CHARLES REYNOLDS, et al.,

Grievants,

v. Docket Nos. 99-CORR-337D/346D/338D/
343D/365D/367D

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

ORDER DENYING DEFAULT

Charles Reynolds, Jennifer Ballard, Larry Hamlin, Susan Pugh, Paul Lyttle, and Mary Harper (Grievants) are employed by the West Virginia Division of Corrections (CORR), as Unit Managers at the Mount Olive Correctional Complex (MOCC). They filed these grievances on August 4, 1999, (See footnote 1) requesting that they be paid overtime when required to work more than 40 hours per week. Grievants claim a default by CORR at Level I.

A Level IV Default hearing was held on November 9, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievants represented themselves, and CORR was represented by Assistant Attorney General Leslie Kiser Tyree. The parties were given until November 19, 1999, to submit proposed findings of fact and conclusions of law, and this default claim became mature for decision on thatdate. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants are employed by CORR as Unit Managers at MOCC.
2. Grievants filed their grievances on August 4, 1999.
3. On August 8, 1999, Inmate David Williams brought a handgun, previously smuggled into MOCC, into the office of the Associate Warden of Security, and fired two shots before being

subdued.

4. On August 8, 1999, as a result of this incident, MOCC Warden Howard Painter issued a memorandum declaring a “State of Emergency - Suspension of Rules” at MOCC. (See footnote 2)

5. This state of emergency disrupted the normal processing of grievances.

6. By memo dated August 19, 1999, Associate Warden of Programs Teresa Waid (Waid) acknowledged MOCC's failure to meet Level I time lines in this grievance, due to the state of emergency.

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature amended W. Va. Code § 29- 6A-3(a), 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 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 falls 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, it added the following language to W.Va. Code § 29-6A-5(a): “the grievance board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure.”

Grievants allege that they should be paid overtime when required to work more than 40 hours per week, and claim they prevailed by default at Level I, because CORR failed to comply with Level I time lines. CORR responds that its failure to timely respond at Level I was the result of excusable neglect.

W. Va. Code § 29-6A-4(a) provides as follows regarding when CORR must act at Level I: “[a]t the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.”

If a default has occurred, the grievants are presumed to have prevailed on the merits of the grievance, and CORR may request a ruling at Level IV to determine whetherthe relief requested is contrary to law or clearly wrong. If a default has not occurred, the grievants may proceed to the next level of the grievance procedure. The Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340, (Feb. 26, 1993). 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/Div. of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998).

The facts in this matter are undisputed. CORR concedes that it failed to respond in a timely manner at Level I. However, it argues that the state of emergency at MOCC, brought about by an inmate having and using a handgun within MOCC, renders this failure excusable neglect. The undersigned agrees.

As noted above, when a default occurs in accordance with W. Va. Code § 29-6A- 3(a)(2), the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. Id.

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 within the timeframe specified 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 specified 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 III 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 II 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, et al. 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, although an inmate had escaped nine work days earlier. Toth v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-344D (Dec. 10, 1998).

The circumstances supporting a finding of excusable neglect in this default claim are far more compelling than those of McCauley, Jr. and White, supra. A maximum-security inmate had acquired and used a handgun within MOCC. Waid testified that this event had a profound effect on MOCC, causing turmoil and requiring an immediate lockdown; that instead of processing these grievances, she was required to take overall charge of MOCC, supervise two investigations into the incident, and serve as liaison to the Governor; and that the gun incident stopped her regular duties. Grievants offered no evidence to contradict her testimony.

CORR established that it acted in good faith and had a reasonable basis for noncompliance, Bailey, supra, and that events arose which were outside the defaulting party's control, and contributed to its failure to act within the specified time limits. Monterre, supra. Accordingly, CORR has established, by a preponderance of the evidence, that it was prevented from providing a timely response at Level I by excusable neglect, and Grievants' default claim must fail. This grievance is dismissed from the docket of this Grievance Board and remanded for proceedings at Level II.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. At Level I, a requested informal conference shall be held within three days, and a written decision shall be issued within six days of the receipt of a written grievance. W. Va. Code § 29-6A-4(a).

2. When grievants assert that their employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), they must establish such default by a preponderance of evidence. Once grievants establish that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. Patteson v. Dep't of Health and Human Resources/Division of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998).

3. Grievants established, by a preponderance of the evidence, that a timely response was not provided by MOCC at Level I.

4. MOCC established, by a preponderance of the evidence, that it was prevented from providing a timely response by excusable neglect.

Accordingly, Grievants' request for a finding of default at Level I under W. Va. Code § 29-6A-3(a)(2) is **DENIED**. (See footnote 3) This grievance is dismissed from the docket of this Grievance Board and remanded for proceedings at Level II.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated December 17, 1999

Footnote: 1

These grievances were consolidated, as arising from the same set of operative facts, by Order dated October 6, 1999.

Footnote: 2

Although Warden Painter's memo referred only to the Quilliams 2 unit, the maximum security unit within MOCC that housed inmate Williams, there was credible testimony that Warden Painter's memo affected all of MOCC.

Footnote: 3

This Order Denying Default is not considered a final, appealable, order.