THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

RICHARD WORKMAN,

Grievant,

v.

Docket No. 06-HHR-282D
Denise M. Spatafore
Administrative Law Judge

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR., HOSPITAL,

Respondent.

ORDER DENYING DEFAULT

Richard Workman ("Grievant") filed a default claim at level four on August 21, 2006, alleging a default occurred at level three. A hearing on the default issue was held in the Grievance Board's office in Westover, West Virginia, on November 15, 2006. Grievant was represented by Craig Miller, and Respondent was represented by Jennifer Akers, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 14, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by Respondent William R. Sharpe, Jr., Hospital ("Sharpe Hospital") as a Security Guard.

2. Grievant, along with several other employees, was suspended due to an incident that had occurred in April of 2006.

3. Grievant initiated a grievance on June 13, 2006, which was processed through levels one and two without incident.

4. Grievant received his level two decision on June 30, 2006. The decision stated that he could appeal to the Level III Grievance Unit, and the address given was "Building 3, Room 554, Capitol Complex, Charleston, WV."

5. The Level III Grievance Unit moved to a different floor of the building several years ago, and the correct address should have been "Building 3, Room 201."

6. Although Rooms 554 and 201 are on different floors of the building, the Level III Grievance Unit has not had any difficulty receiving its mail, because the mail delivery person is familiar with their location.

7. On July 7, 2006, Grievant completed a level three grievance form and mailed it to the address listed on the level two decision.

8. When he did not receive a response to the appeal within a week or so, Grievant "assumed he had won."

9. Grievant had given a copy of his level three appeal to Debbie Cook, Human Resources Director at Sharpe Hospital. On July 18, 2006, after she had not received any notice regarding a level three hearing, Ms. Cook emailed Christopher Amos, Chief Grievance Evaluator, to inquire whether they had received Grievant's appeal.

10. Mr. Amos discussed the matter with everyone in his office who receives the mail, and no one in the unit had received Grievant's appeal. All level three grievances are processed by Mr. Amos' secretary, then given to a paralegal, who reviews it and brings it to Mr. Amos. None of these people had seen or heard of Grievant's appeal.

11. In July of 2006, two other Sharpe employees, represented by the same individual as Grievant (Mr. Miller), filed grievances over the same incident for which Grievant was disciplined. Their grievances reached level three in late July, and an agreement was made that they would be processed together. During these discussions, Mr. Miller never mentioned the instant grievance or the lack of response from the level three unit, and did not request that it be processed with the other grievances.

12. The other grievances from Sharpe Hospital were mailed to the same address as Grievant's, and the level three unit received them promptly.

13. This grievance is the first grievance that has ever been "lost" at Respondent's level three facility.

14. Grievant sent a default claim to Jack Clohan, Sharpe's Chief Executive Officer, on August 14, 2006. After being advised that his request could not be processed by the employer, he filed for a default with this Grievance Board on August 21, 2006.

Discussion

The burden of proof is upon the grievant 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).

Generally, *W. Va. Code* § 29-6A-3(a) provides that a 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. At level three, *W. Va. Code* § 29-6A-4(c) requires that a hearing be held within seven days of receipt of the appeal.

Obviously, there is no dispute here that a hearing was not held at level three. However, Respondent argues that it is impossible for a default to occur in a case where no grievance appeal was ever received by the employer. While Respondent argues that none of the statutory defenses are applicable, because it could not act on a grievance it never received, prior Grievance Board decisions have determined that similar situations involved the “unavoidable cause” defense.

In *Rutherford v. Bureau of Employment Programs*, Docket No. 03-BEP-124D (Feb. 27, 2004), it was held that the loss of grievance documents in the mail was a matter beyond the agency’s control. As noted in that decision, “unavoidable cause” may be defined as "[a] cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate. . . ." or as "[a] cause which reasonable prudence and care could not have prevented, such as death, illness, the mail, etc." (Citations omitted.) Although one could argue that, in the instant case, Respondent could have taken action to correct the address in Sharpe’s level two decision, there is no definitive evidence here that the address was the actual reason for the appeal’s failure to reach the level three unit. In fact, although Sharpe appears to have used the incorrect address numerous times, no other grievances have come up missing before now, including the

grievances related to the current one. Moreover, since no prior level three appeals had been lost, the employees of the level three unit had no previous notice that Sharpe's decisions contained an incorrect address.[1]

Failure to receive mail, both U.S. and interdepartmental, has been viewed as unavoidable cause and excusable neglect by this Grievance Board. *Dilly v. W. Va. Div. of Corrections*, Docket No. 00-CORR-008D (Aug. 8, 2000); *Robinson v. W. Va. Div. of Corrections*, Docket No. 00-CORR-013D (Mar. 24, 2000); *Sauchuck, v. Parkways Economic Dev. And Tourism Auth.*, Docket No. 99-PEDTA-297D (Dec. 14,1999). Accordingly, the undersigned finds that Respondent's failure to schedule or hold a level three hearing was the result of unavoidable cause, so Grievant is not entitled to relief by default.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. The burden of proof is upon the grievant 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-3(a) provides that a 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.

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[1]Although the incorrect address was on the level two decisions, this had not been called to anyone's attention and had apparently gone unnoticed for some time.

3. Failure to receive mail, both U.S. and interdepartmental, has been viewed as unavoidable cause and excusable neglect by this Grievance Board. *Rutherford v. Bureau of Employment Programs*, Docket No. 03-BEP-124D (Feb. 27, 2004)*; Dilly v. W. Va. Div. of Corrections*, Docket No. 00-CORR-008D (Aug. 8, 2000); *Robinson v. W. Va. Div. of Corrections*, Docket No. 00-CORR-013D (Mar. 24, 2000); *Sauchuck, v. Parkways Economic Dev. And Tourism Auth.*, Docket No. 99-PEDTA-297D (Dec. 14,1999).

4. The loss of Grievant's level three appeal in the mail was not the fault of Respondent, so the default here was the result of unavoidable cause.

Accordingly, Grievant's request for relief by default is hereby **DENIED**, and this matter is **REMANDED** to level three. Respondent is directed to hold a level three hearing within seven days of receipt of this Order, or at such as other time as agreed to by the parties.

Date: January 12, 2007

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DENISE M. SPATAFORE
Administrative Law Judge