SHARON HESS,

Grievant,

v. **DOCKET NO. 03-WCC-328D**

WORKERS' COMPENSATION COMMISSION,

Respondent.

ORDER DENYING DEFAULT

Grievant Sharon Hess filed a grievance against her employer, the Workers' Compensation Commission (WCC or Respondent) on October 9, 2002. On October 23, 2003, Grievant filed her notice with the Grievance Board seeking a finding that the Respondent had defaulted at level three by failing to hold a hearing at that level.

A level four hearing on the default issue was held November 19, 2003. Grievant appeared *pro se*, and Respondent was represented by David Fryson, Esq. This matter became mature for decision at the close of the hearing.

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

FINDINGS OF FACT

1. Grievant, an Employment Programs Specialist, filed a grievance at level one on October 9, 2002, alleging a hostile work environment and that she was working out of her classification.

2. Grievant waived level one, but her immediate supervisor, Sandra L. Teets, issued a level one decision denying the grievance on October 16, 2002. 3. Grievant appealed to level two on October 24, 2002. Grievant met with Charles F. Donnelly, Chairman of the Workers' Compensation Appeal Board, on or about November 12, 2002, for the level two conference. At that time, two of the issues Grievant raised were settled, and Grievant and Mr. Donnelly agreed to place the grievance in abeyance to see if the remaining issue could be worked out.

4. Grievant and Mr. Donnelly met again, on or about September 4, 2003, at which time the grievance was reactivated. Mr. Donnelly issued a level two decision denying the grievance on September 15, 2003.

5. Grievant appealed to level three by mailing a copy of the grievance to Acting Commissioner Gregory Burton and to the Division of Personnel, on or about September 17, 2003.

6. On October 1, 2003, the WCC and the Bureau of Employment Programs (BEP), of which it had been a part, were separated into two distinct agencies. This involved the creation of a separate human resources department for WCC with a new director, and a division of appropriate files between the two human resources offices.

7. Personnel files and grievance files were kept separate from each other. Grievant's personnel file was transferred over to the new WCC human resources office, but in the confusion, her grievance file was not. Grievant's case was not the only one in which this confusion occurred.

8. Grievant received no response to her level three appeal.

DISCUSSION

"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, excusableneglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a). 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. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

Although Respondent argues it has no proof Grievant actually appealed to level three, it admits it only has her personnel file, in which grievance documents are not usually kept. There is no dispute Grievant has an active grievance, but Respondent does not have that file, so the missing appeal is not reliable evidence that Grievant did not, in fact appeal. Grievant testified she mailed the appeal to the persons identified in her level two decision, and no evidence refutes that. Respondent admits a level three hearing has not been held, or even scheduled, and the time limit required for doing so is well past. Grievant has met her burden of proving a default occurred.

Respondent's contention that Grievant's appeal was lost in the shuffle when the WCC split from

the BEP amounts to an assertion that its failure to timely hold a level three hearing was the result of 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." Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sept. 27, 2002). "Excusable neglect may be found where events arise which are outsidethe defaulting party's control, and contribute to the failure to act within the specific time limits." Woody, *supra.*

Respondent's situation seems to meet this definition. Two major state agencies were separated, and many files had to be separated or duplicated, and transferred from one to the other. An entirely new human resources office was created, with some new personnel. It is entirely reasonable and understandable that the transition would not be without flaws. There has been no showing of bad faith on the part of Respondent. Given the year's self-imposed delay Grievant has already waited in this matter, it is evident the few extra days of delay caused by Respondent's confusion was not prejudicial. Respondent has met its burden of proving excusable neglect, and the same statute that creates the default right, also provides this as an exception.

The following conclusions of law support this decision:

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). 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. 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. Grievant proved a default did occur at level three. 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 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))." 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); Woody, *supra.*

5. The default at level three was the result of excusable neglect.

For the foregoing reasons, this request for a determination of default is **DENIED**. This matter is hereby **REMANDED** to level three for further proceedings at that level. Respondent is **ORDERED** to hold a level three hearing within five days of receipt of this order, or at such time as the parties may find mutually acceptable. This matter is **DISMISSED** from the docket of the Grievance Board.

Date: November 25, 2003 _____

M. Paul Marteney

Administrative Law Judge