TROY MCCAULEY, JR.,

Grievant,

v. **Docket No. 99-CORR-101D**

DIVISION OF CORRECTIONS,

Respondent.

D E F A U L T O R D E R

Grievant, Troy McCauley, Jr., employed by the Division of Corrections (Respondent) as a Correctional Officer at the Huttonsville Correctional Center (HCC), filed a Motion for Default in the above-styled matter on March 3, 1999, in accordance with W. Va. Code §29- 6A-3(a)(2)(1998). A hearing was held on the Motion in the Grievance Board's Elkins office on May 5, 1999, at which time Grievant was represented by John H. Jeffers, and Respondent was represented by Charles Houdyschell, Jr., Assistant Attorney General. The matter became mature for decision at the conclusion of the hearing when both parties waived the opportunity to file post-hearing findings of fact and conclusions of law.

The facts of this matter are undisputed and are set forth as the following formal findings of fact.

Findings of Fact

1. Grievant, along with more than fifty (50) co-workers including his father, Troy McCauley, filed a level one complaint on January 16, 1998, alleging that he was entitled to a five per cent (5%) pay increase for completion of the Officer Apprenticeship Program. This grievance was subsequently processed at levels three and four as Gragg, et al., v.Division of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999).

2. On August 10, 1998, Grievant filed the present complaint at level one. Grievant's immediate supervisor lacked authority to grant the requested relief, and Grievant advanced the matter to level two. (See footnote 1)

3. A level two decision was issued by HCC Deputy Warden Keith Weese on August 17, 1998, stating that he was unable to grant the requested relief.

4. Grievant appealed to level three on August 20, 1998.

5. By memorandum dated February 8, 1999, Grievant notified the Commissioner of Corrections that a level three hearing had not been scheduled, and that he was entitled to the requested relief by default.

6. Grievant did not sign the grievance form advancing the Gragg grievance to level three.

Discussion

W. Va. Code § 29-6A-3(a)(2), provides:

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 fourhearing 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).

W. Va. Code § 29-6A-4(c) provides as follows regarding when Respondent 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).

Respondent acknowledges that Grievant was not given an individual hearing at level three, but asserts that the failure to do so was based upon an understanding that Grievantwas included in the Gragg grievance. Respondent notes that Grievant signed the level one grievance form, and did not provide any subsequent notification that his complaint was to be separated from the other correctional officers.

Hilda Williams, Respondent's Human Resources Director, testified at hearing that it is her responsibility to assign level three grievances for hearing, and that she genuinely believed Grievant to be part of the Gragg complaint. Because the present matter raises the same issue as that in Gragg, and because Grievant had initially filed with the Gragg grievants, Respondent argues that the failure to schedule his level three hearing was excusable neglect, and requests that the grievance be remanded to level three for processing.

Grievant asserts that his complaint was separated at level two, and that an individual decision was issued for him at that level. Further, even though he and his father were pursuing claims, Grievant asserts that his name does not appear on the level three appeal form, and that any error incurred by a failure to carefully review the list of level three appellants, and to clarify whether his complaint was to be processed separately, does not relieve Respondent of its statutory duty to timely provide him a level three hearing.

This explanation of events closely parallels the explanations previously accepted as excusable neglect by the West Virginia Supreme Court of Appeals. 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.

Given the above discussion and the directions from the West Virginia Supreme Court of Appeals, it is clear Respondent's failure to set a Level III hearing was due to excusable neglect, and since that

is one of the reasons identified in W. Va. Code § 29-6A-3(a), a finding of default cannot be made in this case.

Accordingly, the undersigned Administrative Law Judge finds that Respondent's failure to schedule a level three hearing in this matter was due to excusable neglect. Therefore, Grievant's Motion for Default is **DENIED**, and the grievance is dismissed from the docket of the Grievance Board, and remanded to Level III. The parties are further instructed to set a Level III hearing on the merits of this grievance as soon as possible.

DATE: May 11, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Neither party questioned or explained the second filing at level one. Since the issue in this matter was limited to the process at level three, no further discussion is warranted.