DELORIS THAXTON,
Grievant,

v. **Docket No. 98-VA-416D**

DIVISION OF VETERANS AFFAIRS,
Respondent.

DEFAULT ORDER

Grievant, Deloris Thaxton, filed a motion for default judgment, with her employer, in the above-styled grievance on October 15, 1998, in accordance with W. Va. Code § 29-6A-3(a)(2) (1998). Respondent requested a hearing to demonstrate that it was not in default. A hearing on this matter was held in this Board's Charleston, West Virginia, office on December 1, 1998, and became mature for decision at that time. Grievant was represented by Marilyn Kendall of the West Virginia State Employees Union, and the Division of Veterans Affairs ("DVA") was represented by its Director, Mr. G. L. Harper.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact pertinent to this matter.

Findings of Fact

1. This grievance was filed on or about August 30, 1998.[1]

2. A Level I decision denying the grievance was issued on August 31, 1998.

3. At some point in time, Grievant advanced her grievance to Level II.

4. A Level II conference was scheduled and held on September 10, 1998.

5. The Level II decision was issued on September 14, 1998, and denied the grievance.

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[1]Because Grievant did not pick up her certified letter, dated August 14, 1998, notifying her of her suspension, until August 24, 1998, her appeal rights were extended for an additional eight days.

6. Grievant appealed the Level II decision, and sent her request for a Level III hearing to Director Harper by certified mail. This letter was signed for by Ms. Jane Kimble on September 21, 1998.

7. Ms. Kimble was a new clerical employee and was not familiar with the correct procedures for dealing with a grievance.

8. The certified letter was delivered to Ms. Kimble by a new postal worker, who delivered the letter to Ms. Kimble instead of Director Harper's secretary. The regular postal employee delivers certified letters to Director Harper's secretary.

9. Ms. Kimble filed the appeal in an unknown place and did not notify Director Harper of the grievance. Even after a diligent search, this letter has not been found.

10. On October 15, 1998, Grievant notified Director Harper that DVA was in default. This was the first notice Director Harper had that Grievant had appealed her grievance to Level III.

11. On October 16, 1998, Director Harper wrote Grievant stating he had never received her grievance and scheduled the Level III hearing for October 22, 1998.

12. Upon advice of her representative, Grievant notified Director Harper on October 22, 1998, that she would not attend this hearing, as she believed the employer was in default.

13. On October 22, 1998, Director Harper wrote the Grievance Board and requested a hearing to demonstrate why DVA should not be considered in default.

Discussion

The issue of default in a grievance filed by a state employee has only recently come within the jurisdiction of the Grievance Board. On March 13, 1998, the West Virginia

Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998.[2] That Bill 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 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 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, House Bill 4314 added the following language to W. Va. Code § 29-6A-5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

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.

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[2] This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

> 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).

Director Harper admits he did not respond within set time lines, but states this was not because of any lack of due diligence, but was because he was unaware of the grievance until he received the Notice of Default. He notes he scheduled the Level III hearing as soon as he was aware Grievant had appealed to Level III. Director Harper notes he was never given the form, the individual who delivered the notice gave it to a different person than was past practice, and the employee who received the letter was new and incorrectly filed the grievance.

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.

In evaluating whether a default has occurred, it must also be kept in mind that "default judgements are not favored by the law." Thompson v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-117 (Apr. 30, 1998).[3] Rule 55 of the West Virginia Rules of Civil Procedure allows a plaintiff to obtain a judgment by default when a defendant fails to timely "plead or otherwise defend." However, "[t]he principle is well founded that courts look with disfavor on judgments obtained by default." Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, (1970). Rule 60 provides excuses which may be asserted to set aside a default.

> If any doubt exists as to whether relief should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits. McDaniel v. Romano, 155 W. Va. 875, 878, 190 S.E.2d 8, 11 (1972). The law strongly favors an opportunity for the defendant to make a case to an action against him. Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, 456 (1970).

Graley v. Graley, 174 W. Va. 396, 327 S.E.2d 158, 160 (1985). In determining whether a default judgment should be entered in the face of a Rule 6(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party. Syl. Pt. 3, Parsons v. Consolidated Gas Supply Corp., 163 W. Va. 464, 256 S.E.2d 758 (1979).

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

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[3]See Harmon v. Division of Corrections/Mt. Olive Correctional Complex, Docket No. 98-CORR-284 (Oct. 6, 1998), for a detailed discussion of the issue of default as it relates to the grievance process.

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. This Code Section states:

> 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.

Accordingly, the undersigned Administrative Law Judge finds that Respondent has proven by the preponderance of the evidence that its delay in setting a hearing was due to excusable neglect.

Therefore, Respondent's motion to find no default is **GRANTED**. This case is dismissed from the dockets of this 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 30, 1998