THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEN PATRICK,

Grievant,

v. **Docket No. 2008-1253-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT AND REMANDING TO LEVEL ONE

Ken Patrick ("Grievant") was employed by the Division of Highways ("DOH") for a number of years but is now retired. While employed by the DOH, Mr. Patrick filed a grievance contesting a performance evaluation and seeking "to be given a merit raise effective 7/1/04." The level one form was filed on May 16, 2005, under the old grievance procedure.[1] The grievance was denied at levels one and two of the old grievance procedure and an Order was entered at level three transferring the grievance to the new grievance procedure.[2]

The Order transferring the grievance to the new procedure did not specify to which level of the new procedure the grievance was being transferred, because the parties could not agree. This Order was entered on March 8, 2008.

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[1] In 2007, the Legislature, 2007 Acts ch. 207, 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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

[2] The procedural history of this grievance will be discussed in greater detail in the Findings of Fact section of this Order.

Grievant received a letter dated May 27, 2009, scheduling a level one hearing under the new procedure for June 9, 2009. On June 1, 2009, Grievant filed a written request to prevail by default alleging the DOH had failed to hold a hearing within the time limit mandated by statute. Respondent filed a request for a hearing on the default claim. A hearing on the default claim was held on September 3, 2009, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared at the hearing and represented himself. Respondent was represented by Barbara L. Baxter, Esquire. The only issues to be determined at that hearing were whether a default occurred and, if so, whether Respondent had a statutory defense.

At the conclusion of the hearing the parties declined to provide post-hearing fact/law proposals. This matter became mature for decision on September 3, 2009, at the conclusion of the hearing.

Synopsis

Grievant filed a written request to prevail by default alleging that a level one hearing was not scheduled within the time lines mandated by the statute. Specifically, the grievance was transferred to the new grievance procedure by an Order dated March 8, 2008, and Grievant received a notice, dated May 27, 2009, that a level one hearing was scheduled for June 9, 2009. Respondent demonstrated that the unusually long period for scheduling the hearing was the result of "a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1). Accordingly, the request to enforce the grievance by default is denied.

The following Findings of Fact are based upon a thorough review of the entire record.

Findings of Fact

1. Grievant, Ken Patrick, filed a level one grievance with the DOH contesting an employment performance appraisal and seeking to receive a merit raise effective July 1, 2004. The level one form was filed on May 16, 2005, under the old grievance procedure for state employees. W. VA. CODE §§ 29-6A-1 et seq. (Repealed 2007).

2. The grievance was denied at level one of the old procedure on May 24, 2005, and at level two on June 21, 2005.

3. Grievant filed an appeal to level three of the old procedure on June 22, 2005.

4. On July 30, 2007, Brenda Craig Ellis, Esquire,[3] sent a letter to Grievant advising him that the new statutory grievance procedure became effective on July 1, 2007. Ms. Ellis explained to Grievant that he could transfer his grievance to the new procedure or proceed under the old procedure. Enclosed with the letter, Ms. Ellis provided Grievant with a Transfer Form for transferring the grievance to the new procedure. Respondent's Exhibit 1.

5. Counsel for DOH, Barbara Baxter, acknowledged receipt of Grievant's Transfer Form by letter dated October 24, 2007. Grievant's form indicated that he wished to transfer to level one of the new grievance procedure. In her letter, Ms. Baxter reminded Grievant that levels one and two had already been completed under the old grievance procedure and recommended that the parties proceed to level three in the new procedure. She asked that Grievant respond to her recommendation in writing. Respondent's Exhibit 2.

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[3] Brenda Craig Ellis was a Hearing Examiner employed by the DOH to hear and decide grievances at level three of the old grievance procedure for DOH employees.

6. By letter dated November 1, 2007, Ms. Baxter noted that she had not received a reply from her earlier correspondence and provided Grievant with a new Transfer Form that would transfer the grievance to level three of the new grievance procedure. Ms. Baxter requested that Grievant sign the revised form and return it to her. Respondent's Exhibit 3.

7. Ms. Baxter sent another letter containing a Transfer Form for level three to Grievant on January 23, 2008. She, once again, noted that there had been no response to her earlier requests and asked Grievant to sign the form and return it if he agreed to go directly to level three. Respondent's Exhibit 4.

8. By letter dated February 27, 2008, Brenda Craig Ellis provided another Transfer Form to Grievant and asked Grievant to sign the form and return it to her. Respondent's Exhibit 5.

9. Grievant completed the Transfer Form provided to him by Ms. Ellis requesting that his grievance be transferred from level three of the old procedure to level one of the new procedure. The Transfer Form was signed by Grievant and dated February 28, 2008. Respondent's Exhibit 6.

10. Brenda Craig Ellis entered an Order on March 3, 2008, transferring the grievance from level three of the old grievance procedure to the new grievance procedure without specifying at which level the grievance would be heard in the new grievance procedure. The Order contained the following statement:

> Pursuant to instructions from the Grievance Board to process the transfer request regardless of whether the parties are in agreement as to the level of the new procedure, this matter will be forwarded to the Grievance Board for further processing.

Respondent's Exhibit 7.

11. A memorandum was sent to Grievant and Counsel for DOH from the Grievance Board on March 10, 2008. That memorandum stated:

> On March 3, 2008, Grievant filed a grievance at Level 1 of the grievance process. Please refer to the above name and Docket Number in all correspondence related to this grievance.

Respondent's Exhibit 8.

12. DOH was shutting down its unit for hearing grievances at level three that were filed by DOH employees. At that time, DOH staff did not know if Grievant's claim could be heard at level one of the new grievance procedure since it had been through levels one and two of the old procedure. Staff of the DOH were waiting for the Grievance Board to provide guidance on this issue or set the grievance for hearing.[4]

13. In early May 2009, DOH realized that the grievance had not been processed and assigned Harold Jones to conduct a level one hearing under the new procedure.

14. Harold Jones contacted Grievant by telephone on May 12, 2009, and asked Grievant if he still wished to pursue his grievance. Grievant indicated that he wished to proceed.[5]

15. Harold Jones sent a letter to Grievant dated May 27, 2009, informing him that his grievance had been set for a level one conference to be held on June 9, 2009.

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[4] In the testimony of Julia A. Vande Linde, a paralegal employed in the DOH Legal Division, she noted that DOH had a large number of grievances she was monitoring at that time. Since DOH was awaiting direction from the Grievance Board on this grievance, she concentrated on other matters. The Grievance Board staff evidently did not realize DOH was expecting additional communication and assumed the matter would be set for hearing before the chief administrator.

[5] Grievant testified that this was the first time he knew his grievance "was back in play."

16. After receiving Mr. Jone's letter, Grievant filed a written request to prevail by default. The request was dated June 1, 2009.

17. Respondent filed a written request for a hearing on the default request. The request for a hearing was filed on June 4, 2009.

Discussion

A grievant who alleges a default at a lower level of the grievance process has the burden of proving the default 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 evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Browning 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.[6] *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

The term "response," as used in the default provision, not only refers to the obligation to render decisions within the statutory time limits, but to the holding of hearings within proper limits as well. *Hanlon v. Logan County Bd. of Educ.,* 201 W.Va. 305, 496

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

S.E.2d 447 (1997).[7] Therefore, Grievant may seek relief for default based upon the failure to hold a hearing within the time period mandated by statute.

The applicable statute is W. VA. CODE § 6C-2-4(a)(2) which requires a chief administrator to conduct a hearing at level one within fifteen days of receiving of the grievance. In this instance, the level one and two hearings had been held pursuant to the previous statute. It would be impossible for the chief administrator to hold a level one hearing within fifteen days of receiving the grievance under the new procedure. The grievance was originally received and the process commenced more than two years before the new procedure was enacted. Rather, the time for holding a level one hearing in this instance would have to be within fifteen days of receipt of the notice that the grievance was transferred to the new procedure. That would have been upon receipt of the notice from the Grievance Board sent March 10, 2008. Finding of Fact 11 *supra.* Grievant did not receive notice that a level one hearing had been scheduled until he received the letter from Harold Jones dated May 27, 2009. Under these circumstances, the level one hearing was not held within the time period contemplated. W. VA. CODE § 6C-2-4(a)(2).

The next issue is whether Respondent has a statutory defense for the failure to hold the hearing in the time allowed. The statute allows the employer to escape default if it can be proven that the chief administrator was prevented from making a timely response for

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[7] In *Hanlon, supra,* the Justice Davis noted:

> In [*Martin v. Randolph County Board of Education*, 195 W.Va. 297,465 S.E.2d 399 (1995)], we determined that the word "response," synonymous in this context with "respond," "was intended to include hearings," thereby permitting a grieved employee to seek "relief by default" where the default was occasioned by a delay in holding a hearing. 195 W.Va. at 305-06, 465 S.E.2d at 407-08.

one of three reasons: "injury, illness or a justified delay not caused by negligence or intent to delay the grievance process."[8] Respondent argues that the failure to hold a hearing at level one was the result of a justified delay. For the defense of "justified delay not caused by neglect or intent to delay the grievance process" to excuse a default, the respondent must prove that the failure to act within the required time limit was the result of an unexpected event, or events, that was outside of the respondent'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. *Dunlap, supra.*

The original grievance was properly processed through levels one and two of the old grievance procedure. When it was to be transferred to the new grievance procedure, Respondent thought it should go to level three. Grievant, on the other hand, was insistent that the grievance be transferred to level one of the new procedure. The new statute did not give any guidance on this issue and the parties could not reach agreement. Ultimately, the Hearing Examiner for level three, Brenda Craig Ellis, entered an Order dismissing the grievance from the old procedure and transferring it to the new procedure. That Order did not specify to which level of the new procedure the grievance was transferred. Rather, the Order contained the following language:

> Pursuant to instructions from the Grievance Board to process the transfer request regardless of whether the parties are in agreement as to the level of the new procedure, **this matter will be forwarded to the Grievance Board for further processing.**

(Emphasis added) Respondent's Exhibit 7.

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[8] W. VA. CODE § 6C-2-3(b)(1).

Based upon that Order, Respondent expected to receive instruction from the Grievance Board regarding the level at which the hearing would be held. That instruction was not forthcoming. The only notice Respondent received from the Grievance Board was that it had received the Transfer Form from Grievant stating that he wished to have a hearing at level one. Respondent was aware of Grievant's desire to start again at level one and that he intended to file a Transfer Form reflecting that desire. However, based upon the Order entered by Ms. Ellis, Respondent was waiting for a determination from the Grievance Board on the issue of the appropriate level for the grievance under the new procedure. Under the circumstances, Respondent's failure to act was not unreasonable.

There was enough confusion regarding how grievances, started under the old procedure, would be handled under the new procedure, to prompt the governor to issue an Executive Order to give guidance on the issue. Exec. Order No. 2-07 (May 8, 2007). Even that Order was not detailed enough to specify which level such a grievance should be transferred to. Upon realization that there would be no further guidance from the Grievance Board, Respondent scheduled a level one hearing and notified Grievant. The confusion created by the Ellis Order which indicated that there would be further instruction and the subsequent lack of further instruction forthcoming from the Grievance Board were events leading to the delay of the hearing over which Respondent had no control. Additionally, the record demonstrates that the delay was not a result of negligence by the Respondent nor an intent to delay the grievance process. Consequently, Respondent has proven, by a preponderance of the evidence, that the failure to schedule the level one hearing within the mandatory time period was the result of "a justified delay not caused by negligence or intent to delay the grievance process" and no default can be found.

It is worth noting that Grievant did not raise the issue of default during the fourteen months while Respondent was awaiting instruction from the Grievance Board. In fact, he did not raise the issue until Respondent had scheduled a hearing. In *Hanlon, supra,* Justice Davis wrote:

> Though we do not profess to require grievance proceedings to adhere to the procedural rules and specific objection requirements applicable to circuit court proceedings, we do believe it necessary that the issue of an employee's entitlement to "relief by default" be presented to the grievance evaluator to ensure that the matter is either dealt with at its point of origin or properly preserved for appellate review. Therefore, we hold that, in order to benefit from the "relief by default" provisions contained in W. VA. CODE § 18-29-3(a) (1992), a grieved employee or his/her representative must raise the "relief by default" issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default.

Hanlon, 201 W.Va. at 315, 496 S.E.2d at 457. Under the new grievance statute, a grievant is required to seek enforcement "within ten days of the default." W. VA. CODE § 6C-2-3(b)(2). This creates an affirmative defense of timeliness for the Respondent which was not raised in this matter.[9] However, it is clear under *Hanlon* that Grievant cannot wait until Respondent takes affirmative action to cure the default and then seek enforcement.

Because Respondent has proven a statutory defense the request for enforcement is DENIED.

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). A preponderance

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[9]Respondent has the burden of proof with regard to this affirmative defense. 156 C.S.R. 1 § 3. The failure to raise the defense makes it impossible to meet that burden and the defense is waived.

of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Browning v. Logan County Bd. of Educ.* Docket No. 2008-0567-LogED (Oct. 24, 2008).

2. The grievant prevails by default if a required response is not made by the employer within the time limits established by statute 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 the first default hearing, are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. 156 C.S.R. 1 § 7.1 (2008); *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

3. For the defense of "justified delay not caused by neglect or intent to delay the grievance process" to excuse a default, the respondent must prove that the failure to act within the required time limit was the result of an unexpected event, or events, that was outside of the respondent'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. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

4. Respondent has proven, by a preponderance of the evidence, that the failure to schedule the level one hearing within the time period required by the statute was the result of "a justified delay not caused by negligence or intent to delay the grievance process" and no default can be found.

Accordingly, the request for default is DENIED. This grievance is REMANDED to level one for a hearing before the chief administrator or designee. The hearing must be

held within fifteen days of receipt of this ORDER by Respondent, unless the parties mutually agree in writing to a subsequent date.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: SEPTEMBER 23, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE