THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOANN HEDRICK,

Grievant,

v. **Docket No. 06-HHR-087D**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/MILDRED
MITCHELL-BATEMAN HOSPITAL,

Respondent.

ORDER DENYING DEFAULT

Grievant filed a claim of default on March 9, 2006, claiming her employer, Mildred Mitchell-Bateman Hospital defaulted at Level II of the grievance process. The underlying grievance concerns a written reprimand placed in Grievant's personnel file. A Level IV hearing was held at the Grievance Board's Charleston office on May 3, 2006. Grievant represented herself, and Respondent was represented by Jennifer Akers, Assistant Attorney General. This case became mature for decision on May 31, 2006, upon the parties' submissions of proposed findings of fact and conclusions of law. (See footnote 1)

The following material facts have been proven:

Findings of Fact

1. Grievant is employed at Mildred Mitchell Bateman Hospital.

2. On February 16, 2006, Grievant filed a grievance at Level I. Her informal conference was held on that day, and her grievance was subsequently denied.

3. Grievant appealed to Level II on February 20, 2006. 4. On February 27, 2006,

Grievant and her representative, Robert Legg, also an employee at Mildred Mitchell-Bateman, met with Keith Ann Worden, Director of Human Resources.

5. Ms. Worden issued a decision denying the grievance on March 6, 2006.

6. Ms. Worden tried to deliver the decision to Mr. Legg on March 6, 2006, but he had left for the day. Ms. Worden left an envelope marked confidential containing the decision with Mr. Legg's fellow employee, Billie Pritt.

7. Mr. Pritt provided Ms. Worden with a signed statement confirming this receipt of the envelope containing the decision. The statement was dated March 6, 2006 at 3:40 p.m. Respondent's Exhibit 3.

8. Ms. Worden also gave an envelope marked confidential with a copy of the decision to Keith Davis, security guard and asked him to deliver the envelope to Grievant.

9. Because Grievant had left for the day, Mr. Davis delivered the envelope to Cam Edwards, Grievant's co-worker. Cam Edwards acknowledged his receipt in a written statement which said, "I Cam Edwards received this envelope from Keith Davis at 17:45." Respondent's Exhibit 1.

10. Mr. Edwards was asked to place the decision in Grievant's mailbox. Grievant received the decision when she returned to work the next day, March 7, 2006.

Discussion

When a grievant asserts that her 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 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 Hosp.*, Docket No. 99-HHR-329D (Sept. 24, 1999).

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.

Grievant asserts that Ms. Worden had until midnight on the 5th day to issue a decision on her grievance, but it appears Grievant is arguing Ms. Worden should have ensured Grievant received the decision on the 5th day as well. She also asserts the envelope marked confidential was opened when she received it on March 7th.

Respondent argues that Ms. Worden responded within the appropriate time frame, and the fact Grievant did not receive the decision until the next day does not constitute default. Respondent presented testimony and written documentation that Ms. Worden delivered the decision on the March 6th.

It is undisputed that a Level II decision must be issued in this matter within five working days of the hearing. 29-6A-2(c)."Days" means working days exclusive of Saturday, Sunday or official holidays. Here, Grievant met with Ms. Worden on Monday, February 27, 2006. Tuesday, February 28, 2006, began the running of the 5 day period, putting the 5th day at Monday, March 6, 2006. Clearly, the decision was completed on March 6, 2006, and as demonstrated through testimony and written documentation, Ms.Worden attempted to deliver the decision to Grievant and her representative. However, both individuals had left work for the day. Still, the decision was delivered to their places of employment. *W.Va. Code* § 29-6A-4(b) does not require Grievant or her representative receive the decision within 5 days, but merely requires Respondent to issue the decision within 5 days. In this instance, Respondent complied with those requirements.

Also, Grievant did not claim default until after she received Ms. Worden's decision. The Grievance Board has held the grievant is required to submit the default claim before a response to the grievance has been received. *Harmon v. Fayette County Bd. of Educ.*, 205 W. Va. 125, 516 S.E.2d 748 (1999). In this case Grievant did not claim default until two days after receipt of the Level II decision.

The above discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When a grievant asserts that her 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 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 Hosp.*, Docket No. 99-HHR-329D (Sept. 24, 1999).

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 worklocation, 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.

3. 29-6A-2(c)."Days" means working days exclusive of Saturday, Sunday or official holidays.

4. The Grievance Board has held the grievant is required to submit the default claim before a response to the grievance has been received. *Harmon v. Fayette County Bd. of Educ.*, 205 W. Va. 125, 516 S.E.2d 748 (1999).

5. Grievant failed to meet her burden of proof. Ms. Worden clearly issued the decision within the five-day statutory time frame.

Accordingly, Grievant's request a default be entered is **DENIED**. This matter is hereby **REMANDED** to Level III for a hearing on the merits of the grievance, and the hearing shall be held within **10 WORKING DAYS** of the date of receipt of this Order, unless otherwise agreed in writing by the parties.

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, and 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 *W. Va. Code* § 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.

DATE: June 30, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1 *Proposed findings of fact and conclusions of law were only received from Respondent.*