" as provided by W. Va. Code § 29-6A- 3(a)(2). DHHR claims it's failure was a result of 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 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), quoting 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (1969). The Court has 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 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.

This Grievance Board has found excusable neglect, constituting grounds for denying a claim of default, where misfiled documents caused an agency employee to fail to timely schedule a level three hearing, McCauley, Jr. v. Div. of Corrections, Docket No. 99-CORR- 101D (May 11, 1999); and where an agency employee, who lacked authority to resolve the grievance, failed to schedule a level two hearing because he had just met with grievants on the same issue fewer than two months earlier,

and had no new information to present. White v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-003D (Aug. 20, 1999). Excusable neglect, constituting grounds for denying a claim of default, was not found where an employer had a designated substitute employee in place to respond to a grievant's appeal, and that employee simply failed to do so. Toth v. Div. of Corrections,Docket No. 98-CORR-344D (Dec. 10, 1998). See also Brackman v. Div. of Corrections, Docket No. 99-CORR-374D (Apr. 10, 2000).

I find in the instant case that DHHR's failure to hold a level three hearing within seven days of receipt of the appeal was the result of excusable neglect. There is no evidence that Mr. Rodak simply ignored Grievant's appeal. Rather, the evidence shows that he specifically, and in good faith, asked Grievant's whether they would agree to an extension of the time limit until October 27, 2000, four days past the deadline. Furthermore, it must be noted that Grievants did not properly file their level three appeal, and DHHR did not challenge their late filing. The evidence further demonstrates that Mr. Rodak is the only level three grievance evaluator at DHHR, and that it was not possible for him to schedule a hearing on October 23, 2000, as he already had one scheduled for that day. There was simply no way Mr. Rodak could comply with the time lines, and in this case, where he made an attempt to work with Grievants, and in the interests of fairness, I find his failure was simply a case of excusable neglect.

Accordingly, Grievant's request for a finding of default is **DENIED**, and this case is remanded to level three for a prompt level three hearing.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 28, 2000