JOSEPH HAGER, et al.,

Grievants,

v. DOCKET NO. 01-DEP-006D

DIVISION OF ENVIRONMENTAL

PROTECTION and DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING DEFAULT

Grievants, Joseph Hager, Mary McDonald, William Cook, William Pack, William Simmons, Allen Kuhn, Herbert Campbell, and Gary Sanders filed this grievance against their employer, the Division of Environmental Protection ("DEP") at various times in early December 2000. This grievance was denied at Levels I and II in a timely manner. Grievants appealed to Level III on December 14, 2000, and gave notice of this filing to DOP on December 18, 2000.

Grievants filed a default claim to Level IV on January 16, 2001. Grievants are at Level IV alleging their employer is in default for failure to respond at Level III in a timely manner, and failure to hold a Level III hearing. The underlying grievance deals with the filling of supervisory positions in regional offices.

Upon receipt of the default, the undersigned Administrative Law Judge joined the Division of Personnel ("DOP") as an indispensable party. A hearing on the issue of default was held on January 31, 2001. (See footnote 1) **This action became mature for decision on February 23, 2001, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 2)

Issues and Arguments

Grievants allege a default occurred because DEP failed to schedule a Level III hearing in a timely manner and also failed to issue a Level III Decision in a timely manner.

Respondent argues the grievance was not filed in a timely manner, and since this is a jurisdictional issue, a default cannot be found if the underlying grievance was untimely. Respondent also argues the failure to set the hearing and issue the Decision was due to excusable neglect. (See footnote 3)

Grievants' response to the timeliness argument is that is was raised for the first time a Level IV, and this assertion has come too late in the grievance process. (See footnote 4)

Discussion of Timeliness Issue

After the Level IV hearing, a review of the lower level decisions by the undersigned Administrative Law Judge revealed the timeliness issue had indeed been raised in a timely manner by Respondent at either Level I or Level II. Although clearly in the lower level record, it was apparent from the discussion during the Level IV hearing, that neither sidewas aware of this fact, and although the issue was raised, neither side discussed the issue at length.

From the information presented it would appear the grievance was not timely. (See footnote 5) **However, since a ruling on this issue could result in the entire grievance being dismissed, the undersigned Administrative Law Judge does not believe a decision on this matter should be made without both parties having an opportunity to present all the evidence necessary for an accurate and fair determination of the issue. Accordingly, the undersigned Administrative Law Judge declines to address the matter, and directs the parties to pursue this issue at Level III, if Respondent wishes to continue to advance this argument.**

After a detailed review of the record in its entirety, the undersigned

Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. These grievances, with exactly the same language, were originally filed separately on different dates in early December 2000.

2. Level I and Level II conferences were scheduled and Level I and Level II Decisions were issued in a timely manner.

3. Either the Level I or Level II Decisions were issued by Haskel Boytek as the first or second level supervisor. In each of these decisions he noted the grievances wereuntimely filed. He wrote "[t]he ten day time frame expired in May/June 2000 (six months ago)."

4. All the grievances were filed with DEP Director Mike Castle's secretary at Level III on Thursday, December 14, 2000. Grievants gave notice of the grievances to DOP, an indispensable party, on December 18, 2000.

5. Sandra Kee is the Human Resources Manager for DEP. She receives notice of grievances and assigns someone in her office to processes these grievances. The individual normally assigned to process grievances had quit work in November 2000 and was not replaced. Ms. Kee assigned Karen Brown the additional duty of working with grievances in early November.

6. On Wednesday, December 20, 2000, Director Castle asked Grievants for a waiver of the time frames to set the Level III hearing. This request was inaccurately dated January 1, 2000. The request for a waiver of these timelines is usually requested by DEP and usually granted by grievants. This request noted the difficulty in setting the hearing within so short a time period with the multiple parties involved.

7. Grievants received notice of the request for a waiver on or about Friday, December 22, 2000.

8. DEP had difficulty finding an agreeable date for the Level III hearing because of the number of parties involved, the intervening holidays, and its use of an independent contractor as a grievance evaluator.

9. Both Ms. Kee and Ms. Brown were off work from approximately December 22, 2000 to January 2, 2001. Ms. Kee tended to her terminally ill mother. 10. On Tuesday, December 26, 2000, at 4:36 p. m., the day by which the hearing had to be scheduled, Grievant Hager notified DEP by fax that he and the Grievants he represented would not agree to a waiver of the timelines stating it was "NOT in our best interests to agree. . . ."

11. Also on Tuesday, December 26, 2000, Grievant Simmons notified Ms. Brown he and the Grievants he represented would not agree to a waiver. (See footnote 6) In this e-mail, Mr. Simmons noted Grievants' willingness "to proceed to Level IV hearing if you cannot meet the Level III time frames in the regulations." Grt. Ex. No. 2, at Level II.

12. Ms. Kee and Ms. Brown learned of the refusal to agree to a waiver on Tuesday, January 2, 2001, when they returned to work from leave.

13. On Thursday, January 4, 2001, Grievants alleged default. Grt. Ex. No. 1, at Level IV.

14. In a letter dated January 4, 2001, but not postmarked until January 9, 2001, Director Castle denied the grievances. (See footnote 7) He noted that without a waiver it was impossible for either him or his designee to conduct a hearing or a meaningful review of any evidence,and he had no alternative but to deny the grievance. Director Castle directed Grievants to file at Level IV with the Grievance Board.

15. December 25, 2000, and January 1, 2001, were state holidays.

Discussion

In this grievance, Respondent DEP agrees it did not hold a timely hearing, but asserts it was prevented from doing so due to excusable neglect. (See footnote 8)

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board in1998. More specifically, W. Va. Code § 29-6A-3(a) was amended, adding the following paragraph relevant to this matter:

> **(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 a written 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.**

In addition, House Bill 4314 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."

Because Grievants are claiming a default occurred under the statute, they bear the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). 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, and are entitled to the relief requested, unless DEP and DOP are able to demonstrate the remedy requested is either contrary to law or clearly wrong. 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 DEP and DOP demonstrate a default has not occurred because 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). If there is no default, Grievants may proceed to the next level of the grievance procedure.

In this matter, after this grievance was advanced to hearing at Level III, DEP was required to respond in accordance with W. Va. Code § 29-6A-4(c). W. Va. Code § 29-6A- 4(c) provides the following directions regarding when Respondent must act at Level III:

> **(c) Level three.**
>
> **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 or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] 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.**
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> **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.**

In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). Thus, DEP was obligated to hold a hearing by Tuesday, December 26, 2000, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2). In this case the majority of the facts in this matter are undisputed. Grievants appealed their grievance to level three on December 14, 2000, with DEP, and with DOP, an indispensable party, on December 18, 2000. Their Level III 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. Since DEP claims it's failure to act was the result of excusable neglect, it becomes DEP's burden, by a preponderance of the evidence, to demonstrate excusable neglect occurred.

A very similar issue was addressed in a recent case, Darby v. Department of Health and Human Resources, Docket No. 00-HHR-336D (Dec. 28, 2000), and that case is precedent and controlling here. In Darby, the administrative law judge found excusable neglect when the only Hearing Examiner employed by the Department of Health and Human Resources was unable to hold the hearing within

the timelines because of his busy schedule. The administrative law judge found the Department of Health and Human Resources acted in good faith in attempting to hold the hearing as soon as possible even though the hearing date would fall after the statutory deadlines. The failure in Darby did not occur, as here, during the busy Christmas and New Year holidays when many state employees take annual leave. (See footnote 9) **This Grievance Board adheres to the doctrine of stare decisis** (See footnote 10) **in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-132 (July 24, 1992)(citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974)). See also Belcher v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is founded upon a determination that the employees and employers whose relationships are decided by this Board 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.**

The Darby case noted 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) and quoting 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (1969)). The West Virginia Supreme Court of

Appeals 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 Thaxton v. Div. of Veterans' Affairs, Docket No. 98- VA-426D (Dec. 30, 1998)); 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 agrievant'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).

Additionally, this Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No.

98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya, supra, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable. Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP- 256D (Nov. 17, 2000).

In the instant case, as in Darby, DEP's failure to hold a level three hearing within seven days of receipt of the appeal was the result of excusable neglect. Darby, supra. As in Darby, there is no evidence that Mr. Castle, Ms. Kee, or Ms. Brown simply ignored Grievants' appeal, but rather were aware that scheduling the hearing within the time frames with multiple parties, and the interference of the holidays presented multiple problems. The evidence shows that they specifically, and in good faith, asked Grievantsto agree to an extension of the time line in order to work with the schedules of all the parties. The evidence further demonstrates that Mr. Jack McClung, as in Darby, is the only level three grievance evaluator at DEP, and it was not possible for DEP to meet the schedule of all the parties concerned. Again, this issue is controlled by the prior ruling in Darby, and the undersigned Administrative Law Judge may not go against established precedent. There was simply no way DEP could comply with the time lines, and it is clear DEP made an attempt to work with Grievants. In the interests of fairness, this failure was simply a case of excusable neglect. Darby, supra.

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. Within five days of the receipt of a written 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." W. Va. Code § 29-6A-3(a). See Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000).

2. In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). 3. When a grievant files a claim at Level IV and asserts his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes a default occurred, the employer may show it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. See W. Va. Code § 29-6A-3(a)(2); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999).

4. Given the set of facts presented here and the controlling case of Darby v. Department of Health and Human Resources, Docket No. 00-HHR-336D (Dec. 28, 2000), the undersigned Administrative Law Judge finds Respondent DEP has

demonstrated excusable neglect, and although DEP failed to hold the hearing within the established time frames, this failure is excused.

Accordingly, Grievants' request for relief by default is DENIED, and this grievance is remanded for a timely Level III hearing on the merits of the case, and further presentation of evidence on the issue of timely filing of the grievance, if the parties desire to pursue that issue.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 29, 2001

Footnote: 1

A pre-hearing conference was conducted on January 24, 2001, to clarify who the parties were in this grievance.

Footnote: 2

Grievants were represented by Attorney Otis Mann, and Respondents were represented by Senior Attorney General Don Darling. Mr. Mann's proposals were receiveda few days after the agreed upon submission date, but since there was no objection by Respondents, these were accepted.

Footnote: 3

Further, Respondent argued the grievance was moot because the Division of Personnel ("DOP"), since the filing of the grievance, had carried out the actions Grievants complained had not been done, and only one of the Grievants, William Simmons had applied for the positions in question. Since this argument would necessitate reaching the merits of the case, and Grievants would not agree that this action had indeed occurred, this issue was not addressed in the default hearing.

Footnote: 4

At the time of this discussion at hearing, the undersigned Administrative Law Judge informed the parties that there were statutory time limits within which the issue of timeliness must be raised. Apparently, because Grievants believed their assertion that the issue was not raised earlier was indeed a fact, no evidence was presented to counter DEP's and DOP's argument that the grievances were not timely filed. See Finding of Fact 3 and discussion on page 3, infra.

Footnote: 5

Pursuant to W. Va. Code § 29 6A-3-(a), it would appear that if an employer properly raises a timeliness defense and can prove the grievance was not timely filed, an employee cannot, as a matter of law, prevail by default.

Footnote: 6

Although this e-mail listed the time as 2:17 p.m., it is unclear if this e-mail was also faxed with the information from Grievant Hager at 4:36 p.m. It is also noted that computer clocks may be inaccurate.

Footnote: 7

It is unclear from the testimony whether Director Castle received the default request before he wrote the Level III Decision. It would appear that he did as Grievants note in their request for default judgement that it was filed at the "end of business on January 04, 2001." Grt. Ex. No. 1, at Level IV. However a subsequent exhibit notes this same letter was received in Director Castle's office and in the Administration office on January 4, 2001, and this could not happen if the business day were over.

Footnote: 8

Grievants also argued DEP did not issue a timely Decision. This argument does not need separate discussion as the alleged default occurred when Respondent did not hold the hearing.

Footnote: 9

Many long-term employees must take earned annual leave at the end of the year or lose it, because they are allowed to carry over only so many days.

Footnote: 10

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law 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 1577 (Revised 4th Ed. 1968). 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).