DARLENE FAY CRANE,

Grievant,

v. **DOCKET NO. 03-DMV-272D**

DIVISION OF MOTOR VEHICLES,

Respondent.

ORDER DENYING DEFAULT

On August 1, 2003, Grievant Darlene Fay Crane filed a grievance against the Division of Motor Vehicles, Respondent, challenging a three-day suspension. On September 10, 2003, the Grievance Board received Respondent's request for a determination of default, in response to Grievant's Notice of Default, claiming Respondent had defaulted at levels one, two and three.

A level four hearing was held in the Grievance Board's Beckley office on October 3, 2003. Grievant was represented by counsel, J. F. Boomer, Esq., and Respondent was represented by counsel, Janet James, Esq., Assistant Attorney General. This matter became mature for decision October 9, 2003, when the undersigned received a copy of the lower-level record from Respondent. The parties declined to file proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record of the underlying action and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant filed her grievance on Friday, August 1, 2003, by giving it to her immediate supervisor, Donald Penn, Jr.

2. When Mr. Penn received the grievance, he spoke with his supervisor, Steve Crawford, manager of the Lewisburg Regional Office. On Wednesday, August 6, 2003, Mr. Penn and Mr. Crawford met with Grievant for the level one informal conference. Neither Mr. Penn nor Mr. Crawford had initiated the disciplinary action against Grievant, and had no authority to grant the relief sought by

Grievant, which was to have her suspension reduced or eliminated.

3. Mr. Penn participated little in the conference. Grievant was given the opportunity to elucidate on her grievance, and she presented a written statement of her concerns. Mr. Crawford issued the level one response, in the form of a memorandum to his supervisor, with a copy to Grievant, explaining what happened at the conference and iterating that “at level I, no authority is granted to change the initial findings and/or conclusion.” Level three Grievant's Exhibit No. 2.

4. Grievant appealed to level two. The level two grievance evaluator was Zoe Bender, Regional Officer Operations Manager for the Southern Regional Offices. She is Mr. Crawford's immediate supervisor. Grievant was represented at level two by her counsel.

5. Ms. Bender issued a level two decision denying the grievance on its merits on August 19, 2003. The decision makes no mention of a request by Grievant to amend the relief sought.

6. Grievant timely appealed her level two decision, and Respondent received the appeal on Monday, August 25, 2003. A level three hearing was scheduled and held on Friday, September 5, 2003.

7. Monday, September 1, 2003, being a holiday, the level three hearing was held on the eighth day after Respondent received the appeal.

DISCUSSION

The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, 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. Walker v Dep't of Health and Human Resources/ Welch Community Hosp., Docket No. 03-HHR-162D (July 29, 2003); Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Grievant asserts a default occurred at level one because the grievance evaluator required to make a response, Grievant's immediate supervisor, made no response; instead the level one response came from his supervisor. Grievant makes the same failure-to-follow-the-chain-of-command claim as her basis for asserting default at level two. Grievant's level three default claim is based on the fact that the level three hearing was held one day too late. Respondent argues no default occurred at levels one and two, and that the failure to timely schedule a level three hearing was excusable neglect.

"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); Walker, *supra*. At level one of the grievance procedure, the grievance evaluator is the Grievant's immediate supervisor, who is therefore the person required to respond to the grievance at that level. “The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. . . .” W. Va. Code 29-6A-4(a). Unlike levels two and three, there is no language in the level one procedure permitting a “designee” of the supervisor to be a grievance evaluator. Mr. Penn is Grievant's immediate supervisor, and he met with Grievant, along with his own supervisor, Mr. Crawford, for the level one informal conference. There is no allegation the conference or the level one decision were untimely. However, Mr. Penn participated very little in the conference, at which time it was explained to Grievant by Mr. Crawford that neither of them had any authority to grant the relief she was requesting, since neither had any knowledge of the disciplinary action until it was handed down. Mr. Crawford, and not Mr. Penn, wrote the level one response. Obviously, the level one response would likely have been identical had Mr. Penn been the scrivener. Grievant's counsel suggests the grievance could nonetheless have been resolved by Mr. Penn at level one, by providing Grievant with counseling or additional training.

This argument is a good example of the idea that a grievance evaluator need not issue a “yes” or “no” decision, but may work with the grievant to resolve the issue. However, it ignores the fact that Mr. Penn did, in fact, participate in the level one conference, and had been informed he had no authority to act. This assertion also ignores the fact that Grievant did not suggest other means of relief other than that which she requested on her grievance form. (See footnote 1) Grievant suffered no harm from the form of the level one response, and she was afforded due process. Grievant's argument seeks to elevate semantics over substance, entirely ignoring the aim of the grievance process to resolve workplace differences quickly and efficiently. Grievant received a timely level one conference and decision. Grievant has failed to prove Respondent defaulted at level one. The level two default claim on similar grounds is likewise without merit. Grievant was afforded a timely level two conference and decision on the merits of her grievance.

Further, there is no indication in the record, despite Grievant's counsel's assertions to the contrary, that Grievant objected to the level one or level two conferences at the times they were held. “In order to benefit from the 'relief by default' provisions in subsection [W. Va. Code § 29-6A-3(a)],

the grieved employee must raise the default issue as soon as the employee becomes aware of such default." Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Grievant did raise these claims of default before the level three hearing, but certainly not as soon as she became aware of who held the level one and level two conferences.

Grievant has, however, met her burden of proving Respondent defaulted at level three. "The chief administrator or his or her designee shall hold a hearing in accordance with [W. Va. Code § 29-6A-6] within seven days of receiving the appeal [to level three]." W. Va. Code 29-6A-4(c). Grievant timely appealed her level two decision, and Respondent received the appeal on August 25, 2003. The level three hearing was held eight working days (See footnote 2) later, one day outside the time limit.

Respondent asserts that the delay was due to excusable neglect. "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." Woody v. Div. of Rehabilitation Services, Docket No. 02-RS-349D (Dec. 6, 2002). "'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.' [citations omitted]" Woody, *supra.* "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).

Adam Holley, Respondent's General Counsel, testified that Grievant's appeal was received in the Commissioner's office on August 25, but the Commissioner was out of the office that day and his secretary did not forward the appeal to Mr. Holley. (See footnote 3) When he was told on the 26th that the appeal had been received, he assumed it had been received that day, and scheduled the hearing seven days later. Grievant conceded that Mr. Holley acted in good faith, and in fact neither party knew until the day of the level three hearing that the appeal had been received a day earlier than Mr. Holley had assumed. The level three hearing was convened, but was not finished, and has been stayed since Grievant asserted default. There can be no doubt that Respondent, through Mr. Holley, acted in good faithand prosecuted this matter diligently. Respondent has proven its failure to timely hold the level three hearing was due to excusable neglect.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, i.e., 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. Walker v. Dep't of Health and Human Resources/ Welch Community Hosp., Docket No. 03-HHR-162D (July 29, 2003); Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); 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).

2. "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); Walker*, supra.*

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." Woody v. Div. of Rehabilitation Services, Docket No. 02-RS-349D (Dec. 6, 2002); Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sep. 27, 2002).

4. "'Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliancewith 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))." Woody, *supra,* Rosewell, *supra.* "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).

5. “In order to benefit from the 'relief by default' provisions in subsection [W. Va. Code § 29-6A-3(a)], the grieved employee must raise the default issue as soon as the employee becomes aware of such default.” Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).

6. Grievant failed to prove Respondent defaulted at levels one and two, but did sustain her burden of proving default at level three. Respondent showed its failure to timely hold the level three

hearing was a result of excusable neglect.

Accordingly, Grievant's request for relief by default is **DENIED**, and this matter is hereby **REMANDED** to level three for further proceedings at that level. Respondent is ordered to hold a level three hearing within seven working days of receipt of this order, or within such time as is mutually agreed by the parties, in writing. This matter is hereby **DISMISSED** from the docket of the Grievance Board.

Date: October 23, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant's counsel asserted Grievant did attempt to amend the relief sought at level two, and objected that no mention of this was made in the level two decision. However, no evidence was presented that Grievant did so.

Footnote: 2

..."'Days' means working days exclusive of Saturday, Sunday or official holidays." W. Va. Code 29-6A-2(c).

Footnote: 3

Grievant objected to Mr. Holley's testimony on the grounds that he was an attorney representing Respondent in the action, and therefore was barred from testifying under W. Va. R. P. C. 3.7. Grievant's objection was denied. This rule prohibits a lawyer from representing a party at a trial at which the lawyer may be called as a witness, but does not prevent a lawyer from being a witness at an administrative hearing in which he appears not as counsel, but simply as an employee of the respondent. Mr. Holley did not act as an advocate at the default hearing, his prior service in the underlying matter notwithstanding. Further, that rule permits the lawyer to have a dual role when the testimony is undisputed, as it was in this case.