WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LAURA LEIGH GRAY,

Grievant,

v.

Docket No. 2008-01446-LogCH

LOGAN COUNTY HEALTH DEPARTMENT,

and DIVISION OF PERSONNEL,

Respondents.

ORDER GRANTING DEFAULT

Laura Leigh Gray ("Grievant") filed a written notice of default against her employer, the Logan County Health Department ("Health Department"), on or about April 30, 2008. Grievant's notice states in pertinent part:

> I [Grievant] currently have a grievance pending that I filed with the Director of the Logan County Board of Health, Dr. Livia Cabauatan, on April 10, 2008. (See footnote 1) As of today's date, [April 30, 2008], I have not been contacted regarding hearing for this grievance.
>
> Since more than ten (10) days have elapsed from my date, it is my understanding, according to the statutes of the State of West Virginia and the bylaws of the WV Grievance Board, this grievance should be granted in my favor by default judgement.

A hearing was held on the issue of default at the Charleston office of the West Virginia Public Employees Grievance Board on November 18, 2008. Grievant appeared *pro se* and the Health

Department appeared by and through its counsel, Donald C. Wandling. The Division of Personnel ("DOP") did not appear at this default hearing. After presentation of the evidence, the parties were afforded the opportunity to submit proposed findings of fact and conclusions of law on or before November 30, 2008, and this matter became maturefor decision on this date. The Health Department and the Grievant submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant avers that the Health Department is in default because a Level One hearing was not held within ten days of the filing of the grievance. Respondent counters and argues that the Director of the Health Department committed "excusable neglect" and, therefore, default is inappropriate.

The Respondent did not hold a Level One conference or hearing within the applicable time frames. Its failure to hold a hearing or conference was because the Director mistook the grievance for a "chart" and only comes into the workplace for one day per week. Another employee had knowledge that the grievance was in the Director's stack of information to be signed, yet failed to timely inform the Director. The Respondent's delay is not justified in this circumstance. Default is granted.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. At the time Grievant filed her Level One grievance, she was an Office Assistant II with the Health Department.

2. Dr. Livia Cabuatan is the Director of the Health Department and has been since 1996 or 1997.

3. Director Cabuatan works at the Health Department on Friday mornings only.

4. Grievant attempted to file a grievance with the individual the Grievant perceived to be her supervisor, Annette Castelli. Mrs. Castelli replaced the Grievant's previoussupervisor. Mrs. Castelli told the Grievant that it was not her duty to handle grievances and instructed her to file the grievance with the Director.

5. On April 9, 2008, Grievant placed on the Director's desk a grievance. (See footnote 2) She placed the grievance in the usual "stack" of documents the Director reviews for her signature. Grievant did not place the grievance in an envelope or a manilla folder. On this same date the Grievant faxed a copy of this Grievance to the West Virginia Public Employees Grievance Board.

6. On April 30, 2008, Grievant filed a notice of default.

7. Grievant resigned her employment with the Health Department and became an employee of Dr. Jon Miller, a Logan County private physician, on or about May 1, 2008.

8. On or about Friday, May 2, 2008, Director Cabuatan was advised by Annette Castelli that the Grievant resigned and a grievance had been left on her desk. On this date, Director Cabuatan found the grievance in a manilla folder on her desk. Director Cabuatan believed the unmarked folder to be a "chart" and failed to inquire into its contents.

9. A Level One hearing or conference was *never* scheduled prior to the Grievant filing her notice of default.

Discussion

A grievant who alleges a default at a lower level of the grievance process has the burden of proving it by a preponderance of the evidence. *Donnellan v. Harrison CountyBd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Brown v. Logan County Bd. of Educ.* Docket No. 2008-0567-LogED (Oct. 24, 2008). "The grievant prevails by default if a required response is not made by the employer within the time limits established in this article, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. Va. Code § 6C-2-3(b)(1). The issues to be decided, at this juncture, are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. (See footnote 3)

A default occurred in this matter because the Health Department failed to hold a Level One conference or hearing within the required time frames. West Virginia Code § 6C-2-4(a)(2) and (3) provide that

> (2) Conference. The chief administrator *shall* hold a conference within ten days of receiving the grievance. A conference is a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The chief administrator may permit other employees and witnesses to attend and participate in a conference to reach a resolution. The chief administrator shall issue a written decision within fifteen days of the conference. (3) Level one hearing. The chief administrator *shall* hold a level one hearing within fifteen days of receiving the grievance. A level one hearing is a recorded proceeding conducted in private in which the grievant is entitled to be heard and to present evidence; the formal rules of evidence and procedure do not apply, but the parties are bound by the rules of privilege recognized by law. Theparties may present and cross-examine witnesses and produce documents, but the number

> of witnesses, motions and other procedural matters may be limited by the chief administrator. The chief administrator shall issue a written decision within fifteen days of the level one hearing.

(Emphasis added). On the grievance form in this matter, the Grievant failed to check whether she desired a Level One conference or a Level One hearing. However, upon consideration of the plain language of the two above-paragraphs, it is clear that the onus is upon the chief administrator (See footnote 4) to hold a conference or hearing. The statutory language provides that the chief administrator "shall" hold a hearing or conference within a designated time frame. "As used in statutes, contracts, or in constitutional provisions, the word 'shall' is used generally in an imperative or mandatory sense." *State ex rel. Trent v. Sims*, 138 W. Va. 244, 266-67, 77 S.E.2d 122, 136 (1953)(citations omitted). Use of the term excludes the concept of discretion. *In re Mann*, 151 W.Va. 644, 652, 154 S.E.2d 860, 864 (1967)(citations omitted). The duty is not upon the Grievant, but the chief administrator to hold the conference or hearing within the allotted time frame. Failure of the Grievant to check a particular box on the grievance form has no effect upon the duty of the chief administrator.

The Health Department does not challenge receipt of the grievance. It is undisputedthat the grievance was placed on the Director's desk on April 9, 2008, in a stack of items the Director usually signs. A notice of default was filed on April 30, 2008. A hearing or conference was never scheduled prior to the Grievant filing a notice of default. "The grievant prevails by default if a required response is not made by the employer within the time limits established in this article ... ." W. Va. Code § 6C-2-3(b)(1). In this grievance, the Health Department has not responded within the applicable time frames. The Health Department defaulted.

It must next be determined whether the Health Department is excused from its default. The Health Department has not established that its failure to hold a conference or hearing was justified. Therefore, default must be granted. The excuse, "justified delay not caused by negligence or intent to delay the grievance process," was added to the grievance statute with the adoption of the new grievance procedure in 2007. (See footnote 5) As recognized in the recent decision of *Dunlap v. Department of Environmental Protection*, 2008-0808-DEP (Dec. 8, 2008), this language generally parallels the "old" default language for state employees, West Virginia Code § 29-6A-3(a)(2)(2006). The *Dunlap* ALJ held that under the new statute,

> For the defense of, "justified delay not caused by neglect [negligence] or intent to delay the grievance process" to excuse a default, the employer must prove, by a preponderance of the evidence, that the failure to act within the required time limit, was the result of an unexpected event, or events, that was outside of the defaulter's control. Noncompliance with the time limits cannot be excused for acts of bad faith, inadvertence or a mistake regarding the contents of the procedural rule. Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *See Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74 (1998)*; Martin v. Randolph County Bd. of Educ.,* 195 W.Va. 297, 311 S.E.2d 399 (1995); *Bowe v. Workers Compensation Comm'n,* Docket No. 04-WCC-054D (Apr. 12, 2004).

Dunlap v. Dep't of Envtl. Protection, 2008-0808-DEP (Dec. 8, 2008). In the present case, there was no intervening event that caused the delay in holding a Level One conference or hearing. A previous decision under the "old" default procedure for state employees has held that where a chief administrator was out of the office and an appeal to level two was filed, it was excusable neglect for the employer not to respond within the statutory time frame. In *Brackman v. West Virginia Division of Corrections/ Anthony Correctional Center*, Docket No. 02-CORR -019D (June 26, 2002), it was found that the employer's failure to respond was "excusable neglect" where (1) the chief administrator was out of the office and had a designee, (2) grievant gave his level two appeal to a store keeper to give to the chief administrator's designee, (3) the written grievance was placed in an unmarked envelope and (4) there was conflicting evidence whether the employer received actual notice.

The factual scenario presented in this grievance is different from the *Brackman* scenario. The chief administrator only comes in once a week. She apparently has no designee. The Grievant attempted to file the grievance with her perceived immediate supervisor who told her that it was not her responsibility and instructed her to file it with the Director. The Grievant placed the grievance form on the Director's desk in the typical placeshe received incoming documents. The grievance was *not* in an unmarked envelope, but enigmatically appeared in a manilla folder while on the Director's desk. (See footnote 6) The Grievant did not place the grievance in a folder.

The Director believed the unmarked folder to be a "chart" and failed to inquire into its contents. Apparently, the Director did not have time to inquire into the contents of the folder. The scenario is akin to an excuse based upon a large workload or workplace distraction because the Director was in the office only a finite period of time and seemingly did not have time to closely review the documents in her "stack." However, a large workload or workplace distractions do not constitute justifiable delay. *See generally Linger v. Dep't of Transp./Dep't of Highways*, Docket No. 05-DOH-

358D (Jan. 20, 2006)(finding no “excusable neglect” under the “old” default statute where the employer alleges it defaulted because of a large workload); *Toth v. Div. of Corrections*/ *Anthony Corr. Cntr*., Docket No. 98-CORR-344D (Dec. 10, 1998)(recognizing that workplace distractions by a grievance evaluator will not result in “excusable neglect”). In light of the circumstances, the Director's failure to inquire into the contents of the folder does not amount to justified delay. *See Both v. Div. of Corrections/Anthony Corr. Cntr*., Docket No. 98-CORR-436D (Feb. 22, 1998)(failure to open an appeal in the possession of the evaluator is not “excusable neglect”). The Director's conduct was negligent.

The onus is upon the Director to hold a Level One conference or hearing within the statutory time frames. The Health Department failed to prove that the default was a resultof “justifiable delay” and the default is granted.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has the burden of proving it by a preponderance of the evidence. *Donnell v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Brown v. Logan County Bd. of Educ.* Docket No. 2008-0567-LogED (Oct. 24, 2008).

2. Grievant proved, by a preponderance of the evidence, that a default occurred when the Director of the Health Department failed to hold a conference or hearing in violation of West Virginia Code § 6C-2-4(a).

3. 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 injury, illness or a justified delay not caused by negligence or intent to delay the grievance process.” W. Va. Code § 6C-2-3(b)(1); *Brown v. Logan County Bd. of Educ.,* Docket No. 2008-0567- LogED (Oct. 24, 2008).

4. Respondent Health Department failed to prove, by a preponderance of the evidence, that the default was a result of a “justified delay not caused by negligence or intent to delay the grievance process.” The Respondent's failure to hold a hearing was negligent. Accordingly, this default is **GRANTED**, and Respondents may proceed to show that the remedy sought by Grievant is contrary

to law or contrary to proper and available remedies. The parties are directed to confer with one another and provide the Grievance Board with at least **three mutually agreeable dates** for scheduling the remedy hearing, no later than **January 15, 2009.**

DATE: December 30, 2008

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Mark Barney

Administrative Law Judge

Footnote: 1

The testimony indicated this date to be April 9, 2008.

Footnote: 2

The Grievant utilized the standard form provided by the West Virginia Public Employees Grievance Board. The underlying grievance concerns reallocation. As relief, the Grievant seeks to be reallocated from the classification of Office Assistant II to the classification of Office Assistant III. She requested that the relief be retroactive.

Footnote: 3

Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 7.1 (2008).

Footnote: 4

"'Chief administrator' means, in the appropriate context, the commissioner, chancellor, director, president, secretary or head of any state department, board, commission, agency, state institution of higher education, commission or council, the state superintendent, the county superintendent, the executive director of a regional educational service agency or the director of a multicounty vocational center who is vested with the authority to resolve a grievance. A "chief administrator" includes a designee, with the authority delegated by the chief administrator, appointed to handle any aspect of the grievance procedure as established by this article." W. Va. Code § 6C-2-2(b). In consideration of the facts presented, it is clear that Dr. Cabuatan was the Chief Administrator of the Health Department.

Footnote: 5

Respondent Health Department cites W. Va. Code § 29-6A-3(a)(2)(2006) and argues that the failure to hold a Level One hearing or conference was "excusable neglect." See Respondent's Proposed Findings, 2. In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). This new procedure covers both state and education employees. Many sections that differed in the two old procedures, were

revised when combined into the new procedure. The employer default provision is one such section.

Footnote: 6

This is not an instance where the grievance was misplaced or misfiled. See generally McCauley v. Div. of Corrections, Docket No. 99-CORR-101D (May 11, 1999)(finding "excusable neglect" where documents were misfiled).