THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ROBERT DILLON, JR., et al.,

Grievants,

v. **Docket No. 06-CHD-303D**

Sue Keller

Senior Administrative Law Judge

MONONGALIA COUNTY HEALTH DEPARTMENT,

Respondent.

ORDER DENYING DEFAULT

The Monongalia County Health Department ("MCHD") filed a level four appeal upon receiving a claim from Robert W. Dillon, Jr., Joe Lawson, Jennifer Costolo, and Kirk Powroznik ("Grievants"), that a default occurred at level three. A hearing on the default was conducted at the Grievance Board's Westover office on November 21, 2006. Grievant Lawson and Costolo appeared *pro se*, and MCHD was represented by Philip Magro, Esq. (See footnote 1) The matter became mature for decision upon receipt of post-hearing submissions on or before December 5, 2006.

The following facts essential to this matter are set forth as follows:

Findings of Fact

1. Grievants have been employed by MCHD as Sanitarians at all times pertinent to this grievance.

2. Grievants filed individual level one grievances on or about August 29, 2006,in which they challenged the methodology used to award merit pay raises. For relief, Grievants request an additional 2% pay increase.

3. Grievants' supervisors lacked authority to grant the requested relief at level one.

4. Jon Welch, supervisor of Grievant Powroznik, hand delivered the grievance to James Strosnider, MCHD Executive Director, on August 31, 2006. Todd Powroznik, supervisor of the remaining Grievants, placed their grievances in interdepartmental mail at approximately 4:15 p.m. on

August 30, 2006.

5. By letter dated September 5, 2006, Mr. Strosnider advised Grievants that a level two conference was scheduled for Friday, September 5, 2006. Grievants were later notified of the error, since Friday was September 8, 2006.

6. In a letter dated September 7, 2006, directed to Mr. Strosnider, Grievants Lawson and Dillon confirmed the clarification, and requested information regarding the merit raises awarded by MCHD. There was no claim of default made at that time.

7. By a second letter dated September 7, 2006, all four Grievants requested the matters be consolidated at level two. Again, there was no claim of default made by Grievants.

8. The level two conference was conducted on September 8, 2006. After some discussion was completed, Mr. Strosnider advised Grievants that he had five days to respond in written form to their questions. At that time, Grievants alleged a default had occurred when the conference had not been conducted within the statutory time frames. written claim of default was filed later that day. 9. A level two decision denying the grievance was issued on September 12, 2006.

Discussion

The burden of proof is upon the grievants asserting a default has occurred to prove the same by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ*., Docket No. 02-17-003 (Sept. 20, 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

If a default occurs, Grievants are presumed to have prevailed. *W. Va. Code* § 29-6A- 3(a)(2); *Carter v. W. Va. Div. of Corr.*, 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). Of course, if MCHD can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the time lines for one of the reasons listed in *W. Va. Code* § 29-6A- 3(a), or the remedy requested is either contrary to law or clearly wrong, Grievants will not receive the requested relief. *W. Va. Code* § 29-6A-3(a)(2).

W. Va. Code § 29-6A-4(b) provides:

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 appealand issue a written decision upon the appeal within five days of the conference.

Grievants concede that they participated in a level two conference with Mr. Strosnider, and explain that the default claim was raised because the meeting “never met the intended structure as bound by grievance code [sic].” Because Mr. Strosnider did not provide immediate answers to questions Grievant posed during the conference, they decided to “suspend the meeting and proceed with a default claim.” MCHD asserts that the claim was not timely filed.

It appears that Grievants have misconceptions regarding default claims. They do not deny that they were aware on September 5, 2006, that the hearing was scheduled for September 8, 2006, yet they did not claim a default at that time. Neither did they assert a default in their September 7, 2006, letters. Finally, by their own admission, they did not claim a default during the level two conference until Mr. Strosnider advised them that he would provide a written response within five days.

Grievants' letter confirming the date of the conference may be interpreted as their acquiescence to the delay in scheduling. Certainly, they could have stated their objection, and claimed default right then. Instead, they participated in the conference until Mr. Strosnider would not comply with the their wishes to provide immediate answers to questions, and did not file the written claim of default until after the conference was concluded. In order to benefit from the "relief by default" provisions, the grieved employee must raise the default issue as soon as the employee becomes aware of such default. *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997). This Grievants did not do. Accordingly, Grievants have failed to prove entitlement to relief by default. In any event, Mr. Strosnider testified that he received the grievances on Thursday, August 31, 2006. Because Monday, September 4, 2006, was Labor Day, the level two conference was conducted on the fifth day after receipt of the grievances.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. The burden of proof is upon the grievants asserting a default has occurred to prove the same

by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002).

2. *W. Va. Code* § 29-6A-4(b) provides:

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.

2. In order to benefit from the "relief by default" provisions, the grieved employee must raise the default issue as soon as the employee becomes aware of such default. *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997).

3. Grievants failed to timely file a claim for default at level two.

4. The level two conference was conducted on the fifth day after receipt, and no default occurred.

Accordingly, Grievant's claim of default is **DENIED** and this matter is DISMISSED from the docket of the Grievance Board. This grievance is remanded to level three, and MCHD is hereby ORDERED to schedule a level three hearing within five days of receipt of this order, or at a mutually agreeable date and time.

DATE: DECEMBER 15, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievants Dillon and Powroznik are no longer employed by MCHD, and did not appear at the hearing. Grievant Lawson advised that they remain active participants in the grievance.