DENNIS BRACKMAN,

Grievant,

v. **DOCKET NO. 02-CORR-019D**

W. VA. DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

ORDER DENYING DEFAULT

On December 7, 2001, Grievant attempted to file at Level II a grievance regarding overtime he worked on November 22, 2001. On January 7, 2002, Grievant filed a claim at Level IV that Respondent had defaulted at Level II as no response had been received. A Level IV hearing on the issue of default was held on February 19, 2002, with a second day of testimony held on June 4, 2002. Grievant represents himself at Level IV, and Respondent is represented by Leslie Tyree, Assistant Attorney General. The parties declined to submit written argument, so this matter became mature for decision at the close of the hearing on June 4, 2002.

Based on a preponderance of the evidence adduced at the Level IV hearing, I find the following facts have been proven:

Findings of Fact

1. Grievant attempted to file a Level II appeal of his grievance on December 7, 2001, with Frank Rush, Associate Warden of Operations. 2. Mr. Rush was officer on duty that day designated to receive matters such as the grievance filing.

3. Mr. Rush was not in his office at the time Grievant appeared to deliver his grievance.

4. Grievant gave his grievance appeal to Pat Barker, a storekeeper who works in the business office. She placed appeal in a pink envelope, and placed it in Mr. Rush's mailbox. She then gave Grievant a written note stating: “Mr. Brackman gave me his Level 2 grievance to give to Mr. Rush (Warden Designee).” [Gr. Exh. No. 1]. She did not indicate on the outside of the envelope that it contained a grievance; she only put Mr. Rush's name on the envelope.

5. Mr. Rush's does not have a secretary. Ms. Barker is not under Mr. Rush's supervision, is not part of the staff in his office, and is not a person designated to receive grievance filings in his absence.

6. Grievant recalls having contacted Mr. Rush by radio that day to inquire as to where to leave the grievance, but Mr. Rush recalls no such conversation. Grievant did not present the testimony of Ms. Barker to verify his assertion. Grievant did not inform Mr. Rush that he did, in fact, leave the Grievance with Ms. Barker.

7. Mr. Rush was not made aware of Grievant's appeal until after the five-day period for a response had run, when Grievant asked him about it. He then located the unopened envelope that had been misplaced in his office.

Discussion

When a grievant files a claim at Level IV and asserts his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default bya preponderance of the evidence by proving that the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35- 554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01- MCVTC-391D (Sept. 14, 2001).

The time limit for a response to a Level II appeal is clear: “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.” W. Va. Code § 29-6A-4(b).

Grievant asserts that Respondent failed to reply in a timely manner to his Level II filing, which he attempted to deliver to Mr. Rush on the same day he received a waiver of his grievance at Level I. Mr. Rush was the administrator's designee on that day, and W. Va. Code § 29-6A-4(b) provides, “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.” However, no conference was scheduled within five days because Mr. Rush misplaced the nondescript envelope, and did not know he had been given a grievance to process, so Respondent did default at Level II.

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). Respondentasserts that Mr. Rush's failure to process the grievance that had been placed in his in-box was excusable neglect.

Mr. Rush was the acting warden on duty the day he filed his appeal, and the Mr. Rush was the proper person to whom his appeal should be filed. Grievant ensured that his appeal was timely placed in Mr. Rush's mailbox, where it is reasonable to assume he should see it. However, the evidence is less clear as to whether Mr. Rush actually knew the appeal had been left with him, and the envelope containing the appeal did not indicate it contained a grievance. While Grievant's receipt did state it was for a grievance, he had that and not Mr. Rush. In any event, the nondescript envelope was misplaced by Mr. Rush, who had no reason to suspect it should be quickly acted upon.

"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)." Treadway v. Dep't of Health and Human Resources/Pinecrest Hospital, Docket No. 01- HHR-537D (Jan. 11, 2002). "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 andwould not result in a default." Treadway, *supra*. The facts in this case are sufficiently close to this type of inadvertent neglect that no default should be found here, either.

The following conclusions of law support the decision to deny Grievant's default claim.

Conclusions of Law

1. When a grievant files a claim at Level IV and 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.

2. "The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal [to Level II] and issue a written decision upon the appeal within five days of the

conference." W. Va. Code § 29-6A-4(b).

3. Respondent failed to schedule a conference within five days of Grievant's appeal to Level II.

4. 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).

5. "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)." Treadway v. Dep't of Health and Human Resources/Pinecrest Hospital, Docket No. 01- HHR-537D (Jan. 11, 2002). "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." Treadway, *supra*.

6. Respondent asserted the default was inadvertently caused by excusable neglect.

Accordingly, Grievant's request for relief by default is **DENIED**, and this grievance is remanded for a timely Level II conference on its merits.

Dated: June 26, 2002 _____

M. Paul Marteney

Administrative Law Judge