STEPHEN DILLEY,

Grievant,

v. **Docket No. 00-CORR-008D**

WEST VIRGINIA DIVISION OF CORRECTIONS,

ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER DENYING DEFAULT

On January 13, 2000, Stephen Dilley, Grievant, appealed to Level IV of the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., alleging he was entitled to prevail by default in a grievance filed against his employer, Respondent West Virginia Division of Corrections, Anthony Correctional Center (WVDOC). On June 29, 2000, a Level IV default hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Beckley, West Virginia. (See footnote 1) That hearing was limited to the question of whether or not a default had occurred. At the conclusion of the hearing, the parties waived closing arguments. This matter became mature for decision on July 28, 2000, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

The following Findings of Fact pertinent to resolution of this issue have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

Findings of Fact

1. Grievant is employed by Respondent West Virginia Division of Corrections (WVDOC) at the Anthony Correctional Center.

2. Grievant filed a grievance on December 1, 1999. The grievance was advanced through Level III without resolution.

3. A Level III hearing was conducted on Wednesday, December 29, 1999, by Warden Mark A.

Williamson, the designee of WVDOC Commissioner Paul Kirby.

4. On January 3, 2000, Mr. Williamson mailed his recommended Level III decision via U. S. Mail to Hilda Williams, WVDOC's Director of Human Resources, in the WVDOC main office in Charleston, West Virginia. (See footnote 3) The Level III Recommended Decision is dated January 3, 2000, and was accompanied by a memo from Mr. Williamson to Ms. Williams dated January 3, 2000. This correspondence was never received in the Charleston office. Test., Mr. Williamson at Level IV; Resp. Ex. No. 1, at Level IV; Grievance Documents.

5. The past practice is to review, sign, and mail the recommended decision on the same day as it is received.

6. On Monday, January 10, 2000, Mr. Williamson called Commissioner Kirby's Secretary, Susan Harding, to inquire about Grievant's Level III decision, as he had not yet received his customary copy of the signed, Level III decision.

7. Also on January 10, 2000, Ms. Harding contacted Nancy Leonoro-Swecker, WVDOC's Director of Administration, who was unable to find a copy of Mr. Williamson's recommended decision on this grievance after looking through all incoming mail. Ms.Leonoro-Swecker instructed Ms. Harding to contact Mr. Williamson and direct him to send an electronic facsimile copy of his recommended decision to Commissioner Kirby's office.

8. Mr. Williamson faxed a copy of his Recommended Decision that day.

9. On January 10, 2000, after a copy of Mr. Williamson's recommended decision was received in the main office via electronic facsimile transmission, WVDOC Commissioner Kirby signed a Level III decision denying the grievance.

10. Ms. Leonoro-Swecker then sent a copy of Commissioner Kirby's Level III decision to Grievant via electronic facsimile transmission on January 10, 2000, sending the original via certified mail that same day. Resp. Ex. No. 2, at Level IV.

11. Grievant filed his claim of default on January 13, 2000, after receiving the Level III Decision denying his grievance.

Discussion

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board when the West Virginia Legislature passed House Bill 4314 on March 13, 1998. That legislation, among other things, added a default provision to the state employees grievance

procedure, effective July 1, 1998. (See footnote 4) More specifically, W. Va. Code § 29-6A-3(a) was amended, 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 defaultif 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."

If a default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless WVDOC is able to demonstrate that the remedy requested is either contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there was no default, Grievant may proceed to the next level of the grievance procedure. WVDOC denies a default occurred in this matter, as contemplated under the terms of the statute.

Because Grievant is claiming a default occurred under the statute, he bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W.Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

In this matter, after this grievance was advanced to a hearing at Level III, WVDOC was required to respond in accordance with W. Va. Code § 29-6A-4(c). W. Va. Code § 29-6A-4(c) provides the

following directions 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).

This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya, supra, the grievanceprocess is for "resolving problems at the lowest possible administrative level." Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that “days” means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). Thus, WVDOC was obligated to issue a Level III decision on this grievance not later than Monday, January 6, 2000, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

The statute requires the employer to "issue" a Level III decision within the applicable time limit. Mr. Williamson sent his recommended Level III decision to the office of the WVDOC Commissioner on January 3, 2000. Grievant, of course, was not provided a copy of the recommended decision. Clearly, the Level III decision was not issued until it was signed and transmitted to Grievant on January 10, 2000. Wensell v. W. Va. Regional Jail & Correctional Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998).

Grievant argued he should prevail by default as the Level III Decision was not issued until after the required date. In Grievant's brief, he argued he had established apattern because another mailed decision had also not been received had not been received in WVDOC's office during that same time period. (See footnote 5)

Because the Level III decision was not issued until two days after the statutory limit for issuing a timely response had passed, the statute shifts the burden to WVDOC to demonstrate by a preponderance of the evidence that it was prevented from issuing a timely decision "as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2). Friend, supra.

WVDOC contended it should not be held in default under the circumstances presented in this case, without specifying which of the foregoing criteria were relied upon to excuse Commissioner Kirby's failure to issue a timely Level III decision. WVDOC's failure to act was based on the fact Mr. Williamson's recommended decision was not received in time to issue a timely response.

The statutory criteria which could apply to excuse WVDOC's failure to issue a timely Level III decision are excusable neglect and unavoidable cause. To a certain extent, these defenses are overlapping. Robinson v. Div. of Corrections, Docket No. 00-CORR-013D (Mar. 24, 2000). This Grievance Board has previously observed that 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. Id.; Friend, supra. See Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). However, simple inadvertence or a mistake will not suffice to excuse noncompliance withtime limits. Friend, supra. See White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey v. Workman's Compensation Comm'r, 170 W. Va. 771, 296 S.E.2d 901 (1982), n.8.

In the matter at hand, Mr. Williamson mailed his recommended Level III decision to Commissioner Kirby's office on January 3, 2000. (See footnote 6) This should have provided ample time for Commissioner Kirby and his staff to review the decision, and prepare the appropriate correspondence approving or disapproving Mr. Williamson's recommended decision by the January 6, 2000 deadline. However, a preponderance of the evidence indicates Mr. Williamson's mailed, recommended decision was never received, and the faxed copy was not sent until after the time limit for issuing a Level III response had passed.

This explanation of events parallels the explanations previously accepted as excusable neglect by the West Virginia Supreme Court of Appeals. Robinson, supra. 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 resultingfailure to file an answer in a timely fashion was due to excusable neglect and would not result in a default.

In Toth v. West Virginia Division of Corrections, Docket No. 98-CORR-344D (Dec. 10, 1998), this Grievance Board relied upon the approach to excusable neglect adopted by the West Virginia Supreme Court of Appeals in Purdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997): "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 time frame specified in the rules. Absent a showing along these lines, relief will be denied." See Thaxton v. Div. of Veterans Affairs, Docket No. 98-VA- 416D (Dec. 30, 1998). Grievant indicated in his written argument that WVDOC had acted or may have acted in bad faith, but there is no evidence to indicate this occurred. A preponderance of the credible evidence indicates Mr. Williamson's recommended decision was not received in the Commissioner's office in time to issue a timely response through no fault of Respondent WVDOC. It was not unreasonable for WVDOC to rely upon the United States mail for transmission of Mr. Williamson's recommended decision, and the apparent loss of this item in the mail is a matter outside WVDOC's control. Robinson, supra. See Sauchuck v. Parkways Economic Dev. & Tourism Auth., Docket No. 99- PEDTA-297D (Dec. 14, 1999). Additionally, the fact that two

pieces of mail went awry at the same time during the busy holiday season does not establish a pattern. Thus, Respondent has established it was prevented from issuing a timely decision as the result of excusable neglect or unavoidable cause. No default occurred in this matter. Grievant has indicated his intention to appeal the Level III decision to Level IV. Accordingly, this matter will remain on the docket of this Grievance Board, and a Level IV hearing will be scheduled to address the merits of this grievance.

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

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. 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." W. Va. Code § 29-6A-3(a). See Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-469D (Feb. 29, 2000).

2. When a grievant asserts 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 a default occurred, the employer may show 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); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999). 3. When the employer asserts the remedy that would be received is contrary to law in accordance with W. Va. Code § 29-6A-3(a)(2) because, in fact, no default occurred, the employer must establish such a defense by a preponderance of the evidence. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998). See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

4. In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that “days” means working days exclusive

of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998).

5. In determining whether an agency has issued a decision in compliance with the applicable time limit in the state employee grievance procedure, the controlling event is when the decision is transmitted to the grievant, not when the decision is actually received by the grievant. Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998). See W. Va. Code § 29-6A-3(i).

6. Grievant established Respondent WVDOC did not issue a Level III decision on his grievance within the time limit specified in W. Va. Code § 29-6A-4(c). See W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999).

7. The default provision contemplates a situation where the grievance process has been aborted due to the inaction of the employer or its grievance evaluator. Stanley v. W. Va. Dep't of Tax & Revenue, Docket No. 99-T&R-155D (June 10, 1999). See Hattman v. Darnton, 201 W. Va. 371, 497 S.E.2d 348 (1997). 8. 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. Robinson v. Div. of Corrections, Docket No. 00-CORR-013D (Mar. 24, 2000); Bell v. Northern Regional Jail & Correctional Facility, Docket No. 99-CORR-054D (Apr. 14, 1999). See Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). 9. A preponderance of the evidence indicates WVDOC's failure to issue a timely Level III response was the result of excusable neglect or unavoidable cause. Robinson, supra. See Thaxton v. Div. of Veterans Affairs, Docket No. 98-VA-416D (Dec. 30, 1998).

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is **DENIED**. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order. The representatives of the parties are requested to confer and provide agreed dates to conduct the Level IV hearing on the merits of this grievance.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 18, 2000.

Footnote: 1

Grievant was represented by Jack Ferrell with the Communications Workers of America. Respondent WVDOC was represented by its General Counsel, Leslie Tyree.

Footnote: 2

Ms. Tyree elected not submitted these proposals.

Footnote: 3

Ms. Williams was on sick leave.

Footnote: 4

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).

Footnote: 5

This grievance is styled Robinson v. Div. of Corrections, Docket No. 00-CORR- 013D (Mar. 24, 2000). The grievance was denied on similar grounds as the ones addressed in this Order.

Footnote: 6

December 31, 1999, was a holiday. January 1 and 2, 2000, constituted a weekend. The day of the hearing, December 29, 1999, is not counted.