DIANA TREADWAY and

ROBIN MILAM,

Grievants,

v.

DOCKET NO. 01-HHR-537D

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/PINECREST HOSPITAL,

Respondent.

ORDER DENYING DEFAULT

Grievants, Diana Treadway and Robin Milam, filed a grievance against their employer, the West Virginia Department of Health and Human Resources/Pinecrest Hospital ("DHHR"), alleging discrimination, retaliation, and failure to follow policy in a selection matter. Grievants had a level two conference with Thomas McGraw, Administrator of Pinecrest Hospital, on October 19, 2001. Grievants notified Mr. McGraw and this Grievance Board by memorandum dated November 2, 2001, that DHHR was in default because he had not issued a level two decision within the statutory time frame pursuant to W. Va. Code § 29-6A-3. A level four hearing was conducted on the default issue on November 30, 2001, in the Grievance Board's Beckley, West Virginia, office, and the matter became mature at the close of the hearing after both parties waived the opportunity to file proposed findings of fact and conclusions of law. Grievants appeared pro se, and DHHR was represented by Jon Blevins, Esq., Assistant Attorney General. The following facts of this matter are undisputed.

FINDINGS OF FACT

1.

Grievants are employed by DHHR as Health Service Workers.

2. Grievants filed a grievance over a selection matter in October, 2001.

3. Grievants had a level two conference with Administrator Thomas McGraw on October 19, 2001.

4. Mr. McGraw prepared a handwritten response to the grievance, which he gave to his secretary to prepare on October 25, 2001. That same day, after it was typed, Mr. McGraw signed the decision, and told her to send it to Grievants by certified mail by October 26, 2001, the deadline for the level two response.

5. October 25, 2001, was a Thursday. Mr. McGraw was off work on Friday, October 26, 2001.

6. On October 26, 2001, Mr. McGraw's secretary, Ms. Shrewsbury, was involved with some other tasks, and forgot to mail the level two decision. When Grievants called sometime the next week inquiring about the decision, she told them they would be getting it in the mail, because she thought she had mailed it on October 26, 2001.

7. Grievants called again on November 1, 2001, and asked Mr. McGraw about their decision. It was only then that Ms. Shrewsbury discovered she had not mailed the decision.

8. Ms. Shrewsbury mailed the decisions on either November 1 or 2, 2001.

9. Grievants notified Mr. McGraw and this Grievance Board on November 2, 2001, that they considered DHHR in default.

DISCUSSION

Grievants bear the burden of establishing they prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A default claim is based on the employer's alleged procedural violation of failing to respond to the grievance within the time limits contained in W. Va. Code § 29-6A-4. The default provision applicable to state personnel grievances is contained in W. Va. Code § 29-6A-3(a), and states 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 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 that 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.

W. Va. Code § 29-6A-4(a) provides the following directions regarding when Respondent must act at 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 or her 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.

DHHR concedes the level two decision was delivered past the statutory time lines, but asserts the delay was due to excusable neglect. This Grievance Board has found that, in certain instances when the employer was unable to comply due to other obligations, this constituted excusable neglect. “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.” Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 11, 2001); Hager v. Div. of Envtl. Protection, Docket No. 01-HHR-006D (Mar. 29, 2001). The explanation of events in the

instant grievance 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). 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). Thelaw 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).

It should also be noted that 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., 186 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). The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure. See W. Va. Code § 29-6A-1. 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. Given the above discussion and the directions from the West Virginia Supreme Court of Appeals, it is clear DHHR's failure to timely respond to the level two conference was due to 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.

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 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).

2. The burden of proof is upon the grievant who files his default claim at level four 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).

3. 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. Noggy v. Div. of Corr./Northern Regional Jail and Corr. Facility, Docket No. 99-CORR-487D (May 26, 2000).

4. Absent an agreement by the parties to extend the statutory time lines, a level two decision must be issued within five working days from the date of the level two conference. W. Va. Code § 29-6A-4(a).

5. DHHR defaulted when it failed to issue a level two decision within five working days following the level two conference. 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.

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." Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 11, 2001); Hager v. Div. of Envtl. Protection, Docket No. 01-HHR- 006D (Mar. 29, 2001).

7. DHHR has demonstrated a statutory excuse, excusable neglect, for the delay in issuing a level two decision.

Accordingly, Grievants' claim of default is **DENIED**, and this case is dismissed from the docket 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 11, 2002