THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ALITA SELLERS,

Grievant,

v. DOCKET NO. 06-HE-276D

M. Paul Marteney, Chief ALJ

WEST VIRGINIA UNIVERSITY - PARKERSBURG,

Respondent.

ORDER GRANTING DEFAULT

Grievant, by counsel, filed a notice of default in this grievance on August 11, 2006, claiming her employer, West Virginia University-Parkersburg (WVU-P), had defaulted at level three by failing to hold a hearing within the required time limits. A level four hearing on the default issue was held in the Grievance Board's Charleston office on September 22, 2006. Grievant was represented by Walt Auvil, Esq. and Respondent was represented by Elaine L. Skorich, Assistant Attorney General. The matter became mature for decision on October 20, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Following a remand to Level III, Grievant waived the time limit for holding a hearing on her grievance, to accommodate her counsel's schedule. The written waiver included a limitation to a certain future date, but Respondent altered the waiver to delete the limitation. Held that Respondent had no power to alter Grievant's voluntary waiver, and was obligated to hold the hearing within the extended time frame.

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

Findings of Fact

1. Grievant filed a grievance directly to level four on or about May 23, 2006. As the grievance did not involve a disciplinary issue, Administrative Law Judge Janis Reynolds remanded the matter to Level III of the grievance procedure, by Order dated June 22, 2006.

2. The parties stipulated that Grievant's counsel was on vacation the week of July 4, 2006.

3. The parties further stipulated that the remand order was received on June 28, 2006, and that a level three hearing should have been held no later than July 6, 2006, in order to be within the statutorily-required time limit. 4. Angie Eaglen is Administrative Assistant to the President at WVU-P and secretary to Roberta Brandt, Associate General Counsel. When the Remand Order was received on June 28, Ms. Eaglen called Mr. Auvil's office to schedule a Level III hearing for July 6.

5. Ms. Eaglen spoke to Mr. Auvil's legal assistant, Brandi Dennis, who informed her Mr. Auvil was not available for a Level III hearing on that date. Ms. Eaglen faxed an “Agreement for Grievance Hearing Extension” form to Mr. Auvil, who listed five available dates in July. The form stated, “I hereby agree to extend the time limits in the above-referenced grievance to a mutually agreeable date and time,” to which sentence Mr. Auvil added “not to exceed July 31, 2006.”

6. Under a paragraph on the form starting, “I understand that it may not be possible to schedule a hearing for these times but I am available of the following five (5) dates and times over the next two months for a hearing,” Mr. Auvil listed July 19, 26, 27, 28 and 29.

7. Ms. Dennis faxed the waiver back to Respondent, and Ms. Brandt signed the document, after crossing out Mr. Auvil's emendation limiting the waiver to July.

8. Ms. Eaglen was out of the office until July 5, but attempted to fax the form, with Ms. Brandt's changes, back to Mr. Auvil's office on July 5, 6 and 7. For unknown reasons, the fax transmission failed to go through, and Ms. Eaglen was out of the office again until July 19. Ms. Eaglen was able to fax the waiver on July 19, and spoke with Ms. Dennis on July 25 in an attempt to find a mutually-agreed date for the hearing.

9. Ms. Eaglen and Ms. Dennis were unable to find a date in July when all parties were available for hearing, and continued to look for dates in August.

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."

W. Va. Code § 29-6A-3(a). When a grievant asserts that his employer is in default, 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 footnote 1)

Respondent asserts Grievant, by her counsel, waived her right to a timely Level III hearing. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. (See footnote 2) Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure. (See footnote 3) "The concept of an actual waiver of one's established rights implies a voluntary act. (See footnote 4) "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (See footnote 5) It hasbeen held by this Grievance Board that time lines may be extended by the actions of the grievant and by the agreements of the parties. (See footnote 6)

Respondent's argument is self-defeating. If it had a valid waiver of Grievant's right to a timely hearing, then it only had one when the waiver was voluntary, on Grievant's terms. This would include the limitation of July 31. Although Respondent contends Mr. Auvil unilaterally altered the pre-printed waiver form, it was a unilateral waiver; Respondent had no right to a waiver and had no basis for demanding an agreement. If Mr. Auvil's limitation on the form meant there was no valid agreement, then there was no waiver, and Respondent was obligated to hold the hearing within the required time frame.

In the latter case, the default could have been excused. A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. (See footnote 7) However, as it was in this case, it was Respondent who induced the error by destroying the voluntary waiver tendered by Grievant. Respondent had no basis for assuming that it had to agree to the waiver of Grievant's right to a timely hearing; that was the error that caused the default. "Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences." (See footnote 8) It was obligated to either negotiate a longer waiver, or hold the hearing within the extended time limit. On these facts, Respondent has defaulted.

The following conclusions of law support this discussion:

Conclusions of Law

1. When a grievant asserts that his employer is in default, 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 Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

2. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. *See Huston v. W. Va. Dep't of Tax and Revenue/Div. of Personnel,* Docket No. 99-T&R 469D (Feb. 29, 2000)*; Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 99-HHR-296D (Nov. 30, 1999).

3. "Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences." *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993). *Pullen v. Div. of Corrections*, Docket No. 04-CORR-323D (Dec. 15, 2004).

4. Respondent defaulted at level three by failing to hold a hearing within the extended time limit set by Grievant.

For the foregoing reasons, Grievant's request for a finding of default in this grievance is hereby **GRANTED**. Grievant is presumed to have prevailed on the merits of the underlying grievance. Respondent may request a hearing on the remedy in order to demonstrate that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); *Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

February 27, 2007

_____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

See W. Va. Code § 29-6A-3(a)(2). Board, et al. v. WVDHHR / Lakin Hospital, Docket No. 99-HHR-329D (Sep. 24, 1999).

Footnote: 2

See W. Va. Code § 18-29- 3(g).

Footnote: 3

Huston v. W. Va. Dep't of Tax and Revenue/Div. of Personnel, Docket No. 99-T&R 469D (Feb. 29, 2000).

Footnote: 4

Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947).

Footnote: 5

Rucker v. Dep't of Transp., Docket No. 05-DOH-123D (2005).

Footnote: 6

Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001).

Footnote: 7

Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-133D (Jan. 17, 2001).

Footnote: 8

Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993).