THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JACQUELINE C. DUNLAP,
Grievant,

v. **Docket No. 2008-0808-DEP**

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant Jacqueline C. Dunlap filed a level one grievance against her employer, the Department of Environmental Protection ("DEP"), on November 9, 2007. Her statement of the grievance was the following:

> Since 1-1-06 thru 7-6-07 I have been working under the following conditions resulting in emotional stress, anxiety, fear and physical illness. They are hostile work environment, harassment, unfair treatment, favoritism, double standards, age discrimination, retaliation, privacy, dress code restrictions. The person responsible is Ramona Dickson, Controller, Fiscal Services. DOP Work place harassment, ADEA of 1967, DEP's dress code, Privacy Act, other incidents since returning to work.

Grievant stated that she seeks the following remedies:

> All annual and sick leave restored from 7-6-07 thru 10-22-07.
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> All out of pocket medical bills paid from 7-6-07 thru 10-22-07.
>
> Stay in my current position until such time as an equivalent or higher position comes available within DEP KC [Kanawha City] office that I can transfer in if I choose to or until I choose to leave DEP through another job or retirement.
>
> Future legal fees.
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> Punishment described in any of the policies, rules, acts or other stated in my grievance be enforced against Ramona Dickson.[1]

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[1] The final remedy, related to punishment of Ramona Dickson, was not included on the level one grievance form. Grievant added this remedy at the level one hearing without objection from Respondent.

On January 18, 2008, the first day of the level one hearing was held . The hearing was not concluded that day and five more meetings were held at level one to complete the presentation of evidence. The last day of presentation of evidence was April 9, 2008. On September 10, 2008, Grievant filed a written notice of default with DEP, claiming that the level one decision was not rendered within the time required by statute and policy.[2] A hearing was held regarding the default allegation and a decision was rendered granting the default on December 8, 2008. *Dunlap v. W. Va. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008). On January 21, 2009, a hearing was held at the Charleston office of the Public Employees Grievance Board on the issue of whether the remedies requested by Grievant were "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b). Grievant appeared at the hearing *pro se.* DEP was represented by Raymond S. Franks II, DEP General Counsel. Grievant presented her position regarding the facts and the law at the close of the hearing and DEP submitted a written post hearing argument on February 3, 2009. This matter became mature for decision on that date.

Synopsis

Since Grievant prevailed on the merits by default, the sole issue is whether the remedies sought by Grievant are contrary to law or contrary to proper and available remedies. While unhappy with the default decision, DEP stipulated in writing, and at the hearing, that the remedies of restoring Grievant's annual and sick leave, as well as permitting Grievant to remain in her position at the DEP Kanawha City Office, are proper

[2] W. VA. CODE § 6C-2-4(a)(3) requires that a written decision be issued within fifteen days of the level one hearing.

and available remedies to the Grievant. Those remedies are granted. The remedies related to medical expenses, future legal fees and punishment of a co-worker are not proper and available remedies and they are denied.

The following findings of fact are based upon a thorough review of the record of this grievance.

Findings of Fact

1. Grievant prevailed in her grievance initially filed November 7, 2007, through an *Order Granting Default* dated December 8, 2008.

2. The remedies sought by Grievant were:

> All annual and sick leave restored from 7-6-07 thru 10-22-07.
> All out of pocket medical bills paid from 7-6-07 thru 10-22-07.
> Stay in my current position until such time as an equivalent or higher position comes available within DEP KC [Kanawha City] office that I can transfer in if I choose to or until I choose to leave DEP through another job or retirement.
> Future legal fees.
> Punishment described in any of the policies, rules, acts or other stated in my grievance be enforced against Ramona Dickson.

3. DEP stipulated that restoring Grievant's annual leave and sick leave for the period of July 1, 2007, through October 22, 2007, is a proper remedy in this grievance.

4. DEP stipulated that allowing Grievant to remain in her current position at the DEP is a proper remedy in this grievance.

5. Grievant submitted receipts for out of pocket expenses for prescription drugs she purchased between July 6, 2007, and October 3, 2007, that she claims were treatment for stress related illnesses caused by her working conditions. The total out of pocket expense submitted was $204.51. Grievant's Exhibit 2.

6. Grievant submitted invoices for out of pocket expenses[3] for medical treatment incurred between July 6, 2007, and October 31, 2007, which she claims were necessary as a result of her stressful working conditions. The total out of pocket expenses submitted for medical treatment was $345.55. Grievant's Exhibit 3.

7. Grievant has not incurred any attorney fees for representation in this grievance.

8. Debbie Hughs and Charles Rollins, employees in DEP's Human Resources Department, confirmed that Grievant used 500 hours of sick leave and 48 hours of annual leave between July 6, 2007, and October 22, 2007. Grievant's Exhibit 5.

Discussion

Burden of Proof

Determining which party has the burden of proof, and the level of proof that must be established to meet that burden, is a prerequisite to resolving any judicial or quasi-judicial controversy. Default grievances filed after July 1, 2007, are controlled by WEST VIRGINIA CODE § 6C-2-3(b).[4] Subparagraph (1) of that Code section provides that a grievant prevails by default if the employer fails to make a required response within the

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[3] "Out of pocket expenses" in this matter, refer to expenses paid by Grievant, over and above any amounts paid or reimbursed by health insurance.

[4] 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). The effective date of S.B. 442 was July 1, 2007. All grievances commenced after that date are controlled by W. VA. CODE §§ 6C-2-1 *et seq.*

time line required in the statute.[5] That subparagraph also provides affirmative defenses that can be raised by the employer to excuse the default. Those defenses arise when the employer is prevented from meeting the statutory time line "directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." *Id.* The employer is provided an additional affirmative defense in Subparagraph (2), by "showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies."[6]

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[5] Default generally occurs when the chief administrator fails to render a level one decision within fifteen days after the level one hearing, as required by W. VA. CODE § 6C-2-4(a)(3).

[6] W. VA. CODE § 6C-2-3(b) specifically states the following:

(b) Default. --

(1) 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.

(2) Within ten days of the default, the grievant may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default. If the chief administrator objects to the default, then the chief administrator may, within five days of the filing of the notice of intent, request a hearing before an administrative law judge for the purpose of stating a defense to the default, as permitted by subdivision (1) of this subsection, or showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law.

(3) If the administrative law judge finds that the employer has a defense to the default as permitted by subdivision (1) of this subsection or that the remedy is contrary to law or not proper or available at law, 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.

Default grievances are generally bifurcated.[7] In the first hearing, it is determined whether a default actually occurred. If a default is proven, a second hearing is held to determine if any of the remedies requested by the grievant are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). In the first hearing, the grievant who alleges a default at a lower level of the grievance process, has the burden of proving that occurred, by a preponderance of the evidence. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002); *Browning v. Logan County Bd. of Educ.* Docket No. 2008-0567-LogED (Oct. 24, 2008); *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

Once the grievant has proven that the employer has failed to meet a required time line, the respondent may advance an affirmative defense that the employer was prevented from meeting the time line as a direct result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process. To prevail due to one of these affirmative defenses, established in W. VA. CODE § 6C-2-3(b)(1), the respondent must prove the facts establishing the defense by a preponderance of the evidence. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Browning v. Logan County Bd. of*

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[7] Public Employees Grievance Board, 156 C.S.R. 1 § 7.1 (2008) provides that:

> The default proceeding is usually bifurcated into two hearings. Once a grievant files a written claim for relief by default with the Board, or the chief administrator files an objection, all proceedings at the lower levels are automatically stayed until all default matters have been ruled on unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

Educ. Docket No. 2008-0567-LogED (Oct. 24, 2008); *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

Once the default is established, the second hearing addresses the remedies requested by the grievant. At that hearing, the respondent has the opportunity of showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. These issues are sometimes matters of law that may not require the presentation of evidence, but to the extent that proof is required, the respondent has the burden of proving this affirmative defense by a preponderance of the evidence. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).[8] *See Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and *Flowers v. W.Va. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999) p. 3 of 8.

In the present case, at the first hearing, Grievant proved by a preponderance of the evidence that a default occurred. DEP did not prove that the default should be excused because the time line for issuing the level one hearing was missed as the direct result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process. Consequently, Grievant prevailed at the first hearing. The decision granting the default was issued on December 5, 2008, and the remedy hearing was held on January 21, 2009. Since Grievant proved default at the first hearing, at the second hearing Respondent has the burden of proving by a preponderance of the evidence, that the

[8] In pertinent part, 156 C.S.R. 1 § 3 states that "[a]ny party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence."

remedies requested by Grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b); Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

Motion To Reconsider

On February 26, 2009, DEP filed a Motion for Reconsideration of Default. In support of the Motion, DEP asserts that the designee for the Chief Administrator was suffering from a medical ailment that kept him from completing the level one decision within the statutory time line. Counsel for DEP asserts that he was unaware of the designee's medical condition prior to the hearing and had no reason to inquire about it.

There is a significant question regarding whether an ALJ for the Grievance Board has legal authority to reconsider a written decision once it has been issued. However, in this case, it is unnecessary to address that issue. While there is no specific rule or policy related to reconsideration of Grievance Board decisions, the key to reopening a decided matter to introduce newly discovered evidence is that the party making the motion must demonstrate diligence in ascertaining and securing the evidence prior to the initial hearing. *See generally, Powderidge Unit Owners Ass'n v. Highland Properties, LTD.,* 196 W. Va. 692, 474 S.E.2d 872 (1996). Such diligence was not demonstrated in this grievance. One of the few statutory defenses for a default relates to the health of the level one decision maker. Counsel had ready access to the Chief Administrator's designee before the hearing. With minimal effort, he could have discovered any infirmity the designee suffered and presented that evidence at the initial hearing. Counsel's failure to interview this witness prior to the hearing is not a valid basis for reconsideration and the motion is hereby denied.

Remedies

The first remedy sought by Grievant is to have "[a]ll annual and sick leave restored from 7-6-07 thru 10-22-07." The basis of Grievant's claim is that DEP created an inordinately stressful work environment which caused her to miss work and utilize her leave. Respondent filed stipulations regarding the propriety of the remedies in anticipation of the remedy hearing. In those stipulations Respondent stated: "The truth of that allegation being assumed, DEP believes that it would be authorized to restore Grievant's annual and sick leave." The Grievance Board has awarded the restoration of leave in situations where the employer's action, or lack of action, has caused the employee to utilize leave. *See Guerin v. Mineral County Bd. of Educ.,* Docket No. 92-28-422/459 (Jan. 31, 1996); *Swanson v. Div. of Motor Vehicles*, Docket No. 06-DMV-065 (July, 31, 2006). This remedy is not contrary to law and is available and proper in this grievance.

The second remedy requested by Grievant is to have "[a]ll out of pocket medical bills paid from 7-6-07 thru 10-22-07." Damages such as medical expenses, mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); As pointed out in *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997), Grievant's claim for compensation for her work related illness falls best under the purview of workers' compensation. Therefore, medical expenses, as requested in this grievance, are contrary to proper and available remedies.

Next Grievant seeks to "[s]tay in my current position until such time as an equivalent or higher position comes available within DEP KC [Kanawha City] office that I can transfer in if I choose to or until I choose to leave DEP through another job or retirement." There is no evidence in the record, at either hearing, that grievant has been transferred, suspended, or dismissed from her position. Additionally, Respondent stipulated that allowing Grievant to remain in her present position is an appropriate remedy. It is important to note that this is not a guarantee of future employment. While Respondent may not retaliate against Grievant for participation in the Grievance process,[9] Grievant may be subject to reasonable disciplinary action for matters that may arise in the future, which are unrelated to the events giving rise to this grievance.

As her fourth claim of relief Grievant seeks any future legal fees she might incur in pursuing this grievance. W. VA. CODE § 6C-2-6 controls the allocation of expenses and attorney's fees in the Grievance Procedure. That statute states:

> (a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses.
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> (b) In the event a grievant or employer appeals an adverse level three decision to the circuit court of Kanawha County, or an adverse circuit court decision to the Supreme Court of Appeals of West Virginia, and the grievant substantially prevails upon the appeal, the grievant may recover from the employer court costs and reasonable attorney's fees for the appeal to be set by the court.

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[9] W. VA. CODE § 6C-2-3(h) provides:

(h) Reprisal.--No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.

The legislature has made it clear that the parties must bear their own expenses through the grievance process. An ALJ for the Grievance Board is not authorized by law to grant attorney's fees at level three. *See Long v. Kanawha County Bd. of Educ.,* Docket No. 00-20-308 (Mar. 29, 2001). This remedy is contrary to law and unavailable in this grievance.

Finally, Grievant sought that any "[p]unishment described in any of the policies, rules, acts or other stated in my grievance be enforced against Ramona Dickson." It is a well settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996). A decision concerning disciplinary action resides with the employer. This Grievance Board may award relief against the employer based upon conduct of which the employer is aware, and which it in effect "condones." *White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (Mar. 30, 1994). "However, this Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. *Daugherty v. Bd. of Directors*, Docket No. 93-BOD-295 (Apr. 27, 1994); *See Daggett v. Wood County Bd. of Educ.*, Docket No. 91-54-497 (May 14, 1992); *Rice v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-288 (Apr. 30, 1997); *See Coster v. W. Va. Div. of Corr.*, Docket No. 98-CORR-506 (Feb. 24, 1999). An exception to this rule is where a supervisor retaliates against an employee for participation on the grievance process. *Grant & Grant v. Cabell*

County Bd. of Educ., Docket No. 06-06-012 (Oct. 17, 2006).[10] No such allegation was made in the statement of this grievance. The punishment remedy requested by Grievant is contrary to law and consequently, unavailable to Grievant.

Ultimately, Grievant is entitled to remain in her position at the DEP, without any loss of pay or benefits, and without reprisal for participating in the grievance process. Grievant is also entitled to the reinstatement of all of the sick and annual leave she utilized between July 7, 2007 and October 22, 2007. To that extent the grievance is granted. All other remedies sought by Grievant are denied.

Conclusions of Law

1. In the remedy phase of a default grievance, the respondent has the burden of proving by a preponderance of the evidence, that the remedies requested by the grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b); Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *See Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and *Flowers v. W.Va. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. The Grievance Board has awarded the restoration of leave in situations where the employer's action or inaction has caused the employee to utilize leave. *See Guerin v. Mineral County Bd. of Educ.,* Docket No. 92-28-422/459 (Jan. 31, 1996);

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[10] In this case the Grievance Board ordered the employer to discipline a supervisor for retaliation under W. VA. CODE § 18-29-3 (h) which contained language similar to that found in the new grievance statute at W. VA. CODE § 6C-2-3(h).

Swanson v. Div. of Motor Vehicles, Docket No. 06-DMV-065 (July, 31, 2006). This remedy is not contrary to law and is available and proper in this grievance.

3. Tort-like damages have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). Therefore, medical expenses, as requested in this grievance, are contrary to proper and available remedies.

4. Grievant has never been removed from her present position and Respondent stipulated that remaining in her present position is an available remedy. It has not been proven by a preponderance of the evidence that the remedy of allowing grievant to remain in her present position is contrary to law or contrary to proper and available remedies.

5. The Grievance Board is not authorized by law to grant attorney's fees at level three of the Public Employees Grievance Procedure. W. VA. CODE § 6C-2-6; *See Long v. Kanawha County Bd. of Educ.,* Docket No. 00-20-308 (Mar. 29, 2001). This remedy is contrary to law and contrary to proper and available remedies in this grievance.

6. The Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996); *Daugherty v. Bd. of Directors*, Docket No. 93-BOD-295 (Apr. 27, 1994); *See Daggett v. Wood County Bd. of Educ.*, Docket No. 91-54-497 (May 14, 1992); *Rice v. W. Va. Dep't of Transp./Div. of*

Highways, Docket No. 96-DOH-288 (Apr. 30, 1997); *See Coster v. W. Va. Div. of Corr.*, Docket No. 98-CORR-506 (Feb. 24, 1999). Grievance's requested relief that her supervisor be punished, is contrary to law and contrary to proper and available remedies.

Accordingly the Grievance is GRANTED in part and DENIED in part.

Respondent is Ordered to reinstate Grievant with all sick leave and annual leave she utilized between July 7, 2007 and October 22, 2007. Accordingly Grievant must be reinstated 500 hours of sick leave and 48 hours of annual leave. Further Respondent is Ordered to allow Grievant to remain in her present position without reprisal. However, Grievant may be subject to reasonable disciplinary action for matters that may arise in the future which are unrelated to the issues in this grievance. All other remedies sought by Grievant in this matter are denied.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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: March 20, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE