MARVIN WALKER, et al.,

Grievants,

v. DOCKET NO. 03-HHR-162D

DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/

WELCH COMMUNITY HOSPITAL,

Respondent.

ORDER DENYING DEFAULT

Grievants, the housekeeping staff at Welch Community Hospital, (See footnote 1) filed a grievance on May 5, 2003, alleging they were required to perform duties outside their classifications. On June 10, 2003, Grievants filed a notice with Level III Grievance Evaluator Jerry A. Wright that requested their grievance be granted by default. Respondent requested a level four default determination hearing, which was held July 11, 2003 at the Grievance Board's Beckley office. Grievants were represented by Sandra Faye Parker, and Respondent was represented by Darlene Ratliff-Thomas, Assistant Attorney General. The parties declined to file written argument, and the matter became mature for decision at the close of the hearing.

Based on a preponderance of the evidence adduced at the hearing, I find the following facts have been proven:

FINDINGS OF FACT

1. Grievants, 13 members of the housekeeping staff at Welch Community Hospital, filed a joint grievance May 5, 2003, that proceeded to level three of the grievance process.

2. Grievants did not designate a spokesperson or representative prior to level three.

3. A level three hearing was scheduled by Chief Grievance Evaluator Jerry Wright for June 9, 2003, and he sent a Notice of Hearing to the parties.

4. Kathy Addair, Human Resources Director and Welch Community Hospital's representative at level three received the Notice of Hearing on June 2, 2003, and found the hearing was scheduled for a day she would not be at the hospital.

5. Ms. Addair had seen Grievant William Jones in the hospital earlier, so she paged him to come to her office, and asked him if he thought it would be okay to postpone the hearing.

6. Mr. Jones said it was acceptable to him to postpone the hearing, and Ms. Addair asked him to tell the other grievants. Mr. Jones said he would tell the others if he saw them, and try to pass the word.

7. Ms. Addair then sent an email to Mr. Wright, stating, in part, "I spoke with a representative of this group and they have agreed to continue the hearing." Resp. Exhibit. No. 1.

8. Mr. Jones saw about five of the other grievants, and told them of the postponement.

9. On or about June 4, 2003, Mr. Wright was at the facility for a hearing in another grievance, and confirmed with Ms. Addair that the hearing was canceled, andasked her to confer with the grievants and supply him with possible dates for the rescheduled hearing.

10. Sandra Parker was at the grievance hearing that day as well, and while she was there Mr. Jones asked her to represent the grievants in this grievance, but she had not been their representative until then, and no notice was provided to Ms. Addair or to Mr. Wright that she had assumed that responsibility.

11. Mr. Jones did not inform Ms. Parker about the postponement.

12. By the time of the June 9 hearing date, not all of the grievants had heard about the postponement. Grievant Anna Collier, who did know about the postponement, went by the hearing room on that day and saw John Collier, Quintin Jackson and Joyce Holbrook there waiting for the hearing. John Collier knew about the postponement, but showed up anyway.

13. None of the grievants received any official notice that the hearing had been cancelled.

14. None of the grievants who did hear about the continuance voiced an objection to Ms. Addair or to Mr. Wright.

DISCUSSION

The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level

failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Grievants contend that Mr. Wright improperly continued the original hearing without conferring with all the grievants. Respondent argues Mr. Wright had no reason to disbelieve Ms. Addair's assertion she had conferred with the grievants and obtained theirconsent to the continuance, and if anything, his failure to confirm this with all the grievants was excusable neglect.

"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). Respondent admittedly did not hold the level three hearing within the time limit it was required to do so, but failed to do so because it, through Ms. Addair, believed Grievants had consented to a continuance. Two circumstances contributed to this misunderstanding, one of which was the fault of one of the grievants, and one of which was the fault of Respondent's representative. Since the burden of proving a default is on the Grievants, error on the part of a grievant has a significant effect on his ability to claim default. "Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences." Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993). "It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

Mr. Jones, who told Ms. Addair he thought it would be okay to continue the hearing and told her he would tell the other grievants, was but one of the grievants and at no time held himself out to be speaking for all of them. Ms. Addair knew at the time she made her request to continue that Mr. Jones was not their representative, and knew the group did not have a representative. The undersigned will not deny the default claim of all the grievants based on the actions of one grievant who Respondent knew was not their spokesperson. However, a default must be based on a failure of the "grievance evaluator required to respond to a grievance," and Ms. Addair was not the level three grievance evaluator. It was Mr. Wright who was required to hold the hearing in a timely fashion, and he was somewhat insulated from the interactions between Ms. Addair and Grievants. Mr. Wright's sole source of information was Ms. Addair's e-mail, which informed him that she had spoken to a representative of the grievants and that "they have agreed to continue the hearing." Ms. Addair

confirmed the same to him in person later. Mr. Wright testified that it is his normal practice to rely on the veracity of communications such as these, and saw no need to independently confirm the continuance. Respondent argues his failure to do so was excusable neglect.

"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."Woody v. Div. of Rehabilitation Services, Docket No. 02-RS-349D (Dec. 6, 2002); Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sep. 27, 2002). "'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))." Woody, *supra,* Rosewell, *supra.* "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." Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). Respondent demonstrated that its failure to comply with the time lines was based on the good-faith reliance of Mr. Wright on Ms. Addair's email. Ms. Addair's email, in turn, was based on her good-faith but incorrect assumption that Mr. Jones was able to speak for the grievants, and the lack of objection from grievants who heard about the postponement. Mr. Wright's reliance on the e-mail was reasonable, and excuses his failure to meet the time limit for holding the level three hearing.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

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).

3. "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."Woody v. Div. of Rehabilitation Services, Docket No. 02-RS-349D (Dec. 6, 2002); Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sep. 27, 2002).

4. "'Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliancewith 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))." Woody, *supra,* Rosewell, *supra.* "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." Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993).

5. Respondent's failure to hold the level three hearing within the time limit for doing so was the result of excusable neglect.

Accordingly, Grievant's request for relief by default is **DENIED**, and this matter is hereby **REMANDED** to level three for hearing at that level within five days of receipt of this order, or within such time as is mutually acceptable to the parties, and this matter is hereby **DISMISSED** from the docket of the Grievance Board.

Date: July 29, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Marvin Walker, Anna Collier, John Collier, James Curry, Stephen Evans, Thomas Glenn, Adam Hammond, Joyce Holbrook, Quintin Jackson, William Jones, Anita Justice, Barbara Lester and Stanley Pruitt.