LOIS BOARD, et al.,

Grievants,

v. **Docket No. 99-HHR-329D**

WEST VIRGINIA DEPARTMENT OF HEALTH &
HUMAN RESOURCES, BUREAU FOR BEHAVIORAL
HEALTH & HEALTH FACILITIES, LAKIN HOSPITAL,

Respondent.

ORDER DENYING DEFAULT

On August 9, 1999, Lois Board, Marilyn Bugg, Russell Stover, Brenda Black, Jennifer Dunn, and Barbara Varian (Grievants) appealed to Level IV of the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., alleging they were entitled to prevail by default in a grievance filed against their employer, Respondent West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities, Lakin Hospital (DHHR). On September 15, 1999, a Level IV default heari ng was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Charleston, West Virginia. (See footnote 1) That hearing was limited to the question ofwhether or not a default had occurred. At the conclusion of the hearing, the parties waived closing arguments, and this matter became mature for decision at that time.

The following Findings of Fact pertinent to resolution of this 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. Grievants are employed by Respondent West Virginia Department of Health and Human

Resources, Bureau for Behavioral Health and Health Facilities (DHHR) at Lakin Hospital.

2. Grievants filed a joint grievance on June 9, 1999, alleging discrimination, favoritism, unfair scheduling, incompetency, unprofessional conduct, harassment, stress, and hardship. After failing to receive a satisfactory resolution of their grievance at Levels I and II, Grievants advanced their grievance to Level III where an evidentiary hearing was conducted by Grievance Evaluator M. Paul Marteney on July 26, 1999.

3. A Level III grievance decision was signed by someone on behalf of Jonathon Boggs, DHHR's Commissioner for Behavioral Health and Health Facilities, on August 2, 1999. J Ex 1.

4. Mr. Marteney prepared a Certificate of Service indicating that copies of Commissioner Boggs' Level III decision were sent by United States Mail to each of the Grievants at their respective home addresses on August 2, 1999. R Ex 1. 5. Grievants Dunn and Varian received their Level III decisions on August 2, 1999, in envelopes postmarked at Charleston, West Virginia, on August 2, 1999, and delivered by their local mail carrier in Mason County, West Virginia. G Exs C & D.

6. Grievant Board received her Level III decision on August 7, 1999, in an envelope which appears to be postmarked on August 2, 1999, at Charleston, West Virginia. G Ex A. Grievant Board receives her mail at a Post Office box, and did not go to the Post Office to pick up her mail until August 7, 1999.

7. Although Grievant Board's envelope had the same postage affixed as the envelopes addressed to Grievants Varian and Dunn, the United States Postal Service required her to pay 11 cents postage due before delivering her Level III decision. Cf. G Exs A & B.

8. Grievant Black received her Level III decision on August 10, 1999, in an envelope postmarked on August 9, 1999, at Charleston, West Virginia. G Ex B.

9. The postage was affixed to Grievant Black's envelope and the postmark stamped by a mechanical postage meter. G Ex B. Actual postage stamps were affixed to the envelopes in which the Level III decisions were mailed to Grievants Board, Dunn and Varian. G Exs A, C & D.

10. August 2, 1999, was the fifth working day following Grievants' Level III hearing.

11. Grievants filed a notice of default with DHHR on August 9, 1999.

DISCUSSION

The issue of default in grievances filed by state employees came within the jurisdiction of the Grievance Board last year. On March 13, 1998, the West Virginia Legislature passed House Bill

4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998. (See footnote 2) That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. 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. Within five days of the receipt of a written notice of the 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 to comply with the law and to make the grievant whole.

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A- 5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

If a default occurs, Grievants are presumed to have prevailed, and are entitled to the relief requested, unless DHHR is able to demonstrate that the remedy requested iseither contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there was no default, Grievants may proceed to the next level of the grievance procedure. DHHR contends no default occurred in this matter, as contemplated under the terms of the statute.

This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Because Grievants are claiming they prevailed by default under the statute, they bear the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence

which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

In this matter, after this grievance was advanced to a hearing at Level III, Respondent was required to respond in accordance with W. Va. Code § 29-6A-4(c): "The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing." In counting the timeallowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98- T&R-275D (Sept. 30, 1998). Thus, DHHR was obligated to issue a Level III decision on this grievance not later than August 2, 1999, unless "prevented from doing so as a direct result of sickness, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code § 29-6A-3(a)(2).

DHHR correctly contends the statute only requires the employer to "issue" a Level III decision within the applicable time limit. Therefore, when the decision was signed and placed in the mail by Mr. Marteney on behalf of Commissioner Boggs on August 2, 1999, the employer completed all actions necessary to meet the statutory time limit. W. Va. Code § 29-6A-3(i) provides that the decision is to be "transmitted to the grievant and any representative named in the grievance within the time prescribed." The statute makes no reference to when the decision must be received by the grievant, and this Grievance Board has determined that the controlling event is when the decision is effectively transmitted to the grievant. Carter; supra; Wensell v. W. Va. Regional Jail & Correctional Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998). Thus, the burden is upon Grievants to demonstrate that the Level III decision was not issued on or before August 2, 1999.

As indicated in the findings of fact previously set forth in this decision, copies of the Level III decision were timely mailed to Grievants Board, Dunn and Varian, but GrievantBlack's copy of the decision was not mailed until several days after the five-day time limit for responding at Level III (See footnote 3) . Grievants argue that because Grievant Black's decision was not effectively issued until August 9, 1999, DHHR was in default. However, this argument disregards the fact that this was a

joint grievance. (See footnote 4) Although Grievants did not select a particular individual to serve as their spokesperson, it is clear that they collectively filed the grievance at issue. (See footnote 5) Despite the fact that DHHR offered no explanation as to how Grievant Black's Level III decision was not mailed along with the copies sent to the other Grievants, a preponderance of the record indicates that DHHR made a good faith effort to comply with the requirements of W. Va. Code § 29-6A-4(c), by properly mailing a timely Level III response to five of the six Grievants involved in this joint grievance. (See footnote 6) In these circumstances, DHHR demonstrated substantial compliance with the requirements of the time limits in the grievance procedure statute. See Ehle, supra. See also State ex rel. Catron v. Raleigh County Bd. of Educ., 201 W. Va. 302, 496 S.E.2d 444 (1997).

Because no default occurred in this matter, DHHR will not be required to demonstrate that the remedy sought is contrary to law or clearly wrong. Grievants have indicated their intention to appeal the Level III decision to Level IV. Accordingly, a Level IV hearing will be scheduled to address the merits of this grievance.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

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. Within five days of the receipt of a written notice of the 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." W. Va. Code § 29-6A-3(a).

2. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, 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. See W. Va. Code § 29- 6A-3(a)(2).

3. In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" meansworking days exclusive

of Saturday, Sunday or official holidays. Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998).

4. In determining whether an agency has issued a decision in compliance with the applicable time limit in the state employee grievance procedure, the controlling event is when the decision is effectively transmitted to the grievant, not when the decision is actually received by the grievant. Harmon v. Div. of Corrections, Docket No. 98-CORR- 284D (Oct. 6, 1998). See W. Va. Code § 29-6A-3(i).

5. Grievants failed to establish that Respondent DHHR did not issue a Level III decision on their grievance within the time limit specified in W. Va. Code § 29-6A-4(c). See W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR- 147D (June 4, 1999).

Accordingly, Grievants' request for a determination of default under W. Va. Code § 29-6A-3(a)(2), is **DENIED**. This matter will remain on the docket for further adjudication at Level IV as previously indicated in this Order. The representatives of the parties are requested to confer and provide agreed dates to conduct the Level IV hearing on the merits of this grievance.

_____

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: September 24, 1999

Footnote: 1

Grievants Lois Board, Brenda Black, Barbara Varian, and Jennifer Dunn appeared pro se and in behalf of the remaining Grievants who were not present. DHHR was represented by Assistant Attorney General B. Allen Campbell.

Footnote: 2

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins- Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998). As this grievance was initiated on June 9, 1999, it falls under the new statute.

Footnote: 3

In regard to when a document is placed in the mail, the postmark on the envelope transmitting the document ordinarily provides the best evidence to establish that date. Carter, supra. See Wensell, supra.

Footnote: 4

W. Va. Code § 29-6A-2(k) defines "grievant" to include "a group of named employees filing a grievance."

Footnote: 5

If this was not a joint or group grievance, each Grievant would be expected to submit a separate declaration of default. This did not happen.

Footnote: 6

Beyond the Certificate of Service and an affidavit from Mr. Marteney indicating that the Level III decision was mailed on August 2, 1999, neither party presented any evidence as to when or if Grievants Bugg and Stover received their Level III responses. In the absence of evidence to the contrary, the Certificate of Service is accepted as proof that the decisions were timely mailed to those Grievants. See Carter, supra.