VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 16-62
EDWARD VON TURKOVICH	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by Edward von Turkovich ("Grievant"), filed after the expiration of the 30-day period to file an appeal, to enlarge the time for filing a notice of appeal of the June 13, 2017, Memorandum and Order issued by the Labor Relations dismissing the grievance in this matter. 34 VLRB 56.

Grievant filed the motion to enlarge time, and accompanying memorandum of law, on August 4, 2017. The State of Vermont filed a memorandum on August 9, 2017, in opposition to Grievant's motion to enlarge. Grievant filed a reply memorandum to the State's opposition on August 25, 2017.

The undisputed facts pertinent to deciding this motion are as follows: The Labor Relations Board sent the June 13, 2017, Memorandum and Order dismissing this grievance by regular mail that day to Grievant's attorney to the address provided to the Board by the attorney throughout the case. Grievant's attorney had moved from this address on March 20, 2017. The attorney promptly notified the Postal Service of the change in address and requested that all mail be forwarded to the new address. Grievant's attorney did not notify the Labor Relations Board of the change in address. On July 17, 2017, the United States Postal service returned to the Board the envelope containing the June 13, 2017, Memorandum and Order with a "return to sender" label setting forth a different address. The Postal Service returned the envelope with the June 13 decision to the Board, rather than forwarding it to the new address, because Board envelopes bear a "return service requested" endorsement. It is unknown why it took the Postal Service 34

days after the decision was mailed to return the envelope containing the decision to the Board. The Board remailed the Memorandum and Order on July 18, 2017, to Grievant's attorney at the different address. Grievant's attorney received the decision on July 20, 2017, after the 30-day period set by the Vermont Rules of Appellate Procedure to appeal Board decisions to the Vermont Supreme Court.

We consider this motion pursuant to Rules 1 and 4 of the Vermont Rules of Appellate Procedure ("V.R.A.P."). Rule 1 provides that the V.R.A.P "govern the review or enforcement of orders of administrative . . . boards". Rule 4(d)(1) provides that the Board "may extend the time for filing the notice of appeal if: (A) the relief is requested by motion filed no later than 30 days after the expiration of the time prescribed by Rule 4(a); and (B) the party shows excusable neglect or good cause."

Grievant contends that the delay in his receipt of notification of the decision resulted in him being unable to timely file an appeal of the decision, and should be excused as good cause and/or excusable neglect. The State submits that there is neither good cause not excusable neglect.

The Board previously has not had occasion to interpret the "excusable neglect or good cause" provision of V.R.A.P. 4(d)(1), but the Reporter's Notes to V.R.A.P and Vermont Supreme Court decisions provide guidance on interpreting Rule 4(d)(1). The Reporter's Notes make clear that the two grounds of good cause and excusable neglect "reflect different standards. Good cause refers to situations in which there is no fault on the movant's part . . . Excusable neglect assumes fault on the part of the movant."

Federal cases shed more light on the distinction between "good cause" and "excusable neglect". It is appropriate look to federal case law as persuasive authority because V.R.A.P. 4 is

substantially identical to Fed.R.App.P. 4. In re Town of Killington, 2003 VT 87A, ¶ 16, 176 Vt. 60 (2003). The concept of good cause "takes account of a narrow class of cases in which a traditional 'excusable neglect' analysis would be inapposite." Mitpuri v. ACT Mfg., Inc., 212 F.3d 624, 630 (1st Cir. 2000). Bishop v. Corsentino, 371 F.3d 1203, 1207 (2004). Good cause comes into play "in situations where there is no fault – excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant." Fed.R.App.P. 4(a)(5) Advisory Committee's Note (2002 Amendments).

We first consider whether Grievant has shown good cause to extend the time for filing the notice of appeal. Section 12.4, "Method of Service", of Labor Relations Board *Rules of Practice* provides:

> The method of service of all pleadings and other materials shall be in accord with V.R.C.P. 5(b). The signature of the party serving pleadings shall mean that copies have been served on all parties. The Board and all parties shall be notified of any change of address of a party not represented by an attorney who moves while a matter is pending. An attorney or bargaining agent whose address changes shall likewise notify the Board and all parties.

This provision explicitly required Grievant's attorney to notify the Board of the change of address. His failure to do so constituted fault on his part, and thereby precludes a conclusion that good cause exists to extend the time for filing a notice of appeal.

We turn to addressing whether Grievant has demonstrated excusable neglect to warrant extending the appeal period. The U.S. Supreme Court interpreted the meaning of "excusable neglect" in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380 (1993). The Vermont Supreme Court summarized the Pioneer decision, subsequent federal appeals court decisions, and how the standard would be applied in Vermont in the decision In re Town of Killington, supra, ¶ 16, 17:

This Court applies federal case law as persuasive authority to clarify the excusable neglect standard under V.R.A.P. 4 because the rule is substantially identical to Fed.RApp.P. 4. State v. Felix, 153 Vt. 170, 171, 569 A.2d 493, 494 (1989). The United States Supreme Court has described the federal standard for excusable neglect as an "elastic concept" that requires an equitable determination. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 392 (1993). In Pioneer, the Court enunciated factors for evaluating a party's claim of excusable neglect under a number of federal rules including Fed. R. App. P. 4. These factors include: "(1) the danger of prejudice to the [nonmovant], (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for delay, including whether it was in the reasonable control of the movant, and (4) whether the movant acted in good faith." Id. While this standard ostensibly represents a modest liberalization of the "excusable neglect" concept in the federal rules, several federal circuit courts of appeal have recognized that the post-Pioneer threshold remains high. Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 370 (2d Cir. 2003) (collecting cases); Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F.3d 248, 250-51 (2d Cir. 1997) (per curiam), cert. denied, 522 U.S. 1117 (1998) (observing that "the equities will rarely if ever favor a party who fails to follow the clear dictates of a court rule" and holding that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary case, lose under the Pioneer test"). Despite the flexibility of the standard and the existence of a four-factor test, the appropriate focus is on the third factor: the reason for delay, including whether it was within the reasonable control of the movant. Silivanch, 333 F.3d at 367; Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5-6 (1st Cir. 2001) (observing that, of the four Pioneer factors, the excuse given for the late filing "must have the greatest import"). Federal courts emphasize the third factor because, "[i]n the typical case, the first two Pioneer factors will favor the moving party: delay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible." Silivanch, 333 F.3d at 367. Additionally, the absence of good faith in these cases is rarely in issue. Id.

Many federal courts have taken what we think is an appropriately hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is "excusable." United States v. Hooper, 43 F.3d 26, 28-29 (2d Cir. 1994) (per curiam) (affirming denial of Rule 4(b) extension where delay resulted from legal assistant's ignorance of the rules); see also Gibbons v. United States, 317 F.3d 852, 855 (8th Cir. 2003) (affirming denial of extension where solo practitioner failed to timely file because of vacation followed by temporary illness); Graphic Communications, 270 F.3d at 8 (affirming denial of extension because late filing was result of ignorance of the law and "inattention to detail"); Canfield, 127 F.3d at 250 (affirming denial of extension when attorney's late filing was a result of his personal involvement in other business); Jin v. Metropolitan Life Ins. Co., 2003 WL 21436211 (S.D.N.Y. June 20, 2003) (denying extension because neglect occasioned by changes in attorney's office personnel and location was not "excusable"). Notwithstanding the flexibility of the "excusable neglect" concept, its application to cases like the instant one must remain strict lest there be a de facto enlargement of the appeal-filing time to sixty days. As the Second Circuit Court of Appeals explained, "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not

> rigorously enforced-where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of the [time] bar." Silivanch, 333 F.3d at 368.

The Court concluded in Town of Killington that an internal office procedure breakdown in a town counsel's office, resulting in the failure to place the appeal deadline date on the calendar thus causing a late filing, did not warrant an excusable neglect finding. Similarly, the Court concluded in another case that an attorney's vacation and a related breakdown in internal procedures resulting in a late filing was insufficient to warrant a finding of excusable neglect. Bergeron v. Boyle, 2003 VT 89, ¶21,22; 176 Vt. 78 (2003). The Court held along the same lines that excusable neglect did not exist, justifying an appeal of a court decision more than 30 days after the decision was issued, when an attorney was on vacation away from delivered mail, and did not see a court decision until returning from vacation more than 30 days after the decision was issued. Coles v. Coles, 2013 VT 36, ¶10 193 Vt. 605 (2013). The Vermont Supreme Court also has held that the mistaken belief of an attorney for the State that his motion to stay a judgment pending appeal was one of the motions that tolled the running of the thirty-day appeal period was not excusable neglect. In re Lund, 2004 VT 55, ¶5 177 Vt. 465 (2004).

In applying these Vermont Supreme Court precedents establishing a hard line and a strict application of the excusable neglect concept, we conclude that excusable neglect does not exist here. In focusing, as the Court directs, on the factor of the reason for delay, including whether it was in the reasonable control of the movant, the equities do not favor a conclusion of excusable neglect. The reason for delay was in the reasonable control of Grievant's attorney. Although the length of time it took the Postal Service to act affected the ability of Grievant to file an appeal, the delay would not have occurred if Grievant's attorney had followed the Board rule requiring notification to the Board and the other party of an address change. As discussed above in the

Killington decision, the equities will rarely if ever favor a party who fails to follow the clear dictates of a rule. The ignorance of a rule and inattention to detail exhibited here warrants denial of an extension.

The two factors set forth in the Pioneer decision of delay and prejudice favor Grievant since delay is minimal in actual terms, and the prejudice to the State would be negligible. Also, the other factor of absence of good faith is not in issue here. Nonetheless, the focus on the factor of the reason for delay outweighs these other factors and results in the neglect here not being excusable.

Based on the foregoing reasons, it is ordered that Grievant's motion to enlarge the time to file an appeal of the June 13, 2017, Memorandum and Order in this matter is denied.

Dated this 21st day of September 2017, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy_____
Gary F. Karnedy, Chairperson

/s/ Richard W. Park
Richard W. Park

/s/ Edward W. Clark, Jr.
Edward W. Clark, Jr.