DANIEL E. DELLA-GIUSTINA,

Grievant,

v. **Docket No. 99-BOT-272D**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

ORDER DENYING DEFAULT

On July 13, 1999, Daniel E. Della-Giustina, Grievant, submitted an appeal to level four of the grievance procedure, alleging that West Virginia University (Respondent) had failed to issue a decision following the informal conference within the time lines set forth in W. Va. Code § 18-29-4. He requests that he be granted relief by default pursuant to the provisions of W. Va. Code §18-29-3(a).

On September 15,1999, a hearing was conducted before the undersigned Administrative Law Judge in the Grievance Board's office in Morgantown, West Virginia. Grievant was represented Thomas P. Meloy, a colleague, and Respondent was represented by Bruce R. Walker, General Counsel for the Board of Trustees. The parties presented oral arguments, waiving written arguments, and this matter became mature for decision at the conclusion of the hearing.

The following findings of fact pertinent to resolution of the default issue have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

Findings of Fact

1. Grievant is employed by the Board of Trustees as a Professor in the Department of Industrial and Management Systems Engineering of the College of Engineering and Mineral Resources at West Virginia University.

2 On May 4, 1999, Grievant learned that he would receive no merit pay increase for the 1998-99 academic year.

3. On May 5, 1999, Grievant discussed the matter with Dr. Ralph Plummer, Chair of the Industrial and Management Program. Grievant followed up with a hand- delivered letter to Dr. Plummer dated May 6, 1999, in which he stated, “[o]n May 5, 1999 we had a meeting in your office. I stated to you that I am filing a grievance on you based on my merit pay raise. I believe the protocol is for you to schedule an informal meeting with me to discuss the grievance. This is my confirmation.”

4. On May 11, 1999, Dr. Plummer conducted a meeting with Grievant and Dean Cogley to discuss Grievant's complaint relating to merit pay.

5. By memorandum dated June 11, 1999, Grievant advised Dr. Plummer in pertinent part, “[i]n accordance with Grievance Procedure 18-29 you have failed to notify me of your decision relative to my grievance. You had ten (10) working days to comply with the grievance procedure. As a result, I am submitting a Level I grievance.”

6. Dr. Plummer responded to Grievant by memorandum dated June 16, 1999, as follows: This is in response to your memorandum dated and received June 11, 1999. Relative to your allegation of default, there was no notice of grievance previously made by you. During a meeting with Dean Cogley, you, and I on May 11, 1999, regarding the issues impacting merit pay authorizations, you indicated you were 'thinking' of filing a grievance. Subsequently you indicated you 'probably' would file a grievance, however, notice of such was not given by you to me. Since our original discussions on this matter, more than fifteen working days have passed, and therefore it would now be untimely to pursue a grievance.

If you have any questions regarding this matter, please contact me. If you have questions regarding the grievance process, please contact Colleen Lankford in Human Resources at 293- 5700 ext. 2284, or, C.B. Wilson in Academic Affairs & Research at 293-2120.

7. Grievant responded in a letter dated June 17, 1999:

Your letter of June 16, (enclosed), does not reflect reality. On May 6, (enclosed) I wrote to you stating I was initiating a fast track grievance because I did not receive a deserved merit raise.

Subsequently, I met with you and the Dean and on May 11 (enclosed) I filed in writing said grievance. You have been nonresponsive to my written grievance of May 11. Thus you, the Dean, and the University have forfeited said grievance. (See footnote 1)

* * * Furthermore, while you are on salary, I am not. Thus, your working days are not mine. Finally, I have been on extended travel and thus out of town.

Please arrange to have my merit increase paid immediately!

I have enclosed letters and [the] rating table, to assist you in understanding my case, why I think you have not acted fairly and why I think a reasonable person would agree that you have forfeited my case.

8. On June 23, 1999, Dr. Plummer issued a response, advising Grievant in pertinent part:
As previously noted in my memo dated June 16, 1999, I had not received notice of your grievance. Your memo dated June 11, 1999, was the first formal indication that I had received from you regarding filing a grievance, and as I indicated, it was denied as being untimely.

Today, I received from Human Resources a copy of your memo dated May 6, 1999, addressed to me, filing a grievance and in which you requested that I schedule an informal conference.

As it appears that you may have attempted to file a grievance on May 6, I am willing to waive the deadline for filing a grievance and consider you memorandum dated June 11, 1999, as formal notice that you are filing a grievance and, as such, have scheduled an informal conference for June 24, 1999 at 4:00 p.m. which is within the 10 working days as provided under West Virginia Code 18-29-4(a)(1).

Or you may consider this as your level 1 response, which is a denial, and in accordance with West Virginia Code 18-29-4(b) submit a Level II appeal, in writing, to President David C. Hardesty, Jr., Office of the President, 102A Stewart Hall, Post Office Box 6201, within five working days of receipt of this memo.

9. On June 24, 1999, Dr. Plummer again met with Grievant and his representative to discuss the merits of the grievance.

10. By memorandum dated June 30, 1999, Dr. Plummer advised Grievant that his position regarding merit pay had not changed.

11. Grievant did not appeal to level two, but filed this complaint at level four on July 13, 1999.

Discussion

The default provision applicable to education personnel grievances is contained in W. Va. Code §18-29-3(a), which states in pertinent part:

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 or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

W. Va. Code §18-29-5 (1998) provides that "[t]he Board shall administer the grievance procedure . . . as provided for in section four of this article." Based upon this provision, the Grievance Board has jurisdiction to hear a grievant's claim seeking relief by default, based upon the employer's alleged procedural violation, i.e., failure to respond to the grievance within the time limits contained in W. Va. Code § 18-29-4.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dept. of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). If a default has occurred, then the grievant wins, and Respondent may request a ruling at level four regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 18-29-4(a) states that:

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

(3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

At the level four hearing, Dr. Plummer testified that he had advised Grievant in both the May and June conferences that he would not change his mind regarding the merit increases. Dr. Plummer stated that throughout this period of time he was under the impression that Grievant might file a grievance. Linda McDonald, Human Relations Assistant, testified that as part of her job duties she provides counsel and assists employees with the grievance procedure. Ms. McDonald confirmed that her department never received a grievance form from Grievant.

After reciting the chronology of events, Grievant testified that he did not complete a grievance form until July 12, 1999, but that he had previously been under the impression that the Chair was to provide him with the necessary forms and directions on how to file a grievance. Grievant further indicated that he may have been confused, at least initially, about which grievance procedure he was going to follow. (See footnote 2)

It appears to the undersigned that both parties were unfamiliar with the grievance procedure and its requirements. Grievant's own memorandum establishes that he discussed his complaint with Dr. Plummer on May 5, 1999. Grievant asserts that he filed a level one grievance on May 6; however,

there it is undisputed that it was not filed with the office of personnel, or presented on a form furnished by the employer. A meeting was held by Dr. Plummer with Grievant and Dean Cogley on May 11, 1999 to discuss Grievant's complaint. Dr. Plummer verbally responded to the grievance the same day, denying Grievant's request for a merit increase. As evidenced by the June 11, 1999, letter to Dr. Plummer, Grievant apparently believed that he had not received a decision. Although Dr. Plummer declared the grievance to be untimely in his June 16, 1999, letter, he rescinded that ruling on June 23, when he decided that Grievant's memorandum of June 11 would be considered notice of filing. He then scheduled a second informal conference for June 24, or allowed Grievant the option of proceeding to level two. The informal meeting was held as scheduled, and Dr. Plummer issued a written decision denying the grievance six days later. Grievant did not advance his claim to level two, but instead, filed this claim for a default judgment.

Grievant was timely provided an informal conference on May 11, and received a verbal response the same day. (See footnote 3) Grievant failed to file a formal level one grievance; however, Respondent has waived its claim regarding timeliness. Therefore, Grievant cannot prevail by default, but may continue with the processing of his claim.

Accordingly, the undersigned concludes that Grievant has failed to meet his burden of proof in this default claim. However, due to Respondent's waiver of any claim that the matter was not timely filed at level one, the matter is properly **REMANDED** to level two for hearing on the merits. (See footnote 4) Said hearing is to be conducted within five days of receipt of this Order.

Conclusions of Law

1. "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 or illness, the grievant shall prevail by default." W. Va. Code § 18-29-3(a). Harmon and Chiles v. Fayette County Bd. of Educ., ___W. Va. ___, 516 S.E.2d 748 (1999).

2. W. Va. Code §18-29-4(a) requires that an informal conference with the immediate supervisor be conducted within ten days of the employee's request, and thata response be made within ten days of the conference. It does not require that the response be in writing.

3. An informal conference was conducted within ten days of Grievant's request, and a response was given the same day the conference was conducted, in compliance with W. Va.Code §18-29-4(a).

4. Grievant has failed to prove this default claim.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 18-29-3(a) is **DENIED**, and Remanded to level two for hearing on the merits. 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: November 9, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

May 11 was stricken in this paragraph and replaced with June 11. June 11 was the accurate date of Grievant's letter previously addressed.

Footnote: 2

Employees of state institutions of higher education have the option of filing grievances under the statutory procedure set forth in W. Va. Code §§18-29-1, et seq., or that provided by the Board of Trustees in Policy Bulletin No. 36.

Footnote: 3

W. Va. Code §18-29-4(a) does not require that the response to the informal conference, or the level one decision, be in writing.

Footnote: 4

Dr. Plummer has had ample opportunity to consider the grievance, and to remand the matter to level one would be an exercise in futility.