EMILY RUTHERFORD, et al.,

Grievants,

v.

DOCKET NO. 03-BEP-040D

W. VA. BUREAU OF EMPLOYMENT PROGRAMS/
GREENBRIER VALLEY JOB SERVICE

Respondent.

ORDER DENYING DEFAULT

Grievants, Emily Rutherford, Bob Bittinger, Dawn Graybeal, Les Miller, and Janet Shelton, filed a grievance on January 2, 2003, against their employer, the West Virginia Bureau of Employment Programs/Greenbrier Valley Job Service ("BEP"), alleging failure to follow policy in a promotion and/or reallocation matter. (See footnote 1) Grievants' immediate supervisor responded on January 10, 2003, and Grievants appealed to level two on January 16, 2003. Grievants notified Director Quetta Muzzle by memorandum dated January 29, 2003, that BEP was in default because a level two hearing had not been scheduled, nor a level two decision issued, within the statutory time frame pursuant to W. Va. Code § 29-6A-3. A level four hearing was conducted on the default issue on March 17, 2003, in the Grievance Board's Beckley, West Virginia, office, and the matter became mature at the close of the hearing after both parties waived the opportunity to file proposed findings of fact andconclusions of law. Grievants appeared pro se, and BEP was represented by Patricia Shipman, Esq., Assistant Attorney General.

The following facts of this matter are undisputed.

FINDINGS OF FACT

1. Grievants are employed by BEP in its Greenbrier Valley Job Service location.

2. Grievants filed a grievance on January 2, 2003, and received a level one response from their supervisor denying the grievance on January 10, 2003.

3. Grievants appealed to level two on January 16, 2003, and the appeal was received in the Division Director's office on January 17, 2003.

4. The grievance form filed by Grievants identifies AFSCME-WV Council 77 as their representative.

5. Assistant Director Stephen Dailey issued a level two decision on January 23, 2003, which was mailed to Ed Hartman at the AFSCME office in Charleston, West Virginia. The decision was not mailed to the individual Grievants. Mr. Dailey did not schedule a level two conference because he believed the grievance to be untimely filed, and there was no need for a conference.

6. Mr. Hartman did not notify Grievants a level two decision had been rendered.

7. On January 29, 2003, Grievants notified BEP through Director Quetta Muzzle that it was in default.

8. Thereafter, Grievants contacted Mr. Hartman, who told them he had something he thought they had sent him, which turned out to be the level two decision dated January 23, 2003.

DISCUSSION

Grievants bear the burden of establishing they prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A default claim is based on the employer's alleged procedural violation of failing to respond to the grievance within the time limits contained in W. Va. Code § 29-6A-4. The default provision applicable to state personnel grievances is contained in W. Va. Code § 29-6A-3(a), and states in pertinent part:

> (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 that 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.

W. Va. Code § 29-6A-4(b) provides the following directions regarding when Respondent must act at level two:

> 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 or her 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.

Grievants assert they have prevailed by default because no level two conference was held, and they did not receive a level two decision within five days of their appeal. BEP denies it is in default because Mr. Dailey issued a level two decision on January 23, 2003, within the five day time limit specified by statute. There is no dispute that a level two conference was not held with Grievants. However, Mr. Dailey did issue the level two decision within the statutory time lines, and mailed it to Grievants' representative, Mr. Hartman, at the AFSCME office. Mr. Hartman never notified Grievants he had received the decision. Here, the fault lies not with BEP, but with AFSCME. Admittedly, Mr. Dailey did not mail the Grievants copies of his decision, but there is nothing which compels that he must in a case where multiple grievants have identified a representative. To find a default occurred because the Grievants did not receive individual copies of a timely-issued response would elevate form over substance, and as defaults are not favored in the law, the undersigned Administrative Law Judge is hesitant to find a default under these circumstances. See Thompson v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-117 (Apr. 30, 1998).

With regard to Grievants' assertion they should prevail by default because no level two conference was held, the statutory default provision states a “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.” W. Va. Code § 29-6A-3(a)(2). A level two conference is a required response under Code § 29-6A-4(b), and no level two conference was held in this matter.

This Grievance Board has been directed in the past that “the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'” Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 186 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382

S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure. See W. Va. Code § 29-6A-1. Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Mr. Dailey believed the grievance was untimely filed, and could be dismissed on that ground, and therefore concluded a level two conference was unnecessary. Such a decision is not in accord with the spirit of the grievance process, which is to try to resolve grievances at the lowest level possible. Even if an administrator believes a grievance is untimely, he or she is required by statute to hold a level two conference, precisely so that the merits of the grievance are not forgotten. To resolve a grievance at level two based strictly upon legal theories, regardless of the facts, only serves to complicate the grievance process, and alienate employees who are intended to benefit from the process.

Conversely though, to hold the Grievants prevail in this particular set of circumstances would also hold form over substance, as Mr. Dailey did issue a level two decision. Therefore, it is appropriate to make the following conclusions of law.

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 inthis 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. The burden of proof is upon the grievant who files his default claim at level four to prove by a preponderance of the evidence that a default has occurred. Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct; 6, 1998).

3. W. Va. Code § 29-6A-4(b) provides the following directions regarding when Respondent must act at level two:

> 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 or her 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.

4.

A level two conference is a required response under Code § 29-6A-4(b).

5. While Grievants have proven BEP failed to hold a level two conference, they have failed to prove BEP defaulted at level two of the grievance procedure, inasmuch as a level two decision was rendered.

Accordingly, Grievants' claim of default is **DENIED,** and this case is dismissed from the docket of this Grievance Board and remanded to Level II for a conference.. The parties are further instructed to set a Level II conference on the merits of this grievance as soon as possible.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 24, 2003

Footnote: 1

John Gherman, Grievant in the original filing, notified the Grievance Board by letter dated February 27, 2003, that he wished to withdraw from the grievance.