CYNTHIA WOODY,
Grievant,

v. **DOCKET NO. 02-RS-349D**

DIVISION OF REHABILITATION SERVICES,
Respondent.

ORDER DENYING DEFAULT

Cynthia L. Woody filed three grievances with her immediate supervisor on or about September 16 and 17, 2002. A level one conference was held for all three grievances on September 20, 2002, and a level one decision covering all three was issued on September 24, 2002. On October 23, 2002, Grievant provided written notice to Respondent that she intended as "written notification of the agency's default in responding to [her] request for a Level 2 Hearing on the three grievances within the time limits required."[1] Respondent then requested a level four determination of default, and further requested that if it were found to be in default, a determination be made as to whether the relief sought was contrary to law or clearly wrong.

A level four hearing on the default claim was held in the Grievance Board's Charleston office on November 25, 2002.[2] The parties declined to submit proposed

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[1]Grievant's Exhibit No. 5.

[2]Grievant is represented by her husband, David Woody and Respondent is represented by Warren Morford, Jr., Training and Employee Relations Coordinator.

findings of fact and conclusions of law, and the matter became mature for decision at the close of the hearing.

I find the following facts have been proven by a preponderance of the evidence contained in the record:

FINDINGS OF FACT

1. Grievant filed three grievances at level one, participated in a level one conference and on or about September 24, 2002, received a level one decision that granted part of her requested relief and denied part of her requested relief.

2. On September 25, 2002, Grievant met with Kevin Maynus, one of her representatives, who helped her prepare an appeal to level two. Mr. Maynus that same day hand-carried the forms and papers provided by Grievant to the office of the level two Grievance Evaluator, Charles Lovely, Senior Manager of Field Programs.

3. Mr. Maynus is blind and was unable to see what the papers he carried actually were. He did not count the papers, but estimated there were eight to 12 pages.

4. Mr. Lovely was not in his office that day, so Mr. Maynus delivered the papers to his secretary, Mary Brady, and told her they were the level two appeal of Grievant's grievances.

5. Mary Brady received the papers from Mr. Maynus at about 3:30 p.m., and although she did not look at more than the top page, recognized them as related to a grievance. She had been alerted by Mr. Lovely that he was expecting something important, and believed the appeal was what he was waiting for. She placed the papers in Mr. Lovely's "immediate action" folder on his desk, and wrote out a receipt for the papers to give to Mr. Maynus. She signed and dated the receipt, which stated, "Received Level I Grievance from above individual."

6. Mr. Lovely knew about the level one decision and expected to receive an appeal. On September 26, 2002, he was back in his office, and did not see the appeal in his folder.

7. On the morning of September 26, Mr. Lovely sent an e-mail to Michael Meadows, Jim Quarles and Ms. Brady stating: "If Ms. Woody files for a level 2 I will be on annual leave all next week. You will have to handle." Mr. Meadows is the back-up level two grievance evaluator for Mr. Lovely.

8. Ms. Brady did not see this e-mail, so she did not realize Mr. Lovely had not seen the appeal that morning. Since she knew she had placed it on his desk, she assumed he had seen it and did not discuss it with him or point it out to him.

9. On October 23, Grievant sent her notice of default to Janice A. Holland, Interim Director, who contacted Mr. Lovely. After a thorough search of his office, Ms. Brady's office and Mr. Meadow's office, the grievance papers were not located and it was determined they were lost.

10. Mr. Meadows asked Ms. Brady to look at the receipt provided by Grievant, because he suspected her signature had been forged. Ms. Brady confirmed both her signature and that the grievance forms had been delivered to her and by her placed on Mr. Lovely's desk as claimed by Grievant.

11. The original appeal papers delivered by Mr. Maynus have never been located.

DISCUSSION

A grievant seeking to establish that a default occurred in the grievance proceedings bears the burden of establishing the default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

Grievant asserts that Respondent did not timely respond to her level two appeal of three grievances. Her default claim is based on W. Va. Code § 29-6A-3(a)(2), which provides in part, "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." Respondent claims that its failure to schedule a level two hearing within the required time limits was the result of excusable neglect or unavoidable cause. "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." Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sep. 27, 2002).

The time limit for response to a level two appeal is contained in W. Va. Code § 29-6A-4(b), which states:

> 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 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.

Respondent's level two Grievance Evaluator does not dispute that his office received grievance-related papers from Grievant on September 25, 2002, or that he was expecting to receive an appeal to level two from her. Respondent does not dispute that no level two hearing was scheduled within five days of receipt of those papers. However, it contends that the disappearance of those papers from Mr. Lovely's office before he became personally aware of them was excusable neglect or unavoidable cause. "'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).

Grievant suggested that the unexplained disappearance of her appeal demonstrates Respondent's bad faith effort to stonewall the resolution of her case, and to frustrate and intimidate her, casting further doubt on the validity of a grievance process which she claims most employees see as a farce. Respondent objected to the characterization of its handling of this matter as being in bad faith, pointing out that a level one conference was promptly held, and that Grievant was awarded much of the relief she sought. Respondent also pointed out that Interim Director Janice Holland promptly responded to Grievant default notice, and indicated in her letter to Grievant that, if she would re-deliver her request for a level two hearing, one would "be promptly and timely scheduled and had."[3]

Although Grievant provided no discrete evidence that the papers Mr. Maynus delivered actually were the level two appeal of her grievances, neither is there any reason to doubt they were. Ms. Brady recognized that the top page was a grievance form, and Mr. Lovely did not report finding grievance papers on his desk unrelated to this grievance,

[3]Grievant's Exhibit No. 6.

therefore it cannot be persuasively argued the Mr. Maynus did deliver grievance papers, but they were not Grievant's appeal.

Respondent credibly demonstrated it made a good-faith effort to respond to Grievant's appeal, despite the unexplained disappearance from Mr. Lovely's desk. Respondent was expecting the appeal and took steps to ensure a timely response to it despite a planned absence by the normal level two Grievance Evaluator, something it would not have done if it had planned to delay the appeal. Grievant's argument that Respondent somehow hoped to gain an advantage by causing a delay is defeated by the very default provision giving rise to this hearing, which was put in place to prevent such machinations.

Respondent's initial suspicion that the receipt for the level two appeal had been forged also gives weight to its claim that it wanted to process the appeal as soon as possible. While it does perhaps indicate Respondent harbored some mistrust of Grievant, had Respondent been intentionally obstructing the process, it would have known whether the receipt was legitimate. Ms. Brady's forthright verification of the receipt is further evidence that she, at least, was acting in good faith and had nothing to hide.

Unfortunately, the papers disappeared as sometimes happens in an office setting, but their disappearance, without anything more, cannot be attributed to direct, obstructionist action of Respondent. Mr. Lovely was unable to respond to an appeal he had no actual or constructive knowledge of due to matters outside his control. As such, the disappearance is simply typical excusable neglect.

The following conclusions of law supplement this discussion:

CONCLUSIONS OF LAW

1. A grievant seeking to establish that a default occurred in the grievance proceedings bears the burden of establishing the default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

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)(2).

3. Grievant established that Respondent failed to respond to her level two grievance appeal within the required time limits.

4. "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." Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources, Docket No. 01-DEP-506D (Sep. 27, 2002).

5. "'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).

6. Respondent met its burden of proving its failure to respond to Grievant's level two appeal was the result of excusable neglect.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a) is **DENIED**. This matter is hereby **REMANDED** to Level II for processing at that level, and it is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

Date: December 6, 2002

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M. Paul Marteney
Administrative Law Judge