PAMELA McBRIDE,

Grievant,

v. **Docket No. 05-DJS-205D**

DIVISION OF JUVENILE SERVICES/
SOUTHERN REGIONAL JUVENILE
DETENTION CENTER,

Respondent.

ORDER DENYING DEFAULT

AND DISMISSING GRIEVANCE

This default proceeding arises out of a grievance filed by Pamela McBride ("Grievant") against her employer, the West Virginia Department of Corrections/Division of Juvenile Services ("DJS"), on December 6, 2004. The grievance was brought to challenge Grievant's transfer (See footnote 1) from her position as a Correctional Counselor I at Mercer County Southern Regional Juvenile Detention Center to a position as Community Resource Counselor, which required Grievant to work out of her home. (See footnote 2) For relief, Grievant stated that she wanted "[r]einstatement to my position as Correctional Counselor at the Mercer County Southern Regional Juvenile Detention Center in Princeton and relief from harassment and retaliation."

The grievance was not resolved at Level I or Level II. It was set for hearing at Level III on May 13, 2005. However, the hearing was postponed to allow the parties anopportunity to try to reach a settlement agreement. A tentative settlement was reached but never came to fruition. By correspondence, dated June 7, 2005, counsel for Grievant asked for the Level III hearing to be rescheduled within ten days.

Instead of rescheduling the Level III hearing, DJS "decided to grant [the grievant] Ms. McBride the relief requested in her grievance." This decision was communicated to Grievant through

correspondence to her counsel, dated June 10, 2005.

Despite having been granted all of the relief she requested, Grievant filed a motion entitled "Grievant's Motion for Original Relief Involving Demotion and Motion for Default" ("default motion"). (See footnote 3) This default motion was received by the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on June 17, 2005. A default hearing was held on July 20, 2005, in the Grievance Board's hearing room at Beckley. Grievant was present in person and by counsel, John W. Feuchtenberger, Esquire. DJS was represented by Assistant Attorney General Steven R. Compton. The purpose of the hearing was to afford Grievant an opportunity to substantiate, by a preponderance of the evidence, her claim that a default occurred at Level III. This issue was submitted for decision at the conclusion of the July 20 hearing.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1. Grievant has been employed by DJS for approximately fourteen years. 2. On December 6, 2004, this grievance was brought to challenge Grievant's transfer from her position as a Correctional Counselor I at Mercer County Southern Regional Juvenile Detention Center to a position as Community Resource Counselor.

III 3. Grievant's request for relief was "[r]einstatement to my position as Correctional Counselor at the Mercer County Southern Regional Juvenile Detention Center in Princeton and relief from harassment and retaliation."

IV 4. In due course, the grievance was set for a Level III hearing to be held on May 13, 2005.

V 5. The Level III hearing was postponed upon agreement of the parties while they pursued, albeit unsuccessfully, efforts to settle their dispute.

VI 6. By correspondence, dated June 7, 2005, counsel for Grievant asked for the Level III hearing to be rescheduled within ten days.

VII 7. No hearing was scheduled. Instead, DJS granted Grievant all of the relief she had requested in her written statement of grievance.

VIII 8. Thereafter, on June 17, 2005, the Grievance Board received a motion for default from Grievant based upon DJS's failure to schedule a Level III hearing. Grievant asserts that DJS's refusal

to afford her a Level III hearing "constitutes a default pursuant to the statutes, and it entitles Grievant to a finding from this Board that she has prevailed upon the merits of the grievance and to a determination of what remedy best suits the facts of this case in light of that presumption."

IX 9. DJS refuses to schedule a Level III hearing on the grounds that Grievant was granted "the relief requested in her grievance in its entirety making the grievance moot." "Respondent's Response to Grievant's Motion for Original Relief Involving Demotion and Motion for Default" at 3. (See footnote 4)

X 10. At the default hearing conducted on July 20, 2005, Grievant requested permission to amend the request for relief to include back pay. This request was opposed by DJS and was not granted.

Discussion

West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that "[t]he 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." The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Stanley v. Higher Educ. Policy Comm'n,* Docket No. 01-HEPC-503D (Dec. 20, 2001) (citing *Friend v. Dep't of Health & Human Res.*, Docket No. 98-HHR-346D (Nov. 25, 1998)). The effect of a default is that the grievant is then presumed to have prevailed upon the merits. Such presumption in this case would result in Grievant receiving the same relief she has already been afforded.

DJS asserts that this grievance is moot. "In general a case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Murphy v. Hunt,* 455 U.S. 478, 481 (1982) (quoting *Powell v. McCormack,*395 U.S. 486, 496 (1960)). (See footnote 5) As noted, DJS granted Grievant all of the relief she requested. At that point this grievance became moot, making a written response to the grievance unnecessary.

It is the failure to issue a written response within the statutory time frame that constitutes a default under the provisions of West Virginia Code section 29-6A-3(a)(2). Because no response would be required once a grievance became moot, it follows that there could not be any default. To hold otherwise would exalt form over function.

The grievance procedure provides for the “equitable and consistent resolution of employment grievances raised by nonelected state employees who are classified under the state civil service system[.]” W. Va. Code § 29-6A-1. Here, the dispute has already been resolved. There is nothing more to be done under the grievance procedure.

At the default hearing on July 20, 2005, Grievant attempted to amend her request for relief to include back pay. Understandably, DJS objected to such belated amendment. Both Grievant's motion for default and her request to amend the relief sought were made after her grievance had already become moot through DJS's actions in granting her all of the relief she requested. Accordingly, neither should properly be entertained.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

Conclusions of Law 1. “In general a case becomes moot 'when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.'” *Murphy v. Hunt,* 455 U.S. 478, 481 (1982) (quoting *Powell v. McCormack,* 395 U.S. 486, 496 (1960)).

II 2. This grievance became moot on or about June 10, 2005, when DJS granted Grievant all of the relief she had requested in her written statement of grievance.

III 3. Grievant has failed to cite any legal authority that supports her proposition that she was entitled to a Level III hearing even after she had prevailed in her grievance and obtained all of the relief she requested.

IV 4. Grievant has failed to prove that there was a default within the meaning of West Virginia Code section 29-6A-3(a)(2).

Based upon the foregoing, Grievant's request that a default be entered is **DENIED** and, there being nothing further, this grievance is **DISMISSED** and **STRICKEN** from the docket of the West Virginia Education and State Employees Grievance Board.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party

must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Dated: July 28, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Although this transfer took place on or about August 24, 2004, it does not appear that DJS raised the timeliness issue.

Footnote: 2

Grievant was subsequently transferred to Gene Spadaro Correctional Center as a Correctional Counselor I. This transfer is extraneous to this grievance.

Footnote: 3

Grievant's claim that she received a promotion as a result of the aborted settlement agreement and was subsequently demoted by being granted her request for reinstatement into her former position is not properly before the West Virginia Education and State Employees Grievance Board in this default proceeding.

Footnote: 4

This document is not paginated.

Footnote: 5

This definition was cited by the Supreme Court of Appeals of West Virginia at footnote 2 of State ex rel. M.C.H. v. Kinder, 173 W. Va. 387, 317 S.E.2d 150 (1984).