ANNETTE MITCHEM and

HOLLY WYMER

Grievants,

v. **Docket No. 01-HHR-584D**

W. VA. DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU FOR CHILD

SUPPORT ENFORCEMENT, and

DIVISION OF PERSONNEL

Respondents.

ORDER DENYING DEFAULT

Grievants Annette Mitchem and Holly Wymer filed a grievance alleging misclassification on April 20, 2001. Having eventually appealed the matter to Level III, a hearing was originally scheduled for July 2, 2001. Prior to the hearing, Respondents contacted Grievants and requested a continuance pending an agency-wide reclassification project. Grievants agreed, in writing, to postpone the hearing for 90 days. On November 13, 2001, Grievants filed a notice of default with the Level III Grievance Evaluator, stating that the 90 days had expired on November 7, 2001, counting only working days. Respondent W.Va. Department of Health and Human Resources (DHHR) requested a Level IV hearing on the issue of default, and a hearing to determine whether a default occurred was convened in the Grievance Board's Charleston Office on December 12, 2001. Grievants appeared *pro se*, and Respondent DHHR appeared represented by Anthony Eates, II, Esq., Assistant Attorney General. Respondent Division of Personnel (DOP) made no appearance. The parties elected not to submit proposed findings, whereupon the issue became mature for decision at the close of the hearing.

Findings of Fact

1. Grievants filed similar grievances on April 20, 2001, seeking reclassification. After proceeding through Levels I and II, on May 15, 2001,DHHR Grievance Evaluator Robert P. Rodak issued a Notice of Hearing joining the DOP, consolidating the grievances and setting a Level III hearing for May 30, 2001.

2. Grievants requested a continuance, and a new Notice of Hearing was issued by Mr. Rodak

setting the hearing date for July 2, 2001.

3. On or about June 29, 2001, Grievants were contacted by Respondents, who requested a further continuance until an agency-wide reclassification project was completed.

4. That same day, Grievants gave their written consent to the second continuance. This agreement stated: “The Grievants are agreeing to a Continuation not to exceed 90 days from the date of the hearing scheduled for July 2, 2001. Please confirm Continuation in writing via Groupwise.”

5. Mr. Rodak replied the same day with an e-mail to Grievants, stating: “This is to confirm receipt of agreement to continue referenced grievance hearing for no longer than 90 days.”

6. Counting working days only, the 90-day period expired on November 7, 2001.

7. On Friday, October 26, 2001, Mr. Rodak left the employ of DHHR, following a sudden resignation. A second Grievance Evaluator also discontinued her employment the same day. Jerry A. Wright took over as the sole Level III Grievance Evaluator on Monday, October 29, 2001.

8. Mr. Wright quickly prioritized the outstanding grievance files, starting with those that were due to have a decision issued and those that had upcoming hearingsalready set. He also began reviewing all of the open but inactive files to determine the status of each one. At the same time, an unusually high number of new grievances were being filed.

9. On November 13, 2001, Grievants filed at Level III their Notice of Default. Mr. Wright had not yet had an opportunity to review the file, and the Notice was his introduction to the case and to the continuation agreement. He sent a letter to Grievants on November 16, 2001, informing them that Mr. Rodak was no longer there, and advising them that their default claim should be forwarded to this Grievance Board. He also suggested that a Level III hearing be scheduled so the case could be considered on the merits, and advised Grievants that by doing so, they would not waive any rights they may have to a default judgment.

10. Grievant declined to ask for a Level III hearing date, so Respondent requested a Level IV hearing on the issue of default.

Discussion

Respondent, appealing to Level IV for a decision that no default has occurred or that any default was excused for one of the reasons contained in West Virginia Code § 29- 6A-3(a), bears the burden of proving its claims by a preponderance of the evidence. See, Ehle v. Bd. of Directors, Docket No.

97-BOD-483 (May 14, 1998); Mullins v. Kanawha County Bd. of Educ., 01-20-038D (Apr. 10, 2001); Clifton v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families, 01-HR-078D (June 1, 2001). W. Va. Code § 29-6A-3(a) states in part:

> (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 theemployer 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.

West Virginia Code § 29-6A-3(a) provides, in pertinent part, that a grievant shall prevail 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." Respondent's Level III Grievance Evaluator was required by W. Va. Code § 29- 6A-4(c) to “hold a hearing in accordance with [§ 29-6A-6] within seven days of receiving the appeal.” This time limit was temporarily extended by Grievants' agreement to continue the proceedings for no longer than 90 days. By failing to hold the Level III hearing within this extended time limit, Respondent was in default.

A Respondent found to be in default may avail itself of one of the statutory excuses contained in W. Va. Code § 29-6A-3(a), i.e., “sickness, injury, excusable neglect, unavoidable cause or fraud." Respondent here asserts that the sudden resignation of the Grievance Evaluator handling the case and the attendant failure of the new Grievance Evaluator to be aware of the circumstances surrounding the continuance was the unavoidable cause of the default. In a very similar case, the unexpected resignation of aDHHR Grievance Evaluator was found to be the unavoidable cause of a missed deadline. See, Patteson v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 98- HHR-326 (Oct. 6, 1998). Here, the 90 days agreed to by the Grievants expired shortly after the resignation of Mr. Rodak, but before Mr. Wright had an opportunity to review the file. As soon as he became aware of the issue, he offered to set a hearing. The new Grievance Evaluator testified that

the volume of work and the active caseload he assumed prevented his review of the file any sooner. Given the circumstances and their similarity to Patteson, *supra*, Respondent has amply demonstrated that Mr. Rodak's resignation was the unavoidable cause of the default.

Conclusions of Law

1. Respondent, appealing to Level IV for a decision that no default has occurred or that any default was excused for one of the reasons contained in West Virginia Code § 29-6A-3(a), bears the burden of proving its claims by a preponderance of the evidence. See, Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Mullins v. Kanawha County Bd. of Educ., 01-20-038D (Apr. 10, 2001); Clifton v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families, 01-HR-078D (June 1, 2001).

2. "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), Noggy v. Div. of Corrections/ Northern Regional Jail and Correctional Facility, Docket No. 01-CORR- 364D (Aug. 29, 2001). 3. Respondent defaulted at Level III by failing to hold a Level III hearing within the required time, as extended by Grievant's agreement for a continuance.

4. A Respondent found to be in default may avail itself of one of the statutory excuses contained in W. Va. Code § 29-6A-3(a), i.e., "sickness, injury, excusable neglect, unavoidable cause or fraud." The sudden resignation of Respondent's Level III Grievance Evaluator was the unavoidable cause of the default. *See*, Patteson v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998).

Accordingly, Grievants' request for a determination of default under W. Va. Code § 29-6A-3(a) is **DENIED**. This matter is hereby **REMANDED** to level three for processing at that level, and it is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

DATED: January 8, 2002 _____

M. Paul Marteney

Administrative Law Judge