TERRY C. WILSON,

Grievant,

v v.

Docket No. 99-BOT-115D

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E F A U L T O R D E R

Grievant, Terry C. Wilson, was employed by the West Virginia Board of Trustees (Respondent) as a tenured, full professor in the College of Business and Economics at West Virginia University (WVU) until his dismissal on May 15, 1997. Grievant proceeded to file a grievance under W. Va. Code §§18-29-1, et seq. A level one decision denying the grievance was issued on July 24, 1997, and Grievant appealed to level two. After a delay in scheduling, an evidentiary hearing was conducted on October 15 and 16, and November 12 and 13, 1998. At the conclusion of presentation of evidence on November 13, 1998, the level two transcript reflects the following: (See footnote 1)

Mr. Reed: That's - - - thank you. Is there, ah, any interest in, either side, in making any sort of a, ah, closing oral argument noting, if you will that, ah, you have the opportunity to argue it in writing?

Mr. Eisner: I think, ah - - - I think based on off the record discussions by an among the three (3) of us, namely Bill Hutchens, yourself, and myself, that given the fact that you're going to be reading the transcript and, ah, there will have to be a transcript whenever that comes, ah, I think Bill and I agreed on that we can do a quote unquote “a fast track” briefing schedule. Ah, maybe that's something we can agree on now, after receipt of the - - - of the transcript and the brief - - - ah,the exhibits as to when we - - - when we think we could have the brief to you.

Mr. Reed: Okay. Let's go off the record for a little bit.

OFF THE RECORD

BACK ON THE RECORD

Mr. Reed: We've had a discussion off the record regarding briefing schedules and calendar schedules regarding this grievance. It has been recognized and agreed to by the parties on each side, that, ah, we will wait until the transcript is available for my review. After reviewing both transcript and the file in this instance, I'll determine whether there are additional questions or additional witnesses as Hearing Examiner I feel I need to call, ah, in order to conclude this hearing. If I, ah, find that there's no need for it, I will then give notice to each side that the hearing is closed and I will provide each side with a schedule for filing briefs and proposed findings of facts and conclusions of law.

It's my understanding from the discussions that each side wishes to file findings of facts and conclusions of law or proposed findings of fact and conclusions of law, ah, with accompanying legal memoranda. And I have encouraged each side to do that. Ah, there may be discussions and agreement that will take place between the parties as to working out a schedule that suits each side and that will be fine with me and if not, I'll set - - - I'll set a schedule. I'll notify the parties once I've been able to get through the - - - through the record.

We've had some discussion about recognizing that this grievance, ah, will in all likelihood extend into the following semester. And I've also indicated that should I rule in favor of Terry Wilson, as a part of making the grievant whole in that decision, that we would include the timing of the spring semester so that the grievant would not be harmed by, ah, the time that it takes for us to get through this complicated matter. So for - - - for now in terms of each of the parties in this matter for purpose of - - - of providing witnesses and evidence, this matter is closed. Thank you.

No further action was taken by either party until Mr. Eisner contacted ColleenLankford, Director of Respondent's Department of Human Resources, by letter dated December 11, 1998. At this time, Mr. Eisner noted that “[a]lthough you promised to provide copies of the transcripts of the hearing within fifteen (15) days of the conclusion of each hearing date, Dr. Wilson has not yet been provided such transcripts. Not only does WVU's failure to produce the transcripts in a timely fashion violate your own fifteen-day rule, it violates Section 18-29-6 of Chapter 18 of the West Virginia Code, which requires that transcripts be provided 'promptly' to the grievant.” He noted that it had been 56 days since the first two days of hearing and 28 days since the end of the hearing. Mr. Eisner reminded Ms.

Lankford that by statute a level two decision is to be issued within five (5) days of the hearing, and that WVU was well beyond that time frame. He concluded by requesting that she provide the transcripts immediately.

Again, there was no activity until February 17, 1999, when Mr. Eisner contacted Mr. Reed by telephone. Both parties agree that during the course of the conversation, Mr. Eisner inquired as to the status of Mr. Reed's review of the record, and that Mr. Reed advised that it was not yet completed, but that he did have questions for the Grievant. Mr. Eisner responded that Grievant wished to continued to exercise his statutory right not to testify. Mr. Reed then represented that he intended to complete his review within a reasonable period of time, and to conclude the hearing before the end of the semester.

In a statement attached to the level two decision, Mr. Reed provided his account of this conversation and stated that his comment that he would conclude the hearing before the end of the semester, noting that as a practical matter Grievant could not be returned to the classroom until the next semester in the event he should be reinstated, did not elicitany objection from Mr. Eisner. (See footnote 2) Mr. Reed opined the discussion was merely a status inquiry and that Mr. Eisner did not make any sort of motion, argument, or formal request.

Mr. Eisner's recollection of the conversation is also that he inquired as to the status of the matter, but differs in that he claims to have advised Mr. Reed that Grievant believed Respondent failed to issue a decision within the statutory timelines, and was considering making a declaration of default.

Under cover letter dated March 17, 1999, Mr. Eisner filed a Notice of Default with the Grievance Board, noting that more than four months had elapsed since the parties concluded their testimony and evidence, and that Mr. Reed had neither advised the parties whether the hearing was closed, or that additional questions or witnesses would be necessary, nor had he issued a decision. He suggested that more than four months was an unreasonable period of time to keep the record open, and asserted that Grievant had been severely prejudiced. Citing W. Va. Code §18-29-3(a), Mr. Eisner requested that Grievant be reinstated, with backpay, and no loss of seniority or benefits. (See footnote 3) By memorandum dated March 18, 1999, Mr. Reed advised Mr. Eisner and Mr. Hutchins that he had completed his review of the record, and because Grievant declined to testify, the hearing was closed for the purpose of taking additional testimony. A briefing schedule was designated, with responses due by April 13. Mr. Reed noted that “[d]uring my discussions with the grievant's

representative in February, it was noted that this hearing would be concluded by the end of the current semester. We noted the possible difficulty associated with the grievant's lack of a teaching assignment should he be returned to work during the middle of the academic semester. I believe this schedule matches our off the record discussions regarding the timing of the conclusion of this matter . . . .” Mr. Reed advised that he would consider the hearing concluded as of the end of the day on April 13, and that a written decision would be issued within five (5) working days. A level two decision was subsequently issued on April 19, 1999.

Upon receipt of Mr. Reed's letter, a Supplemental Affidavit was filed by Mr. Eisner on March 23, 1999, in support of the Notice of Default. In this document, Mr. Eisner characterized Mr. Reed's correspondence as “an obvious and desperate attempt to negate Grievant's Notice of Default.” He argues that Mr. Reed offered no explanation for his failure to render a decision within the statutory time limits, and asserts that he misrepresented the February 17, 1999, conversation by implying that Grievant had agreed to conclude the matter by the end of the current semester. On the contrary, Mr. Eisner reiterated that he had advised Mr. Reed that Grievant was considering filing a default claim at that time.

A conference call was conducted with the undersigned, Mr. Eisner, Mr. Hutchins,and Mary Roberta Brandt, Associate Counsel for WVU, on March 25, 1999, at which time the parties agreed that in lieu of a default hearing, a decision could be rendered based upon written submissions. Respondent subsequently filed a Response to the Notice on April 16, 1999 (errata to the original filed on April 9, 1999), and Grievant filed a Reply on April 19, 1999.

In response to the Notice of Default, Respondent sets forth two primary arguments; that no default occurred, and defaults are generally viewed disfavorably by the courts. (See footnote 4) Citing the level two transcript included herein, Respondent asserts that neither party objected to the Grievance Evaluator leaving the record open at the conclusion of the hearing, and that Mr. Eisner did not, at any time, repudiate that agreement. Even though Mr. Eisner may have advised Mr. Reed during the February 17, 1999, telephone call that he was considering declaring a default, Respondent notes that no claim was made until March 17, 1999. Respondent argues that the discussion at the conclusion of the level two hearing established an implied extension of the timelines under which the level two decision would be produced.

Respondent also argues that default judgments are not favored by the law, and cases should

generally be decided on the merits. Finally, Respondent notes that in cases involving the issue of whether a grievance has been timely filed or appealed, equitable principles of tolling, waiver, and estoppel have been applied to create exceptions not specifically set forth in the statute. In his reply, Grievant argues that Mr. Reed did not comply with the statutory guidelines, and has made no claim that the delay in issuing a level two decision was the direct result of sickness or illness, therefore, he shall prevail by default. While Grievant acknowledges that he agreed to allow Mr. Reed time to review the transcripts before closing the record, Grievant argues that he did not agree to waive all time limits, and it had, in fact, been his position that the matter should be resolved as quickly as possible. Certainly, Grievant claims, he never contemplated a review would take over four months to complete, and he never expressly or implicitly agreed to such a time table. He concludes that an agreement to extend the closing of the record for a reasonable period of time does not constitute a waiver. Grievant claims that general default principles applied in civil actions are not applicable in light of the provisions of W. Va. Code §18-29-3(a), and that any equitable principles must be applied in his favor since it was Respondent which failed to comply with the time limits.

Discussion

The issue of default in a grievance filed by an education employee is addressed in W. Va. Code §18-29-3(a), which provides in pertinent part, "[i]f 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 or illness, the grievant shall prevail by default."

W. Va. Code §18-29-4(b) provides that "[w]ithin five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing inaccordance with section six [§18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. . . ."

Clearly, a written decision was not issued within five days of the conclusion of the hearing, and there is no assertion that the delay was directly due to illness or sickness. However, the record establishes that the hearing evaluator requested an undefined period of time to review the transcript prior to rendering a decision, and that Grievant did not object to the request. Suspension of the timelines is permitted by W. Va. Code §18-29-3(a) which states "[that the specified time limits may be

extended by mutual written agreement. . . .” Although the agreement in this case was verbal, documentation of the fact in the level two transcript establishes substantial compliance with this provision. Grievant does not deny that he agreed to an extension of the timelines, he simply asserts that he intended for it to be a reasonable delay, and that more than four months was an unreasonable period of time to review the record.

Unfortunately, with no dates certain specified for the delay, whether the period of time was reasonable is a subjective determination. The record indicates, by Mr. Eisner's letter to Ms. Lankford, and in the addendum to the level two decision, that there was some delay in production of the record, which Mr. Reed represents to be over three thousand pages. Certainly, the closing of the record and scheduling of a briefing period the day following Grievant's notice of default, creates an impression unfavorable to Respondent. However, when considering the amount of time taken to produce the transcript, and the length of the record, the four month delay may not be unreasonable.

In consideration of all the foregoing, it is determined that because Grievant agreedto extend the time limits within which a level two decision was to be issued to allow the hearing evaluator an opportunity to review the record, the length of the extension was undefined, there was some delay in production of the transcript, and the record was unusually voluminous, a finding of default cannot be made in this case.

Accordingly, Grievant's request for a determination of default under W. Va. Code §18-29-3(a) is **DENIED.** This matter will remain on the Grievance Board docket and proceed to a level four hearing on the merits. The parties are directed to confer with each other and inform this office by May 21, 1999, of at least three dates upon which they are available for hearing. The Grievance Board does not consider this Order to be a final order or decision which is appealable to circuit court under the provisions of W. Va. Code §18- 29-7.

DATE: May 13, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Jon A. Reed, General Counsel at WVU, served as the level two hearing evaluator. Eugene G. Eisner, Esq. represented Grievant, and William Hilary Hutchins, III, Associate Counsel at WVU, represented Respondent.

Footnote: 2

Mr. Reed issued a level two decision on April 19, 1999, denying Grievant's request for reinstatement, but granting backpay for the 1997-98 academic year, and the 1998-99 academic year up to the date of the decision. This award was based upon a finding that Grievant had been denied adequate pre-termination due process.

Footnote: 3

Effective July 1, 1998, the West Virginia Legislature amended W. Va. Code §18-29- 5 (1998) to state, "[t]he Board shall administer the grievance procedure . . . as provided for in section four of this article." Based upon the provision the Grievance Board has jurisdiction to hear a grievant's claim seeking relief by default, based upon the employer's alleged procedural violation. Previously, the Board had held that it was without authority to enforce a default in the absence of a request by the employer for a hearing regarding the remedy. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

Footnote: 4

Respondent's Response was filed by Bruce Ray Walker, General Counsel for the State College and University Systems.