THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

Dr. ASHISH CHANDRA,

Grievant,

v. **DOCKET NO. 06-HE-208D**

M. Paul Marteney,

Administrative Law Judge

MARSHALL UNIVERSITY,

Employer.

ORDER GRANTING DEFAULT

To address Grievant's claim that Respondent had defaulted at level three in his grievance, a level four hearing was held in the Grievance Board's Charleston office on August 2, 2006. Grievant was represented by Christine Barr of AFT-West Virginia/AFL- CIO, and Respondent was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General. The matter became mature for decision on September 15, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant claimed Respondent defaulted when it failed to hold a level three grievance hearing within the statutorily-required time frame. Respondent admits this failure, but claims it was a result of excusable neglect. Respondent did not meet its burden of proving this affirmative defense.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant filed a grievance on May 4, 2006, claiming he had wrongly been denied a

promotion. The grievance proceeded through levels one and two, and was timely appealed to level three.

2. On or about May 22, 2006, Grievant appealed to level three by forwarding his appeal to David Harris, who processes grievances at that level for Marshall University (MU). Mr. Harris advised Grievant by email that there might be some difficulty in setting a level three hearing, due to the unavailability of the department chairperson. Mr. Harris requested that Grievant sign a waiver of the required time limits.

3. Grievant did not waive the time limits, but he had done so at level two, and that waiver was in his grievance file. Mr. Harris had also signed this waiver and knew its contents. When Mr. Harris was reviewing the file, he saw the earlier waiver and mistakenly believed it was a waiver for level three. He did not request a waiver for the level three time limits.

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." (See footnote 1) 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 defaultoccurred, 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 footnote 2) Here, there is no question that the level three hearing was not held within the time required by statute. Respondent asserts that its failure to timely hold the level three hearing is the result of excusable neglect, one of the statutory exceptions to the general default rule. The Grievance Board has adopted a definition of “excusable neglect” based upon its interpretation under the Federal Rules of Civil Procedure: "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance with the time frame specified in the rules. Absent a showing along these lines, relief will be denied." *(See footnote 3)*

Respondent first argues it would be unfair to grant a default in this case, because at level two it granted Grievant an extension on the conference time limits because Grievant would be out of town.

Contrary to this assertion, the waiver was granted by Grievant, for the level two conference only, and was date-limited to “not later than” May 18, 2006. In Grievant's May 5, 2006, original grievance filing, he indicated he would be out of town until May 17. Both Grievant and Mr. Harris signed this limited waiver. Respondent derived no advantage from this accommodation, and the statute does not compel Grievant to be available for hearing, it only compels Respondent to make a response.

There was no waiver in place for level three. Mr. Harris knew or should have known he had not signed a waiver for that level as he did for level two. His signature on the level two waiver implies he had read it and knew its contents. The contention is that, when Mr. Harris acknowledged receipt of the level three appeal via email, he stated he may need to request that Grievant sign an additional waiver. This request amounts to an admission he knew the prior waiver did not cover level three.

Grievant admits he knew his department chair would be out of town during the time in which a level three hearing should be held. But he points out that in his acknowledgment, Mr. Harris stated the Dean would likely cover the hearing, and if not, he would request a waiver. The same day Mr. Harris acknowledged the level three appeal, the Dean told him he wanted the department Chair to cover the hearing. Mr. Harris never requested that Grievant sign a level three waiver. Mr. Harris admits he did not ask for a waiver because he saw the prior waiver in the file and thought it covered level three.

Under this set of facts, excusable neglect cannot be found. While there is no evidence Respondent or Mr. Harris acted in bad faith, there are no extenuating circumstances excusing the failure to either set a hearing or obtain a valid waiver. It is understandable that this is not the only Grievance Mr. Harris had to deal with, but he reasonably assert that he thought the prior waiver covered level three, after he signed it, and he knew he had not requested a waiver covering level three. He also had not informed Grievant that the Dean wanted the Chair to cover the hearing, as he suggested might be possible in his email.

The following conclusions of law support this discussion:

Conclusions of Law

1. 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.

2. 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). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

3. "'Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance with the time frame specified in the rules. Absent a showing along these lines, relief will be denied.' *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997)(quoting *Bailey v. Workman's Comp. Comm'r*., 170 W. Va. 771, 296 S.E.2d 901 (1982) and quoting 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (1969))." *Bowe v. W. Va. Workers' Compensation Comm'n*., Docket No. 04-WCC-054D (April 12, 2004).

4. Respondent did not prove its failure to timely schedule and hold a level three hearing was the result of excusable neglect.

For the foregoing reasons, Grievant's request for a determination that he has prevailed by default is **GRANTED**. Grievant is therefore presumed to have prevailed on the merits of his grievance. As Respondent, it its Proposed Findings of Fact and Conclusions of Law, has requested a hearing to determine whether the relief requested by Grievant is contrary to law or clearly wrong, the parties are hereby **ORDERED** to conferwith each other and, no later than November 15, 2006, provide this office with at least 5 mutually-acceptable dates for such hearing.

October 31, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-3(a).

Footnote: 2

Board, et al. v. WVDHHR / Lakin Hospital, Docket No. 99-HHR-329D (Sep. 24, 1999).

Footnote: 3

Bowe v. W. Va. Workers' Compensation Comm'n., Docket No. 04-WCC-054D (April 12, 2004).