THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TERRY MAYHEW,
Grievant,

v. **DOCKET NO. 2009-0222-HamCH**

HAMPSHIRE COUNTY HEALTH DEPARTMENT,
Respondent.

ORDER DENYING DEFAULT

Terry Mayhew, Grievant, filed a claim of default with the Grievance Board against his employer, the Hampshire County Health Department, on September 25, 2008, alleging a default occurred at level one of the grievance procedure. A hearing was held on October 29, 2008, before the undersigned Administrative Law Judge, for the purpose of taking evidence on the issue of whether a default had occurred. The parties asked that they be allowed to appear at this hearing by telephone. Given the limited issues to be addressed, this request was granted. Grievant represented himself. Respondent appeared by two of the volunteer members of the Hampshire County Health Department, Allan Niederberger, Chairman, and Tod Gross. The parties declined the opportunity to submit written argument, and this case became mature for decision upon the conclusion of the hearing, on October 29, 2008.

Synopsis

Grievant argued a default occurred when the level one hearing was not scheduled within ten days of the date the grievance was filed, and when the decision failed to state the reasons for the decision, and failed to include an appeal paragraph. The statutory

provisions applicable to this grievance require that a level one *conference* be held within ten days of the date the grievance was filed. Respondent has *fifteen days* from the date the grievance is filed, however, to hold a *hearing*. Grievant had requested a hearing. The level one hearing was held within fifteen working days of the date the grievance was filed, as required by the statute.

The decision issued was lacking a clear statement of the reasons the grievance was denied, and it did not contain an appeal paragraph. These procedural deficiencies do not provide grounds for a claim of default under the circumstances presented here. Grievant's claim for default will be Denied.

The following Findings of Fact are made based upon the record developed at the default hearing.

Findings of Fact

1. Grievant is employed by the Hampshire County Health Department ("HCHD").

2. On August 15, 2008, Grievant filed a grievance with the HCHD. The grievance form indicated that a hearing was requested.

3. The HCHD scheduled a level one conference for August 26, 2008.

4. The volunteer members of the HCHD were not familiar with the grievance procedure, and did not understand they were to schedule a hearing, not a conference.

5. Grievant appeared on August 26, 2008, and informed the members of the HCHD that he had requested a hearing. Grievant was asked by HCHD Chairman Alan Niederberger how he would prefer to be notified of the date the hearing was scheduled, and Grievant replied that Mr. Niederberger could call the office and leave a message for Grievant.

6. HCHD scheduled the level one hearing for September 3, 2008. Grievant was not notified in writing of the scheduled hearing. As agreed, HCHD left a message for Grievant at his office, and Grievant received the message on September 2, 2008. Grievant did not request a continuance of the hearing.

7. September 1, 2008, was a holiday.

8. The level one hearing was held on September 3, 2008, twelve working days after the grievance was filed. Grievant attended and participated in the hearing.

9. A level one decision was issued on September 12, 2008. The decision states the grievance is being denied, but does not state the reasons for this decision. The level one decision also does not contain information explaining to Grievant how to appeal the decision to level two.

10. Grievant filed a default claim with the Grievance Board on September 25, 2008. He did not claim a default until after he received the level one decision.

Discussion

When a grievant asserts that his employer is in default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-080D (Mar. 21, 2008). 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).

Grievant argued a default occurred when Respondent failed to schedule the level one hearing within ten days of the date the grievance was filed, and that a default also

occurred when the level one decision was issued without a statement of the reasons for the decision or an appeal paragraph.[1] Respondent's witnesses pointed out that the five HCHD Board members are volunteers, all decisions are made by the Board, and it is difficult to schedule a time when all these volunteers can meet on short notice. The Board members had never dealt with a grievance before, but were trying to comply with the statutory requirements. Chairman Niederberger and Board member Gross made it clear that they were acting in good faith, and were not trying to defraud Grievant.

Grievant's first claim is without merit. New W. VA. CODE § 6C-2-4(a)(2) requires that a level one conference be held within ten days of the date a grievance is filed. This provision does not apply to the scheduling of hearings. The scheduling of hearings is clearly governed by W. VA. CODE § 6C-2-4(a)(3), which states:

> (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 . The parties may present and cross-examine witnesses

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[1]Grievant also stated that he had not received reasonable notice of the hearing, and that he was not notified of the hearing in writing. When asked by the undersigned what he was claiming constituted a default, he did not question the notice. While the grievance statute requires that notice of a proceeding be "sent" at least five days prior to the proceeding (W. VA. CODE § 6C-2-3(l)), Grievant had agreed that he could be notified of the hearing by Respondent calling his office and leaving a message. Grievant received this message before the hearing, and he did not request a continuance. Grievant appeared at the hearing, and has not suggested that the notice was so inadequate that he was unable to properly prepare for the hearing. Grievant cannot now complain about any defect in the notice he received, as he agreed that this verbal notice would be sufficient. "[A] party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Rhodes v. Randolph County Bd. of Educ.*, Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res.,* Docket No. 99-HHR-326D (Oct. 14, 1999)." *Corley v. Bureau of Empl. Programs*, Docket No. 05-BEP-080D (Sept. 9, 2005).

> 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.

"'Days' means working days exclusive of Saturday, Sunday, official holidays and [a]ny 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-3-2(c). The level one hearing was held twelve working days after the grievance was filed. Respondent complied with the statutory requirements in holding the hearing within fifteen days.[2]

The remainder of Grievant's default claim rests upon the faulty level one decision. W. VA. CODE § 6C-2-3(n)(2) states:

> A decision, agreement or report shall be dated, in writing, setting forth the reasons for the decision or outcome and transmitted to the parties and, in a private arbitration, to the board, within the time limits prescribed. If the grievance is not resolved, the written decision or report shall include the address and procedure to appeal to the next level.

In this instance, the decision did not set forth any reasons for the outcome, nor did it contain an appeal paragraph.

> This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of*

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[2] "Moreover, an employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. *Hanlon v. Logan County Bd. of Educ.,* 201 W. Va. 305, 496 S.E.2d 447 (1997); *Martin v. Randolph County Bd. of Educ.,* 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. *Harmon v. Fayette County Bd. of Educ.,* 205 W. Va. 125, 516 S.E.2d 748 (1999)." *Rucker v. Dep't of Transp.*, Docket No. 05-DOH-123D (Oct. 21, 2005). Grievant did not claim Respondent defaulted in scheduling the hearing until after he received the level one decision.

> *Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. *Id*. at 743. *See Edwards v. Mingo County Bd. of Educ.*, Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

Waters v. Tucker County Bd. of Educ., Docket No. 07-47-006D (May 3, 2007).

The Grievance Board has previously determined that the failure to include an appeal paragraph in a decision does not automatically constitute a default. *Id.; Deel v. Bureau of Empl. Programs*, Docket No. 00-BEP-256D (Nov. 17, 2000). As in other instances when this issue has been addressed by the Grievance Board, there was no evidence of malice or bad faith on Respondent's part, either in the failure to state the reasons for the decision, or the failure to include an appeal paragraph. These were simply omissions of the volunteer Board members, who were not familiar with the grievance procedure. In fact, the Grievant appears to be more familiar with the grievance procedure than the Board members, and was not prejudiced in any way by this procedural defect. "'[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment.' Syl. Pt. 4, *Burns v. Goff*, 164 W. Va. 301, 262 S.E.2d 772 (1980)." *Adams v. Dep't of Transp.*, Docket No. 00-DOH-DEF (Mar. 13, 2001). Respondent did "respond to the grievance itself, which solves the primary concern of the default provisions: getting the grievant a timely response to the substantive issues raised by the grievance. . . . The response was timely made, and a default did not occur." *Deel, supra.*

This is not to say that a Respondent may ignore the statutory requirements. The inclusion of the appeal language in grievance decisions is mandatory. "This language is

intended to assist the grievant, who in many instances is not an attorney, and to make it clear what the next step is." *Deel, supra.* Likewise, the written decision must contain the reasons for the decision. It is important for the Grievant to understand the reasons a decision was made, so that he can make a reasoned decision about whether to appeal to the next level of the grievance procedure. Respondent must take these requirements seriously, and should undertake those steps necessary to ensure future compliance with the statutory requirements.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a grievant asserts that his employer is in default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-080D (Mar. 21, 2008). 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).

2. A level one hearing must be held fifteen working days of the date the grievance was filed.

3. The level one hearing was held within fifteen working days of the date the grievance was filed, in compliance with the statutory requirements.

4. Any decision issued at any level of the grievance procedure must be dated, reduced to writing, and state the reasons for the decision. If the grievance has not been

resolved, the written decision must "include the address and procedure to appeal to the next level" of the grievance procedure. W. VA. CODE § 6C-2-3(n)(2).

5. Respondent, in good faith, responded to the grievance, issuing a written decision stating the grievance had been denied. The failure of the volunteer Board to state the reasons for the decision, and to include a statement advising the grievant of the procedure for appeal to the next level of the grievance procedure, did not constitute a default.

Accordingly, Grievant's request for judgment by default is **DENIED.** Grievant has ten days from receipt of this Order to file a written request for mediation. This request is to be made by completing the applicable section of the grievance form, and filing it with the Public Employees Grievance Board, 808 Greenbrier Street, Charleston, WV 25311.

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BRENDA L. GOULD
Administrative Law Judge

Date: January 12, 2009