DENNIS BRACKMAN, et al.,

Grievants,

v.

Docket No. 99-CORR-374D

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER GRANTING DEFAULT

Dennis Brackman, Calvin Cox, Twylia Dorsey, Robin Kershner, Michael McQuain, and Rebekah R. Ward (Grievants) are employed by the West Virginia Division of Corrections (CORR), as Correctional Officers at the Anthony Correctional Center (ACC). They filed this grievance July 18, 1999, requesting that they be credited with annual and sick leave for the period of February 2, 1999, through May 31, 1999. Grievants claim a default by CORR at Level I.

A Level IV Default hearing was held on December 2, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievants were represented by Jack Ferrell of the Communications Workers of America, and CORR was represented by Leslie Kiser Tyree, Esq. The parties were given until January 20, 2000, to submit proposed findings of fact and conclusions of law, (See footnote 1) and this default claim became mature for decision on that date. The following Findings of Fact pertinent to resolution ofthis matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants are employed by CORR as COs at ACC.

2. Grievants filed their grievance on July 18, 1999.

3. The ACC employee usually designated to respond to grievances, Shift Commander/Lieutenant T. C. Harper (Harper) was on vacation until July 21, 1999.

4. ACC denied this grievance at Level I, by a letter dated July 26, 1999, postmarked July 30, 1999, and received by Grievants the next day.

5. While Harper was on vacation, ACC designated an employee to replace him.

6. Grievants raised their default claim, by letter dated August 3, 1999, before the August 9, 1999, Level II conference in this grievance.

7. By letter dated September 13, 1999, Grievants appealed their default claim to Level IV.

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 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 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 remedyreceived 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 credited with annual and sick leave for the period of February 2, 1999, through May 31, 1999, and claim they prevailed by default at Level I, because CORR failed to comply with Level I time lines. CORR did not specify whether its alleged failure to timely respond at Level I was the result of sickness, injury, excusable neglect, unavoidable cause, or fraud.

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 whether the 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 thegrievance 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-326D (Oct. 6, 1998).

The facts in this matter are undisputed, and are strikingly similar to those in Toth v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-344D (Dec. 10, 1998). Grievants filed their grievance on July 18, 1999. The ACC employee usually designated to respond to grievances, Shift Commander/ Lieutenant T. C. Harper, was on vacation until July 21, 1999. ACC denied this grievance at Level I, by a letter dated July 26, 1999, postmarked July 30, 1999, (See footnote 2) and received by Grievants the next day.
Grievants raised their default claim, by letter dated August 3, 1999, before the August 9, 1999, Level II conference in this grievance.

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" meansworking days exclusive of Saturday, Sunday or official holidays.

In computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E. 362 (1911). See also W. Va. R. Civ. P. 6(a). Therefore, July 18, 1999, and July 19, 1999, the date of actual receipt are excluded. Also excluded are Saturday, July 24, and Sunday, July 25, 1999.

Accordingly, CORR did not issue Grievants' Level I decision until nine work days after they filed

their grievance at Level I. Thus, it becomes CORR's responsibility to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level I in compliance with W. Va. Code § 29-6A-4(a) “as a result of sickness, injury, excusable neglect, unavoidable cause or fraud” as provided by W. Va. Code § 29-6A-3(a)(2).

Although CORR did not specify whether its failure to timely respond at Level I was the result of sickness, injury, excusable neglect, unavoidable cause, or fraud, its presentation at the Level IV default hearing appeared to be an attempt to establish that excusable neglect prevented CORR from issuing a timely decision at Level I.

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 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'sCompensation 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 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 a grievant's appeal, and that employee simply failed to do so, although an inmate had escaped nine work days earlier. Toth, supra. As noted above, the circumstances in this default claim are strikingly similar to those in Toth, where the replacement for a vacationing ACC official failed to respond to a grievance in a timely manner. Grievants established, by a preponderance of the evidence, that while Shift Commander/Lieutenant Harper was on vacation, he was replaced by another Shift Commander empowered to respond to grievances. That Shift Commander simply failed to do so in a timely matter. The undersigned administrative law judge takes administrative notice that, in Toth, it was established that, at the higher levels of a correctional facility's management, no one leaves his or her post without being replaced by another employee; and that, as a result of the events in Toth, ACC adopted a policy of opening and date stamping all mail upon receipt. It is also noted that Lieutenant Harper still had four days to issue a decision to Grievants when he returned from his vacation.

Grievants did not allege bad faith on CORR's part. On the other hand, CORR did not establish a reasonable basis for noncompliance with the time frame specified by W. Va. Code § 29-6A-4(a), inasmuch as it had an employee in place to respond to Grievants' appeal. As in Toth, that employee simply failed to do so.

In these circumstances, CORR has failed to demonstrate, by a preponderance of the evidence, that it was prevented from providing a timely response at Level I as a result of sickness, injury, excusable neglect, unavoidable cause or fraud.

Accordingly, it is determined that CORR is in default in regard to this grievance, and may proceed to show, in accordance with W. Va. Code § 29-6A-3(a)(2) that the remedy sought by Grievants is contrary to law or clearly wrong. CORR may request a Level IVhearing, within five days of the receipt of this written notice of default, to present evidence and/or argument on this issue.

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

CONCLUSIONS OF LAW

1. If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by W. Va. Code §29-6A-4, unless prevented from doing so

directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud, the grievant shall prevail by default. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a Level IV hearing examiner for the purpose of showing that the remedy received by the prevailing party is contrary to law or clearly wrong. W. Va. Code §29-6A-3(a)(2).

2. 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).

3. 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/Div. of Personnel, Docket No. 98-HHR-326D (Oct. 6, 1998).

4. Grievants established, by a preponderance of the evidence, that a timelyresponse was not provided by CORR/ACC at Level I.

5. CORR/ACC failed to establish, by a preponderance of the evidence, that it was prevented from providing a timely response at Level I by sickness, injury, excusable neglect, unavoidable cause or fraud.

Accordingly, Grievants' request for a finding of default at Level I under W. Va. Code § 29-6A-3(a)(2) is **GRANTED**. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated April 10, 2000

Footnote: 1

1

Grievant submitted such proposals, but CORR did not.

Footnote: 2

2 This Grievance Board has traditionally relied upon the postmark date in determining when a decision was transmitted to a grievant. See Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999), Wensell v. W. Va. Regional Jail & Correctional Facility Authority, Docket No. 98-RJA-490D (Jan. 25, 1999). CORR also offered no explanation as to why a decision dated July 26, 1999, the last day for CORR's timely Level I response, was not mailed for four more days.