THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LAJENNA KELLEY,

Grievant,

v.

Docket No. 2008-0610-DOT

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT AND REMANDING GRIEVANCE TO LEVEL ONE

LeJenna Kelley, employed by the Division of Highway ("DOH") as a Telephone Operator, filed a Motion for Default on October 17, 2007, in which she alleges that the level one hearing evaluator denied Grievant's right to call and examine witnesses. Grievant asserts this denial to call and examine witnesses results in a denial of due process, as well as demonstrating the Respondent is acting in bad faith. The undersigned Administrative Law Judge subsequently conducted a hearing on the motion in the Grievance Board's Charleston Office on January 9, 2008. Grievant appeared in person and by Gordon Simmons, West Virginia Public Workers Union, and DOH was represented by Carrie A. Dysart, Esq. This grievance became mature at the conclusion of the hearing.

Factual Summary

Grievant asserts a default occurred in light of Respondent's refusal to hold a level one hearing in accordance with the procedure as defined by West Virginia Code § 6C-2- 4(a). DOH maintains that a default occurs when an employer fails to provide a grievantwith a required response within the

prescribed time limits. West Virginia Code § 6C-2-3(b). DOH asserts that disallowing a grievant to call and examine witnesses at a level one hearing does not rise to the level of default as set out by the statute. In the instant grievance, DOH points out that the level one hearing was conducted within the prescribed time limits, and a decision was issued in a timely manner.

DOH expressed its contention that the legislative intent in restructuring the grievance statute was to lessen the formality of level one of the grievance procedure, thereby increasing the likelihood of efficient resolution of certain grievances by evaluators who have the authority to grant or deny requested relief. Grievant maintains she requested a hearing at level one, and that entails the calling and examination of witnesses by Grievant's representative. DOH concedes, on the effective date of the Board's procedural rules, it changed its policy and instructed level one evaluator's to allow calling of witnesses when a hearing is requested.

Discussion

The burden of proof is upon Grievant when 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). West Virginia Code § 6C-2-3(b) sets forth the time lines to be followed at each level of the grievance procedure. The statute also provides that the administrative law judge may deny the default, or modify the remedy to be granted to comply with the law or otherwise make the grievant whole.

In the present grievance, Respondent did provide the level one hearing within the prescribed time limits, and a decision was issued in a timely manner. Therefore, Grievant's motion for default in this matter is denied. However, the statute does provide that the undersigned may craft a remedy to comply with the law or otherwise make the grievant whole. The record in this matter reflects Grievant made application for a level one hearing and attempted to call witnesses. The record also indicates that the level one hearing evaluator denied the request to call and examine witnesses.

West Virginia Code § 6C-2-3(k)(4) provides, in part, as follows:

> At level one, the chief administrator may call witnesses and may allow parties to call witnesses during a conference or hearing upon request. The parties have the right to call, examine and cross-examine witnesses during any hearing. (See footnote 1)

(Emphasis Added).

The above language is clear and unambiguous. The undersigned acknowledges that default is not the proper remedy to address this set of facts. The proper remedy is to remand the grievance to level one to allow Grievant the opportunity to exercise her right to call, examine and cross-examine witnesses during the hearing. Accordingly, Grievant's motion that a default be entered is **DENIED**. The grievance is **REMANDED** to the DOH to provide Grievant a level one hearing conducted in compliance with the statutory procedure.

Entered this 24th day of January, 2008.

_____

Ronald L. Reece

Administrative Law Judge

Footnote: 1 *Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-4 (2007).*