STEPHEN J. ANTOLINI, et al.,

Grievants,

v. DOCKET NO. 03-DNR-049D

DIVISION OF NATURAL RESOURCES,

Respondent.

ORDER DENYING DEFAULT

Sergeants Stephen J. Antolini, Roger L. McClanahan and Mickey A. Sylvester filed separate but identical grievances on April 9, 2002, alleging they were not paid uniformly with other Sergeants, and seeking an increase in pay. The grievances were consolidated at a lower level.

On February 2, 2003, they filed with Respondent a Notice of Default, claiming that they had not received a timely Level III decision. Respondent requested a level four default determination, and a hearing was held in the Grievance Board's Beckley office on April 3, 2003. Grievants were represented by Norman Henry and David White, Esq., and Respondent was represented by Kelley M. Goes, Esq., Assistant Attorney General. The parties elected not to file written proposed findings of fact and conclusions of law, so the matter became mature for decision at the close of the hearing.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. On April 9, 2002, Grievants filed separate but identical grievances regarding pay uniformity within the Sergeant rank of the Division of Natural Resources (DNR) Law Enforcement Section. Level one decisions were issued that same day by Lieutenant C. W. Schollar on the grounds he was without authority to grant the relief sought.

2. The grievances were consolidated at level two, and a level two conference was held on April 23, 2002. On April 30, 2002, a level two decision was issued denying the grievances.

3. A level three grievance hearing was held October 22, 2002 before Grievance Evaluator Jack McClung.

4. At the level three hearing, Grievants were represented by Fred Tucker. After both parties had rested, the following dialogue took place:

> GRIEVANCE EVALUATOR: All right, I have a couple of things I have to address, one of them being the time requirement _
>
> MR. TUCKER: No problem, waiving _
>
> GRIEVANCE EVALUATOR: _ of rendering a decision, the five day. And then I saw an indication in here with respect to posthearing submissions.
>
> MS. GOES: The Division would request that we do a posthearing submission and proposed findings of fact and conclusions of law for the benefit of this court.
>
> GRIEVANCE EVALUATOR: Okay. And, Fred, that's optional with you. Do you want to file anything?
>
> MR. TUCKER: No. I don't think that will be forthcoming from us. No, sir.
>
> GRIEVANCE EVALUATOR: Okay. Then whatever you submit to me, if you'd send Mr. Tucker a copy.
>
> MS. GOES: Certainly.
>
> GRIEVANCE EVALUATOR: It appears we've probably reached the point of closure unless someone wants to make something in the nature of closing in this matter.
>
> MR. TUCKER: No, I don't.
>
> MS. GOES: No.
>
> GRIEVANCE EVALUATOR: All right. Then we'll consider this matter concluded. Thank you.

5. In a discussion after the hearing, at which some, but not all, of the parties and representatives were still present in the room, the time limit waiver was discussed. Sergeant Sylvester understood it to be the agreement of all parties that the five-day time limit be extended to no more than 30 days.

6. Major D. E. Murphy, Respondent's party-representative, left the room quickly at the end of the hearing and does not recall an agreement limiting the waiver, but conceded such a discussion could have taken place when he was not in the room.

7. Having not received a level three decision, Grievants sent their Notice of Default to DNR Director Ed Hamrick Hamrick on February 2, 2003, asserting that, “At this hearing it was agreed upon

by all parties that the time requirement to render a decision in this grievance be extended from the mandatory five days as set by West Virginia Code to, but not to exceed, thirty days. According to this agreed time frame, a written decision was to be rendered by December 10, 2002."

8. On February 5, 2003, Grievance Evaluator McClung issued his recommended decision denying the grievance, sending it to Director Hamrick.

9. On February 10, 2003, Mr. Hamrick issued his decision to the grievants, adopting the recommended decision of Grievance Evaluator McClung. (See footnote 1)

DISCUSSION

"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). A grievant who claimshe prevailed by default under the statute bears 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); Donellan v. Harrison County Brd. of Educ., Docket No. 02-17-003D (June 6, 2002). 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).

This case illustrates clearly the problems associated with failure to properly document an agreement that directly affects the rights of the parties, and with agreeing to an open-ended time limit waiver. While the record shows the time limits in which a level three decision must be issued were waived by Grievants, it does not specify the extent of that waiver. While one of the grievants credibly testified that further, off the record discussion limited the time extension to no more than 30 days by the agreement of all the parties, Respondent's party representative could not remember such an agreement or was out of the room when it was supposedly made. In any event, no such agreement is recorded or memorialized.

Normally, the time limit for a level three decision to be issued is five days, according to W. Va. Code § 29-6A-4(c), which states in part, "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 [level three] hearing." The level three decision was not issued within five days. But for a waiver of the time limit, Respondent would be in default. Respondent did not claim it was prevented from meeting the time limit as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Grievant Sylvester's hearsay testimony as to the nature of the agreed limit, while admissible, is afforded much less weight than the explicit statement of Mr. Tucker contained in the official transcript of the level three hearing. However, it would be unreasonable to assume, as Respondent implicitly argues, that Grievants intended to waive the time requirements indefinitely. It is normal for parties to allow extra time for filing of briefs (which neither party in this case did), or for preparation of a transcript. (See footnote 2) Nevertheless, Grievants neither stated on the record the extent of their agreement nor later rescinded their waiver when it became apparent Respondent was not on a 30-day schedule.

The West Virginia Supreme Court of Appeals has determined that in order to benefit from the "relief by default" provision, a grievant must raise the issue as soon as he knows that a default has occurred. *See* Syl. Pt. 4, Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon v. Dep't of Trans./Div. of Highways, Docket No. 02-DOH-194D (Oct. 22, 2002). In Harmon v. Fayette County Brd. of Educ., 205 W. Va. 125,137, 516 S.E.2d 748,760 (1999), the Court revisited several issues related to the default provision, but finally ruled consistently with syllabus point 4 in Hanlon, *supra*. In Harmon v. Dep't of Trans./Div. of Highways, a delay of 17 days was enough to preclude the grievant from taking advantage of the default provisions. In this case, the delay is also evidence that no 30-day agreement existed. Here, Grievants assert the 30-day time limitation would have expired December 10, 2002, but did not claim a default until February 2, 2003, almost two months later. It is clear that after the close of the hearing, a 30-day limit was discussed among some of the people still present in the room, but this delaysuggests Grievants were also unaware that a 30-day time limit had been agreed to. Balancing the evidence, it appears just as likely the waiver was limited to 30 days as it that no limitation was agreed to. If the evidence supports both sides equally, then Grievant has not met his burden. Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

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." W. Va. Code § 29-6A-3(a)(2).

2. A grievant who claims he prevailed by default under the statute bears 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); Donellan v. Harrison County Brd. of Educ., Docket No. 02-17-003D (June 6, 2002). 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). If the evidence supports both sides equally, then Grievant has not met his burden. Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

3. "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 [level three] hearing." W. Va. Code § 29-6A-4(c). 4. In order to benefit from the "relief by default" provision, Grievant must raise the issue as soon as he knows that a default has occurred. *See* Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon v. Dep't of Trans./Div. of Highways, Docket No. 02-DOH-194D (Oct. 22, 2002); Harmon v. Fayette County Brd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

5. If a default has occurred, a grievant is presumed to have prevailed on the merits of the grievance, and Respondent may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, the grievant may proceed to the next level of the grievance procedure. Pennington v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 01- CORR-011D (Mar. 16, 2001).

6. Grievants did not meet their burden of proving a default occurred.

For the foregoing reasons, Grievants' default claim is hereby **DENIED.** The parties are directed, within fifteen days, to each provide the Grievance Board with five possible hearing dates for the level four hearing on the merits. (See footnote 3)

Date: April 16, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievants appealed this ruling to level four on February 19, 2003, Docket No. 03-DNR-094, and it has been placed in abeyance until the conclusion of these default proceedings.

Footnote: 2

It is noted that the level three transcript was received in DNR Director's office on November 6, 2002, according to the stamp on the cover of the transcript. Respondent's Exhibit No. 1.

Footnote: 3

While the default hearing was held in the Grievance Board's Beckley office, the parties may agree that the level four appeal hearing may be held in the Charleston office, and should so indicate when they provide their dates.