BEVERLY ROSEWELL,

Grievant,

v. Docket No. 01-DEP-506D

DEPARTMENT OF ENVIRONMENTAL PROTECTION/
DIVISION OF WATER RESOURCES,

Respondent.

ORDER DENYING DEFAULT

On September 17, 2001, Grievant, Beverly Rosewell, filed a default claim against her employer, Respondent, Department of Environmental Protection/Division of Water Resources ("DEP"), alleging a default occurred when the Level II decision was not issued within five days of the Level II conference. This matter was placed in abeyance for a period of time in order to allow the parties to discuss a settlement. When this effort was not successful, a Level IV hearing was held on September 24, 2002, solely for the purpose of taking evidence on the issues of whether a default had occurred, and whether Respondent had a statutory excuse to default. Grievant was represented by Fred Tucker, and DEP was represented by Steve Dragisich, Esquire. The parties declined to submit written argument, and this default claim became mature for decision at the conclusion of the Level IV hearing.

The following findings of fact are made based upon the evidence presented at the Level IV hearing.

Findings of Fact

1. Grievant filed a grievance on August 14, 2001, and met with her supervisor, William Brannon, shortly thereafter. Mr. Brannon issued his Level I written decision denying the grievance on August 23, 2001.

2. Grievant appealed to Level II, and met with Allyn Turner, Director of the Division of Water

Resources, for her Level II conference on September 5, 2001.

3. Ms. Turner believed her written response to the grievance was due on September 11, 2001. She had a speaking engagement the morning of September 11, and had set aside time after the speaking engagement that day to write her response.

4. The terrorist attacks on the World Trade Centers and the Pentagon changed Ms. Turner's plans for the day. After her speaking engagement, she was called upon to meet with the Director of the Department of Environmental Protection and the executive staff to work on when offices would be closed. She then returned to the Office of Water Resources, and continued to work with the executive staff on this issue. The Office of Water Resources was closed shortly after lunch on September 11, 2001. Ms. Turner was not able to work on the Level II response that day.

5. On Wednesday, September 12, 2001, Ms. Turner spent the day reviewing her e-mails from preceding days to refresh her memory on certain matters, preparing for a speaking engagement she had scheduled for September 13, 2001, and preparing for an agency workshop which was scheduled for the following week. Ms. Turner did not work on the Level II response that day.

6. On September 13, 2001, Ms. Turner traveled from Charleston, West Virginia, to Canaan Valley State Park, made her presentation, and returned to Charleston, which took the entire day. On September 14, 2001, Ms. Turner spent most of the day preparingfor the workshop, helping other employees with their preparations for the workshop, and making sure the agency was ready for the workshop. She also spent some time on regulatory issues. On September 17, 2001, Ms. Turner had several meetings which took up the entire day. Around midnight, she had a personal family problem which arose, and which took up her time until around 9:30 a.m. She then traveled to Blackwater Falls State Park on September 18, 2001, for the workshop. She wrote the Level II decision that evening.

7. Ms. Turner had been involved as the Level II grievance evaluator on two other grievances filed by Grievant, and had asked for an extension of the timelines in those two grievances because of other matters on her schedule, and Grievant had waived the timelines in those two grievances. Ms. Turner had not asked for a waiver of the timelines on this grievance, because she had set aside time on September 11, 2001, to write the Level II response.

8. Grievant was assisting the Red Cross during the period immediately following September 11, 2001. She was in and out of the office during this time. Ms. Turner asked whether Grievant was working, and was told she was not. Ms. Turner was not aware that Grievant was coming into the

office to check on her work during this time. Ms. Turner did not attempt to contact Grievant to request a waiver of the statutory timelines.

9. On September 17, 2001, Grievant was sitting at her desk waiting to be called in for her evaluation, and it suddenly occurred to her that she had not received her Level II decision. She immediately typed a letter claiming a default, and faxed it to the Grievance Board.

Discussion

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which provides, in pertinent part:

> (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 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.

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

Grievant's default claim is based upon the fact that a Level II decision was not issued within five days of the Level II conference, as is required by W. Va. Code § 29-6A- 4(b). W. Va. Code § 29-6A-4 provides as follows regarding when Respondent must act at Level II:

(b) Level two.

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

Respondent did not dispute that the Level II decision was not issued within five days of the Level II conference. Respondent argued first, that Grievant did not timely file her default claim, arguing she should have filed it on September 13, 2001. While W. Va. Code § 29-6A-3(a)(2) does not specify a time within which one must file a notice of default, the Supreme Court of Appeals of West Virginia has held that, "[i]n order to benefit from the'relief by default' provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Vol. 1994), a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon and Chiles v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). "However, this Grievance Board has held that an employee is allowed to raise a default claim, so long as he raises it as soon as he becomes aware of the default and submits the claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 26, 1997), aff'd Harmon v. Fayette County Board of Education, No. 25323, March 12, 1999 (W. Va. S. Ct.)." Bell v. Northern Regional Jail and Correctional Facility, Docket No. 99-CORR-054D (Apr. 14, 1999).

Grievant testified she was in the office on September 17, 2001, and it occurred to her that she had not received the Level II decision, and the five days had passed. She immediately typed a statement claiming default, and faxed it to the Grievance Board. The decision was not due to be issued until Wednesday, September 12, 2001. The grievance procedure statute does not require a grievant to receive his or her decision within five days, so the fact that Grievant did not receive the decision on September 12, 2001, should not have caused her to believe a default had occurred on that day. Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998). Had the decision been placed in the mail on September 12, 2001, Grievant would not have received it until Thursday, September 13, 2001, at the earliest; and given the events of that week, a delay in mail delivery would not have been unexpected. Grievant promptly claimed a default on Monday, September 17, 2001, as soon as she became aware of the default.

Respondent also argued that the factors set forth in Parsons v. Consolidated Gas Supply Co., 163 W. Va. 464, 256 S.E.2d 758 (1979), used by courts in determiningwhether a default should be set aside, should be applied here, noting there was no harm to Grievant in the delay. Grievant argued

the statutory timelines are for everyone, and the statute should be strictly applied. While this Grievance Board applied the Parsons analysis to default claims prior to the decision of the Supreme Court of Appeals of West Virginia in Harmon and Chiles, supra, the Court indicated in that decision that the Parsons analysis is not applicable to claims of default filed under the grievance procedure. Nelson v. Bureau of Employment Programs, Docket No. 01-BEP-061D (June 25, 2001).

The Parsons default analysis was considered as a factor in the Administrative Law Judges' analysis in Treadway/Milam v. Department of Health and Human Resources, Docket No. 01-HHR-537D (January 11, 2002), and Bloomfield v. Ohio County Board of Education, Docket No. 01-35-554D (December 20, 2001). Neither decision addressed or otherwise distinguished Harmon and Chiles, supra, or addressed, overruled, or otherwise addressed Nelson, supra. The undersigned finds the reliance on the Parsons analysis in Treadway/Milam and Bloomfield to be contrary to Harmon and Chiles, supra, and Nelson, supra, and to the extent Treadway/Milam and Bloomfield considered or applied the equitable principals used by the courts in analyzing whether a default should be set aside, the analysis in those cases was in error.

Finally, Respondent argued it had a statutory excuse to the default, pointing to the events of September 11, 2001, and Ms. Turner's schedule which made it impossible for her to issue the decision on September 12, 2001. Grievant argued Ms. Turner had ample time to respond, notwithstanding the events of September 11, 2001.

"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 specific 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)). The West Virginia Supreme Court of Appeals 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 specific time limits. 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. White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, n. 8." Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001).

This Grievance Board has recently found excusable neglect in instances where a Level III hearing was not held within the statutory time frames due to the difficulty in scheduling a hearing at the end of the year, during the Christmas holiday season, when multiple parties were involved. Hager, supra. Excusable neglect was also found where the state agency had only one Level III grievance evaluator, and he could not schedule the hearing within seven days due to his full schedule. Darby v. W. Va. Dep't of Health and Human Resources, Docket No. 00-HHR-336D (Dec. 28, 2000). In both cases the Administrative Law Judge found no indication that the employer had acted in bad faith.

This Grievance Board has found excusable neglect where, due to his absence from the office while he was attending to a flood emergency in West Virginia, a Grievant's second level supervisor did not respond within the statutory time limits. Grbac v. Dep't of Envtl. Protection, Docket No. 01-DEP-452D (Sept. 5, 2001).

In this case DEP did not act in bad faith. Ms. Turner had every intention of responding to Grievant within the time periods, and had specifically set aside time to do so on September 11, 2001. The events of September 11, 2001, however, changed Ms.Turner's schedule unexpectedly, and made it impossible for her to complete her work on that day. Her schedule for the following day was already full, as she had a presentation on the next day for which she had to prepare, agency business to attend to, and a workshop which was right around the corner. The record does not reflect Ms. Turner's schedule on September 6 and 7, 2001, and Grievant pointed out that Ms. Turner could have been working on her decision on those days. While she perhaps could have worked on the Level II decision sooner than September 11, 2001, that is not an issue here. The fact is, Ms. Turner specifically set aside time on September 11, 2001, to work on her Level II response, and events beyond her control unexpectedly prevented her from doing so. Other matters required her attention on the last day to issue the decision. The undersigned finds excusable neglect in the failure to issue the decision on or before September 12, 2001.

Grievant admitted it was a busy time of the year, as people were preparing for the annual workshop, and trying to get their work caught up, because they would be out of the office for the workshop. Ms. Turner obviously had a key role in making sure everyone was ready for the agency

workshop, and she had a number of other items on her agenda. The undersigned further concludes that Ms. Turner issued her decision as soon as she could.

The undersigned would further note that had Ms. Turner known Grievant was coming into the office in the days following September 11, 2001, it seems likely Ms. Turner would have asked Grievant for an extension of time to write the decision, and Grievant would have agreed to an extension, as she had in her other grievances.

In addition, it is appropriate to make the following conclusions of law.

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 inthis 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).

2. The burden of proof is upon the grievant who files his default claim at Level IV to prove by a preponderance of the evidence that a default has occurred. Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

3. Absent an agreement by the parties to extend the timelines, the Level II grievance evaluator must issue a written decision within five working days of the Level II conference. W. Va. Code § 29-6A-4.

4. Respondent defaulted by failing to issue the Level II decision within five days of the Level II conference.

5. "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 specific 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)). The West Virginia Supreme Court of Appeals 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 specific time limits. 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. White v. Berryman, 187 W. Va. 323, 418 S.E.2d 917 (1992); Bailey, n. 8.” Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001).

6. The historic events of September 11, 2001, unexpectedly prevented the Level II grievance evaluator from working on the Level II response as she had planned to do that day. Other matters required her attention on the following day, which was the last day to issue the decision. The undersigned finds excusable neglect in the failure to issue the decision on or before September 12, 2001.

Accordingly, Grievant's request that a default be entered is **DENIED**. If Grievant wishes to appeal the Level II decision to Level III, she has five days from receipt of this Order to do so.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 27, 2002