WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANTHONY PAUL DANIEL,
Grievant,

v. **Docket No. 2008-1762-FayED**

FAYETTE COUNTY BOARD OF EDUCATION,
Respondent.

ORDER GRANTING DEFAULT

Anthony Paul Daniel ("Grievant") filed a written notice of default against his employer, the Fayette County Board of Education ("BOE"), on or about September 11, 2008. Grievant's notice states in pertinent part:

> [a] Level I conference was held with the [R]espondent's superintendent, Mr. Chris Perkins, on August 13, 2008. As of this date (9-1-08) it has been twenty (20) working days since the Level I hearing [sic] and we have not received the Level I response. Therefore, we must inform you of our intent to prevail by default.

A hearing was held on the issue of default in Beckley, West Virginia, on December 18, 2008, before the undersigned Administrative Law Judge ("ALJ"). Grievant appeared in person and through his representative, Sidney Fragale, AFT-West Virginia, and the BOE appeared by and through its counsel, Erwin L. Conrad. After presentation of the evidence, the parties were afforded the opportunity to submit proposed findings of fact and conclusions of law on or before February 11, 2008, and this matter became mature for decision on this date. Both parties submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant avers that the BOE is in default because a Level One decision was not issued within fifteen days of the conference. Respondent counters and argues that the

decision was timely, the Grievant waived his statutory right to a timely decision and the Grievant's "amendment" of his "Relief Sought" permitted an extension of the statutory requirement.

The Respondent did not issue a Level One decision within the applicable time frame. The evidence established that the Grievant agreed to waive the time requirement for holding the Level One conference. It does not evince any intention to waive the time requirement for issuing a decision. The Grievant's "amendment" of the "Relief Sought" merely clarified or restates the "Relief Sought" in the initial grievance filing and does not create a "justified delay not caused by negligence ... ." W. VA. CODE § 6C-2-3(b)(1). 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. Grievant is a Title I Teacher at Oak Hill High School. He is also the Faculty Senate President of Oak Hill High School.

2. On or about June 11, 2008, Grievant filed a grievance. His "Statement of Grievance" claims "violations of [WEST VIRGINIA CODE §] 18A-4-7a relating to job posting, filling of vacancies and preferred recall." As relief, Grievant "seeks [for the] BOE to adhere to WV State Code § 18A-4-7a."

3. On June 11, 2008, Grievant's representative sent an email to Bryan Parsons, Fayette County Board of Education personnel director, which stated:

> Since you were on vacation and I am out of town or on vacation for the next couple of weeks. [sic] Please consider granting a time lines waiver for the Daniel's grievance. I will call you next week so as we can set a date for the

conference.

Default Hearing, Joint Exhibit 8.

4. By agreement of the parties, a Level One conference was scheduled for August 13, 2008, and held on said date at the Fayette County Board office.

5. On August 14, 2008, at 9:48 a.m., Grievant's representative sent an email to the Fayette County Board of Education Superintendent, Christopher A. Perkins, which stated:

> As per our conference yesterday, we wish to amend our remedy for Mr..[sic] Daniel's grievance. He does not want the position in question to be posted, but assurances that all vacancies (including ones like the position in question) be posted and the most qualified be selected for the position. We look forward to your response.[1]

Default Hearing, Joint Exhibit 6.

6. A Level One decision was issued on September 11, 2008.[2]

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 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.

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[1] The record does not establish what the Grievant's representative meant by "response." The only correspondence in the record occurring after this email is the Level One decision.

[2] The Level One decision provides that a "Time [L]ine Waiver" was forwarded to the Respondent. There is no indication in the record of a written waiver, only a single email from the Grievant's representative to the BOE's personnel director. Default Hearing, Joint Exhibit 6. Though not raised by any party, it is noted that the Level One decision does not contain an appeal paragraph informing the Grievant of his right to appeal the decision. *See* W. VA. CODE § 6C-2-3(n)(2).

31, 1997); *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 [W. VA. CODE §§ 6C-2 *et seq*.], 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).[3] The issues to be decided, at this juncture, are whether a default has occurred, whether the Grievant waived the statutory requirement that a Level One decision be issued within fifteen days of the conference and whether the Grievant changed his "Relief Sought" so as to justify the BOE's delay when issuing the Level One decision.

A default occurred because the BOE failed to issue a decision within fifteen days of the Level One conference. WEST VIRGINIA CODE § 6C-2-4(a)(2) provides that:

> [t]he 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.

(Emphasis added). The onus is upon the chief administrator to issue a timely decision. The statutory language provides that the chief administrator "shall issue a written decision within fifteen days." *Id*. "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,

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

864 (1967)(citations omitted). The duty is not upon the Grievant, but the chief administrator to issue a decision within the allotted time frame.

As the term is used in WEST VIRGINIA CODE § 6C-2-4(a)(2), "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." W. VA. CODE § 6C-2-2(c). "'Working days' refers not to days when an employee is actually working, or performing the duties and responsibilities of his or her job, but rather refers to a work week comprising 'regular working hours,' defined by the employer, which in the instance of most West Virginia state government agencies, would be 8:30 a.m. to 4:30 p.m., Monday through Friday." *Coffman v. Div. of Corr./Anthony Corr. Center*, Docket No. 2008-0120-MAPS (Oct. 31, 2008), citing *Sheppard v. Department of Health and Human Resources*, Docket No. 01-HHR-598DEF (May 9, 2002).

The Respondent claims that the Level One decision was timely because the Grievant, as a teacher, was off on summer break and the earliest he may be considered "working" was August 21, 2008. Therefore, the Respondent argues, the running of "days" does not begin to run until August 21, 2008. Respondent's argument is unpersuasive. The BOE had little problem holding a Level One conference before August 21, 2008: a Level One conference was held on August 13, 2008. The Grievant is entitled to a decision within fifteen working days of the conference and consideration of the grievance should not be cast into the cosmos simply because the employee was not present at the workplace. "The chief administrator *shall* issue a written decision within fifteen days of the conference." W.V. CODE § 6C-2-4(a)(2)(emphasis added). An employer may not hold a hearing and

then attempt to hide behind WEST VIRGINIA CODE § 6C-2-2(c) to avoid a default.

The Level One conference was held on Wednesday, August 13, 2008, and the Level One decision was issued on Thursday, September 11, 2008. When examining the calendar for the months in question, twenty work days elapsed between the Level One conference and the issuance of the decision. A decision was not issued "within fifteen days of the conference." W.VA. CODE § 6C-2-4(a)(2). "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).

The Respondent next argues that even if a decision was not issued within fifteen working days, default still must be denied. First, Respondent avers that the Grievant waived all applicable time requirements as indicated by his representative's email of June 11, 2008. Default Hearing, Joint Exhibit 8. "Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure." *Dunlap v. Dep't Evtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008)(citations omitted). "This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than 'rushing' to judgment." *Jackson v. Hancock County Bd. of Educ.*, Docket No. 99-15-081D (May 5, 1999). The concept of an actual waiver of one's established rights implies a voluntary act. *Smith v. Bell,* 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947).

"A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights." *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950)(citations omitted). "The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Id*.

This Grievance Board has held on numerous occasions that an agreement to extend the timeliness for issuance of a decision is binding upon the parties when made during a formal, recorded hearing and constitutes a valid waiver of the statutory requirement. *Jackson v. Hancock County Bd. of Educ.*, Docket No. 99-15-081D (May 5, 1999). *See Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). The burden is upon the Respondent to prove the Grievant expressly or impliedly waived the right. *Hoffman, supra*.

Upon consideration of the June 11, 2008, email, the Respondent has not established that the Grievant, through his representative, expressly or impliedly waived the statutory requirement for issuing a decision within fifteen days. Aside from the Joint Exhibits, the Respondent has presented no evidence on this issue. When examining the plain language of the email, it does not establish the relinquishment of the right to a timely decision. It simply deals with scheduling the Level One conference. At no time did the Grievant agree to waive his statutory right to a decision within fifteen days of the Level One conference. Default Hearing, Testimony of Anthony Paul Daniel. The Respondent has not established that the Grievant waived the time requirement for issuing a decision.

Secondly, Respondent maintains that the Grievant waived the time requirement by "amending" the "Relief Sought" the day after the Level One conference. The BOE may be excused from its failure to issue a timely Level One decision if it establishes, by a preponderance of the evidence, that the Grievant's alteration of his "Relief Sought" created a justified delay as provided by WEST VIRGINIA CODE § 6-6C-2(b)(1). 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. *Id*. As recognized in *Dunlap v. Department of Environmental Protection*, 2008-0808-DEP (Dec.

8, 2008), 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 this matter, it must be determined whether the Grievant's alteration of his "Relief Sought" created a justified delay. When making this determination, this ALJ looks to the nature of the change to ascertain whether the altered relief is within the purview of the "Statement of Grievance" and whether the change is substantially similar to the "Relief Sought" in the initial grievance filing. Where the change is within the purview of the original "Statement of Grievance" and substantially similar to initial "Relief Sought," it cannot be said that the Respondent's delay was justified.[4] *See generally Snyder v. Preston County Bd. of Educ.*, Docket No. 98-39-

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[4] 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). Under the former statutes for educational employees, W. VA. CODE §§ 18-29-1 to 18-29-11, W. VA. CODE § 18-29-3(k) provided that "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at the level four within the discretion of the hearing examiner." *See e.g. Taylor v. Putnam County Bd. of Educ.*, Docket No. 05-40-332 (Mar. 3, 2006). The term "amendment," as used in decisions under the old statutory framework, generally concerned changes in the substance of the grievance under W.VA. CODE § 18-29-3(j). *See e.g. Lilly v. Fayette Co. Bd. of Educ.*, Docket No. 99-10-433 (Mar. 17, 2000). Our current statutory frame work

509 (May 26, 1999)(examining the amendment under the "old" grievance procedure and stating that "[a] grievant is not required to identify each argument he intends to make in his statement of grievance. In many instances, a grievant will not know what arguments can be made until evidence is presented to clarify exactly what has occurred"); *Wells v. Kanawha Co. Bd. of Educ.*, Docket No. 94-20-149 (July 26, 1994)(recognizing that amendment may occur at the lower level of the grievance procedure under the "old" grievance statutes). If the altered "Relief Sought" is similar, there is not a reasonable basis for delay because there is not an intervening or "unexpected event" outside the BOE's control. *Dunlap v. Dep't of Envtl. Protection*, 2008-0808-DEP (Dec. 8, 2008).

The Grievant's representative's email of August 14, 2008, provides that the Grievant merely wants the BOE to assure that all vacancies, including the position in question, be posted and "the most qualified be selected for the position." Default Hearing, Joint Exhibit 6. In the original grievance filing of June 11, 2008, the Grievant requests that the BOE "adhere to WV State Code § 18A-4-7a." At the Default Hearing, *no* evidence was presented as to the discussion between the parties at the Level One conference. The relief mentioned in the email and the original "Relief Sought" are extremely similar. The August 14, 2008, email merely specifies or clarifies the original "Relief Sought."

The Grievant has established by a preponderance of the evidence the Respondent failed to issue a Level One decision within fifteen days of the conference. The Respondent has not proven that the Grievant waived his statutory right. Nor is there any indication that the Grievant's "amendment" to the "Relief Sought" created a justified delay.

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does not address amendments or changes to the relief. In this matter, the Grievant is merely clarifying the nature of his relief sought.

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); *Browning 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 BOE failed to issue a Level One decision within fifteen days, in violation of WEST VIRGINIA CODE § 6C-2-4(a).

3. "A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights." *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950)(citations omitted). "The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Id*.

4. Respondent did not prove that the Grievant waived the statutory requirement that a Level One decision be issued within fifteen days of the conference, as required by WEST VIRGINIA CODE § 6C-2-4(a).

5. 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). *See Browning v. Logan County Bd. of Educ.,* Docket No. 2008-0567- LogED (Oct. 24, 2008).

6. Respondent BOE 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." W. VA. CODE § 6C-2-3(b)(1). The Respondent's failure to issue a timely decision 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 (3) mutually agreeable dates** for scheduling the remedy hearing. Said dates must be receive by the Grievance Board on or before **March 10, 2009**.

DATE: February 24, 2009

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Mark Barney
Administrative Law Judge