DONALD L. ROY,

Grievant,

v. **DOCKET NO. 05-DOH-150D**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER GRANTING DEFAULT

Grievant Donald L. Roy filed a grievance on April 11, 2005, claiming discrimination in pay and classification. On April 27, 2005, Mr. Roy gave Respondent Division of Highways (DOH) notice that he believed it had defaulted at level two. DOH, on May 4, 2005, requested a level four hearing to determine whether a default occurred, and that hearing was held in the Grievance Board's Charleston office on July 8, 2005. Grievant represented himself, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision at the conclusion of the hearing.

Issues and Arguments

At issue is whether DOH made a timely response following the level two conference, and if it did not, whether the delay was caused by excusable neglect.

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

Findings of Fact

1. Mr. Roy is employed by DOH in District Two as a Transportation Worker 3.

2. On April 11, 2005, Mr. Roy filed a grievance relating to his salary. The grievance was denied at level one on April 13, 2005, and Mr. Roy appealed to level two on April 14, 2005.

3. District Two District Engineer Wilson Braley is the level two grievance evaluator for grievances filed in District Two.

4. A level two conference was held on Monday, April 18, 2005. Mr. Braley was out of the office at a conference on Tuesday, Wednesday and Thursday. He issued the level two decision on the following Tuesday, April 26. Mr. Roy received the decision by mail on Wednesday, April 27.

5. Mr. Roy works four days per week, Monday through Thursday. Mr. Braley works five days per week, Monday through Friday. Friday, April 22, 2005, was not a work day for Mr. Roy, but it was a work day for Mr. Braley.

Discussion

"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." (See footnote 1) When a grievant asserts that 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 that a defaultoccurred, 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. (See footnote 2)

The level two grievance evaluator must issue a written decision within five days of the level two conference. (See footnote 3) In that context, “days” means working days exclusive of Saturday, Sunday or official holidays. (See footnote 4) In this case, the question to be decided is whether use of the term “working days” in the grievance procedure's definition of “days” refers to days the grievant is working or days the grievance evaluator is working, or to some other standard.

That issue has already been determined by the Grievance Board. “'Working days' refers not to days when an employee is actually working, or performing the duties and responsibilities of his or her job, but rather refers to a work week comprised of 'regular working hours,' defined by the employer, which in the instance of most West Virginia state government agencies, would be 8:30 a.m. to 4:30 p.m., Monday through Friday.” (See footnote 5) In this case, that interpretation especially makes sense, since Grievant's absence from the workplace had no bearing on the Grievance Evaluator's ability to issue the decision. Therefore, Mr. Braley issued his level two decision on the sixth day, which was a default according to the statute. DOH argued that its failure to timely issue the level two decision was a result of excusable neglect, because it erroneously interpreted the meaning of “days.” Mr. Braley did issue the decision on the fifth day if the Friday on which Mr. Roy did not work is not counted. “'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

specified in the rules. Absent a showing along these lines, relief will be denied." (See footnote 6) "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 footnote 7)*

In another DOH case, failure to meet the required timelines was not excused because the grievance evaluator was unsure of the proper procedure. "[S]imple inadvertence or a mistake regarding the contents of the procedural rule will not suffice to excuse noncompliance with time limits." (See footnote 8) The failure is likewise not excused here, especially since at least one Grievance Board decision clearly answered the question.

In order to benefit from the "relief by default," the grieved employee must raise the default issue as soon as the employee becomes aware of such default. (See footnote 9) DOH did not argue that the default issue was raised untimely, but the record shows Mr. Roy dated his default claim on April 27, 2005, the same day he received the level two decision. However,since he received the decision by mail at his home address, it can be fairly assumed he had not yet seen it when he filed his default claim at work that same day.

The following conclusions of law support this discussion:

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." W. Va. Code § 29-6A-3(a). When a grievant asserts that 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.

2. Once the grievant establishes 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. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

3. The level two grievance evaluator must issue a written decision within five days of the level two conference. W. Va. Code § 29-6A-4(b). In that context, "days" means working days exclusive of Saturday, Sunday or official holidays. W. Va. Code § 29-6A-2(c).

4. "'Working days' means refers not to days when an employee is actually working, or performing the duties and responsibilities of his or her job, but rather refers to a work week comprised of 'regular working hours,' defined by the employer, which in theinstance of most West Virginia state government agencies, would be 8:30 a.m. to 4:30 p.m., Monday through Friday." *Sheppard v. Dep't of Health and Human Res.*, Docket No. 01-HHR-598D (May 9, 2002).

5. Respondent issued the level two decision six days after the level two conference, and is in default.

6. "'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 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) and quoting 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (1969))." *Bowe v. W. Va. Workers' Compensation Comm'n .,* Docket No. 04-WCC-054D (April 12, 2004). "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).

7. "[S]imple inadvertence or a mistake regarding the contents of the procedural rule will not suffice to excuse noncompliance with time limits. *White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992); *Hager v. Div. of Envtl. Protection*, Docket No. 01-HHR-006D (Mar. 29, 2001)." *Headley v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-397D (Jan. 27, 2005).

8. Respondent's default at level two was not the result of excusable neglect. For the foregoing reasons, this Respondent is hereby found to be in Default. Respondent is **ORDERED** to proceed on the presumption that Grievant has prevailed on the merits of his grievance. However, Respondent has requested a hearing to determine whether awarding the requested remedy would be contrary to law or clearly wrong, as is permitted by W. Va. Code § 29-6A-3(a)(2). The parties are therefore ordered to confer and to provide the undersigned with five mutually-agreed dates upon which they will be available for a hearing on that issue.

July 12, 2005

M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-3(a).

Footnote: 2

Board, et al. v. WVDHHR / Lakin Hospital, Docket No. 99-HHR-329D (Sep. 24, 1999).

Footnote: 3

W. Va. Code § 29-6A-4(b).

Footnote: 4

W. Va. Code § 29-6A-2(c).

Footnote: 5

Sheppard v. Dep't of Health and Human Res., Docket No. 01-HHR-598D (May 9, 2002).

Footnote: 6

Bowe v. W. Va. Workers' Compensation Comm'n., Docket No. 04-WCC-054D (2004).

Footnote: 7

Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993).

Footnote: 8

Headley v. Dep't of Transp./Div. of Highways, Docket No. 04-DOH-397D (2005).

Footnote: 9

Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).