ANTHONY GRBAC,

Grievant,

v. **DOCKET NO. 01-DEP-452D**

DEPARTMENT OF ENVIRONMENTAL

PROTECTION, OFFICE OF EXPLOSIVES

AND BLASTING,

Respondent

ORDER DENYING DEFAULT

Grievant Anthony Grbac filed a grievance at Level I on July 6, 2001. On July 10, 2001 Grievant's immediate supervisor held a Level I informal conference with Grievant and provided a written decision denying the grievance the same day. Later that day, Grievant submitted his Level II appeal to the Director of his division. When no Level II conference had been held or scheduled by July 20, 2001, Grievant submitted a notice of default to his division Director. Respondent thereafter requested a hearing on the default, which was held on August 29, 2001 at the Charleston offices of the Grievance Board. Grievant appeared *pro se* and Respondent appeared represented by Rex Burford, Esq., Sr. Assistant Attorney General. At this hearing the only question considered was whether a default did, in fact, occur.

The following findings are based on a preponderance of the evidence adduced at the hearing:

FINDINGS OF FACT

1. Grievant filed a grievance with his Supervisor, Mike Mace, Chief of the Office of Explosives and Blasting, on July 6, 2001.

2. A Level I conference was held on July 10, 2001 and a Level I decision denying the Grievance was issued that same day. The decision stated in part, “If you do not agree with this decision, you have the right to appeal it to the next level of the grievance procedure. Any appeal must be made within five working days and must be forwarded to Matt Crum, Director of the Division of Mining and Reclamation here in the Nitro Headquarters.”

3. On or about Sunday, July 8, severe weather caused widespread flooding damage in southern West Virginia. The flooding endangered many surface mine impoundments throughout the

area.

4. The undersigned takes judicial notice that on July 8, 2001, Governor Bob Wise declared a state of emergency in eight southern counties as a result of the flooding.

5. On or about Monday, July 9 Department of Environmental Protection Secretary Michael Callaghan received a directive from the Governor's office to inspect the affected impoundments and to do everything necessary to ensure their integrity and safety. Mr. Callaghan required Mr. Crum's presence in the area to work with inspectors and other personnel to evaluate the danger to the surface mine impoundments.

6. On July 10, Grievant hand-delivered his request for a Level II conference to the office of Mr. Crum, and handed it Mr. Crum's secretary, Kathy Mullins. 7. Ms. Mullins placed the request in Mr. Crum's “in-box,” but did not call it to Mr. Crum's attention. She had not handled a grievance before and did not know what else to do with it.

8. Mr. Crum did not work from his office for several days during the flooding, and only made very brief appearances there to attend meetings. He did not check his in- box during this time.

9. The undersigned takes judicial notice that on July 13, 2001, Governor Wise issued a directive that all state agencies be allowed to suspend personnel rules and policies to cope with the flood emergency. Mr. Crum received notice of this directive via e-mail from Ed Staats in the Governor's office.

10. On or about July 17, 2001, five working days after the Level II appeal was submitted to Mr. Crum, Grievant contacted Ms. Mullins to inquire as to the status. She checked and found the request still in Mr. Crum's in-box, and informed Grievant that no action had been taken on the request. At the direction of her supervisor, Mike Mace (also Grievant's supervisor), who said it was too late to act on the request, she placed it in Grievant's personnel file. She did not inform Mr. Crum about the request.

11. On July 20, 2001 Grievant submitted to Mr. Crum a written notice of default that, stating that no Level II conference had been held nor scheduled within five working days after his request.

12. When Mr. Crum received the notice, it was the first time he had heard anything at all about the grievance. He immediately contacted Grievant and explained thesituation he had been in, and requested that Grievant participate in a Level II conference regardless of the default, to which Grievant agreed.

13. Grievant and Mr. Crum met in a Level II conference on August 8, 2001. (See footnote 1)

DISCUSSION

There is no question that Respondent failed to respond to Grievant's request for a Level II conference within the time required by the grievance procedure. West Virginia Code § 29-6A-3(a)(2) provides that "[t]he 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." There is no dispute that Mr. Crum was the grievance evaluator required to make the Level II response. West Virginia Code § 29-6A-4(b) required Mr. Crum to hold the level II conference within five working days from July 10, and he failed to do so.

Respondent, who bears the burden of proof that the default should not be awarded, argued that the failure was a result of excusable neglect or unavoidable cause. Patteson v. Dep't of Health and Human Resources/Division of Personnel, Docket No. 98-HHR-326 (Oct. 6, 1998). Mr. Crum credibly testified that as a result of the flood emergency, he was unable to attend to other administrative matters and did not review the contents of his in- box. He further testified that even had he seen Grievant's request for a Level II conference, he would have been unable to meet with Grievant within the required time as a result of demands related to the flood emergency. Accordingly, the state of emergency caused bythe flooding was the cause of the delay, and Respondent's neglect of the Level II appeal was excusable. Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993). Although a default occurred, the reason for the default is within the statutory exceptions to the required time limits. West Virginia Code § 29-6A-3(a)(2).

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. 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. West Virginia Code § 29-6A-4(b).

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. West Virginia Code § 29-6A-3(a)(2).

3. A default occurred as a result of Respondent's failure to hold a Level II conference within five days of the Grievant's appeal of the Level I decision.

4. The employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. Patteson v. Dep't of Health and Human Resources/Division of Personnel, DocketNo. 98-HHR-326 (Oct. 6, 1998). *See*, Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).

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 specified time limits. *See* Monterre, Inc. v. Occoquan Land Dev. Corp., 189 W. Va. 183, 429 S.E.2d 70 (1993).

6. The flooding in southern West Virginia was an event outside Respondent's control and directly contributed to its failure to act within five days of Grievant's Level II appeal.

7. Respondent proved by a preponderance of the evidence that its failure to respond to the request for a Level II within the required time was excusable neglect.

Accordingly, Grievants' request for a finding of default at Level II under W. Va. Code § 29-6A-3(a)(2) is **DENIED**. This grievance is dismissed from the docket of this Grievance Board and remanded for a decision at Level II.

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M. Paul Marteney

Administrative Law Judge

Dated: September 5, 2001

Footnote: 1 *There was no testimony on whether a Level II decision was issued.*