WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID G. WILLS,
Grievant,

v. **Docket No. 2008-1464-DOA**

DEPARTMENT OF ADMINISTRATION/
OFFICE OF TECHNOLOGY,
Respondent.

ORDER DENYING JUDGMENT BY DEFAULT

David G. Wills ("Grievant") filed a written notice of default with the Grievance Board on May 6, 2008, alleging he was entitled to prevail by default in a grievance[1] filed against his employer, the West Virginia Department of Administration/Office of Technology ("Respondent"). Grievant alleges default at level one of the grievance process averring that Respondent did not hold a properly scheduled and noticed, level one hearing within the mandated statutory time frame. A default hearing was scheduled and conducted regarding the issue of default on July 22, 2008, at the Grievance Board's Office in Charleston, West Virginia. Grievant appeared *pro se* and represented his interest. Respondent appeared through its General Counsel, James A. Kirby III. This matter became mature for consideration on or about August 14, 2008, the mailing deadline for the submission of the parties' memorandum and/or proposed findings of fact and conclusions of law.

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[1]The underlying grievance was filed on April 15, 2008, alleging a violation of West Virginia Code § 6C-2-3(h). This grievance was subsequent to a prior grievance regarding classification. The April 15, 2008, grievance contends reprisal or retribution resulting from the previous grievance and continued acts of bad faith.

Synopsis

Grievant alleges he is entitled to prevail by default in a grievance filed against his employer, the West Virginia Department of Administration/Office of Technology. Grievant contends Respondent is in violation of W. VA. CODE § 6C-2-4 (2007).[2] Pursuant to then applicable grievance statute,[3] rules and regulations, the date, time and place for the level one proceeding was established and agreed to by the parties. Respondent held the level one grievance hearing as originally agreed, and issued its decision despite the fact that Grievant did not attend. Respondent espoused a willingness to reschedule the hearing if Grievant so requested within ten days. Grievant never requested that the hearing be rescheduled. Instead, Grievant filed for default judgment.

The record contains no basis to find bad faith on Respondent's part. In the facts and circumstances of this case, Respondent was taking reasonable and prudent steps to advance to a resolution of the grievance on its merits. If a proper level one hearing did not occur, as Grievant alleges, Grievant was the cause of the failure to conduct such a hearing. Accordingly, Grievant's claim for default is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact:

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[2] Relevant wording of W. VA. CODE § 6C-2-4 (2007), subsection (a)(2) provides that "[t]he chief administrator shall hold the conference or hearing, as requested by the grievant, within ten days of receiving the grievance."

[3] West Virginia Public Employees Grievance Board and Procedure, W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C- 3-1 to 6C-3-6 were amended, effective July 1, 2007. Additional amended language with regard to W. VA. CODE § 6C-2 became effective June 6, 2008. References in this decision are to the July 2007 statutes which control the proceedings in this case.

Findings of Fact

1. On April 15, 2008, Grievant filed a grievance against Respondent, his employer. This grievance was subsequent to a prior grievance regarding classification. The April 15, 2008, grievance alleges reprisal or retribution resulting from the previous grievance and continued acts of bad faith by his employer.

2. Grievant was informed that the Cabinet Secretary of the West Virginia Department of Administration was available on April 28, 2008, to hold the level one grievance hearing. This was done by e-mail correspondence dated April 22, 2008, from the executive secretary/paralegal for the Respondent, Joyce K. Jones. (Resp. Ex. 1).

3. Grievant was advised to respond as soon as possible to Respondent regarding whether he was available on April 28, 2008, and if so, at what times he was available. (Resp. Ex. 1).

4. Grievant replied by e-mail on April 22, 2008, indicating that he was available at any time on April 28, 2008, "that's convenient for Cabinet Secretary Ferguson." (Resp. Ex. 2).

5. In the April 22, 2008 e-mail, sent at approximately 2:46 p.m., Grievant further asked Respondent to advise him on procedural matters regarding witnesses at the level one grievance hearing.

6. The level one grievance hearing was set for April 28, 2008, at 10:00 a.m., at the WV Department of Administration. Grievant was informed of this by an e-mail sent on April 22, 2008, at approximately 3:50 p.m. The e-mail noted that a written notice of hearing would be forwarded to Grievant.

7. In response to Grievant's inquiry regarding subpoenaing witnesses (characterized by Respondent as legal advice), Ms. Jones directed/suggested that Grievant make the aforementioned procedural inquiry to his representative.

8. In a subsequent e-mail to Ms. Jones, on April 22, 2008, at approximately 6:12 p.m. (after normal business hours), Grievant indicated that he rescinded his prior agreement to the April 28, 2008, hearing date.

9. Grievant indicated his acceptance of the hearing date was made with the belief that the accompanying procedural question would be answered. (Resp. Ex. 3).

10. The level one grievance hearing set for April 28, 2008, at 10:00 a.m., at the WV Department of Administration, was not cancelled. A notice of hearing was mailed to Grievant dated April 23, 2008. (Resp. Ex. 4). This was separate and distinct notification subsequent to the 3:50 p.m., April 22, 2008, e-mail.

11. On April 23, 2008, at 10:43 a.m., Ms. Jones conveyed to the Grievant that General Counsel for Respondent suggests that "you should provide Cabinet Secretary Robert Ferguson . . . with a written list of those persons you would like to call to testify at this hearing." Further, the e-mail correspondence states that "Cabinet Secretary Ferguson will determine who is necessary for this hearing, as is stated in your reference to the Procedural Rules." (Resp. Ex. 5).

12. Respondent advised Grievant that if he was not willing to accept the date previously agreed to, he must, in writing, extend the ten (10) day time limit, which was to expire on April 29, 2008. (Resp. Ex. 5).

13. Grievant did not request to extend the time line.

14. On April 28, 2008, Respondent held the level one grievance hearing, as originally agreed, and issued its decision on April 30, 2008.

15. Grievant did not attend the April 28, 2008, level one hearing.

16. Grievant was not at work on April 28, 2008. Grievant presented to Respondent a leave slip from HealthPlus Urgent Care Center indicating Grievant had been to the care center on April 27, 2008, and requested that Grievant be excused from work on April 28, 2008.

17. The April 30, 2008, decision signed by Cabinet Secretary Ferguson acknowledged that the Grievant was not in attendance of the hearing. The decision noted that Grievant would not agree to extend the time period to hold the hearing; thus it was determined the hearing must be held on the date initially agreed.

18. Grievant was off work on sick leave May 1, and May 2, 2008.

19. Grievant did not request that the hearing be rescheduled. Instead, on May 6, 2008, Grievant filed a Motion for Default Judgment with the West Virginia Public Employees Grievance Board. [4]

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[4] Subsequent to filing for default Grievant tentatively contended that Respondent did not request a hearing concerning his motion for default, as noted by W. VA. CODE § 6C-2-3(b)(2), and thus he was entitled to default judgment as a matter of law. Grievant failed to recognize or understand that when the Grievance Board, by letter dated May 7, 2008, requested that the parties provide dates for a hearing, Respondent was not further required to request a hearing. There is no language in W. VA. CODE § 6C-2-3(b)(2) mandating an employer must request a hearing or lose the entire grievance as a matter of law. Given the specific facts of this matter, it was reasonable for the employer not to request a default hearing subsequent to the Grievance Board contacting the parties regarding prospective hearing dates. Further, the Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987). Grievant presented no evidence or argument, at the level three hearing, in support of an allegation that Respondent did not request a hearing concerning his motion for

20. A May 9, 2008, correspondence signed by Cabinet Secretary Ferguson to Grievant specified that:

> By email dated April 23, 2008, at 10:43 a.m., my office notified you that you should submit your list of witnesses to me. This list was never received; therefore, it was believed you had no witnesses to call. Further, the email states that if you were not willing to accept the April 28th hearing date which you previously agreed to, that you needed to "provide this office with a written agreement letter to extend the deadline within which to hold this hearing." Consequently, your statement that we did not ask you for an extension of time for the hearing is incorrect. See email dated April 23, 2008 10:43 a.m. Due to our previous dealings with you, I determined it was necessary to hold your Level I hearing on the date to which you initially agreed, even in light of your April 22, 2008 email.
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> I noticed in your letter that you were ill on the date of the hearing. Due to this circumstance, I would be willing to reschedule your hearing if you request me to do so prior to May 19, 2008.

Resp. Ex. 6.

21. Grievant did not request that the hearing be rescheduled.

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. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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

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default. This procedural point is not a viable issue in the facts of this case. The issue is considered abandoned and will not be discussed further.

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/or whether the employer has a statutory excuse for not responding within the time required by law.[5]

If default occurs, Grievant prevails, and is entitled to the relief requested, unless Respondent is able to state a defense to the default or demonstrate the remedy requested is either contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b)(2). Of course, if Respondent demonstrates that a default has not occurred because it was prevented from meeting the time lines for one of the reasons listed in W. VA. CODE § 6C-2-3(b)(1), Grievant is not entitled to relief. If there is no default or the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

Grievant claims Respondent did not hold a timely, properly noticed hearing. *See* W. VA. CODE §§ 6C-2-4 and 6C-2-3 (2007). A chief administrator is to hold the requested conference or hearing, within ten days of receiving the grievance and issue a written decision within fifteen days of the conference or hearing.[6] W. VA. CODE § 6C-2-4 (2007). Respondent in this case proceeded with due diligence. The facts, clearly set forth an acceptance in writing to hold a hearing on April 28, 2008. Grievant avers that his

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

[6] "Days" 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. Grievant's understanding regarding whether days meant calendar or working days was not always clear or consistent throughout the course of this grievance process.

acceptance was conditioned upon Respondent providing Grievant procedural advice as to how to obtain witnesses for his hearing. In his e-mail, Grievant states:

> I can schedule any time on April 28, 2008 that's convenient for Cabinet Secretary Ferguson. I usually work from 7:30 to 3:30, but can stay later in the day if that works better.
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> Also, I'd like to subpoena, or otherwise compel, witnesses for this grievance hearing, once it's scheduled. Will you please let me know the correct procedure to follow?

Resp. Ex. 2.

There are no conditional terms such as “if,” “only if,” or “conditioned upon.” Rather, Grievant utilizes the word “also” in a separate paragraph to begin his so-called conditional acceptance. At the default hearing, Grievant reluctantly acknowledged that the wording of his communication does not contain conditional terminology. Consequently, the undersigned Administrative Law Judge finds that Grievant’s response is an acceptance and a procedural inquiry regarding the hearing. Grievant agreed to the date of the level one hearing.

Grievant did not attend the level one hearing scheduled for April 28, 2008, and Respondent did not cancel the hearing. Respondent deemed it prudent to proceed with the hearing *in absentia*. *See* Finding of Facts 16, 20, and Resp. Ex. 6. Grievant presented to Respondent leave slips from HealthPlus Urgent Care Center indicating he had been ill and requested that Grievant be excused from work on April 28, May 1, and May 2, 2008. This case presents an intriguing question; however, the undersigned need not address whether a grievance hearing held *in absentia* is proper. Given the facts and circumstances of this case Respondent's actions constitute substantial compliance with the requirements of applicable grievance procedure.

> 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 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); *Toothman v. Marion County Bd. Of Educ.,* Docket No. 05-24-036D (April 15, 2005); *Mayhew v. Hampshire County Health Dep't, Docket No. 2009-0222-HamCH (*Jan 12, 2009*).*

The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. *See* W. VA. CODE § 6C-2-3. Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure. *Parker v. W. Va. Dep't of Health and Human Resources,* Docket No. 99-HHR-296D (Nov. 30, 1999). This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgement. *Jackson v. Hancock County Bd. of Educ.*, Docket No. 99-15-081D (May 5, 1999). *See Parker, supra*. Given the specific facts of this case, the undersigned Administrative Law Judge believes to find default here would not promote the goals of the grievance procedure to avoid a quagmire. However, this ruling does not indicate hearings should not be quickly scheduled and within the time frames outlined by statute.

Respondent's actions indicate reasonable and prudent steps to advance to a resolution of the grievance on its merits. The undersigned is of the opinion, and would like

to emphasize, that Grievant had an opportunity to attend or reschedule the hearing or extend the deadlines if he wanted to have his grievance heard. It is clear he chose to proceed in a different manner. Instead, Grievant made a conscious decision to forego his hearing and seek a default ruling. Respondent's counsel characterized this behavior as a game of "gotcha" being played by Grievant. In a prior grievance proceeding involving these parties, Grievant was advised, "[w]hile the Grievant is entitled to try to win his grievance, the process is not a game." *Wills v. West Virginia Department of Administration/Office of Technology* (June 6, 2008).

The record contains no basis to find bad faith on Respondent's part.[7] Respondent attempted to schedule and conducted a level one hearing within the prescribed time frame. If a timely, properly noticed hearing did not occur, the reason for the deficiency is Grievant's actions, his refusal to seek an extension of time, his absence on the scheduled day of the hearing, and his refusal to request the hearing be rescheduled (arguably brought on by his desire to pursue a default claim). This Grievance Board has consistently ruled that 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 Resources*, Docket No. 99-HHR-326D (Oct. 14, 1999). *See, e.g., State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996)("Having induced an error,

[7] Respondent presented Grievant the opportunity to reschedule the level one hearing, prior to and post to the April 28, 2008, hearing. This is relevant. To the undersigned, this demonstrates a willingness to cooperate and responsible action on the part of Respondent. At the default hearing, Grievant testified as to his beliefs and interpretation(s) of Respondent's actions. Grievant does not trust Respondent. Grievant's actions and reactions to Respondent's various communications were colored by his beliefs and perception of Respondent's motivation.

a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences."); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

The undersigned finds that, under the circumstances presented, Grievant is not entitled to relief by default. Respondent made a good faith effort to substantially comply with the requirements of applicable grievance procedure. If a proper level one hearing did not occur, as Grievant alleges, the undersigned finds that Grievant was the cause of the failure to conduct such a hearing. Accordingly, this matter will be remanded to level one for a hearing, since Grievant was unavailable for the previously scheduled hearing.

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. *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. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. If the grievant establishes that a default occurred, an 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).

3. Respondent took reasonable and prudent steps to advance to a resolution of the grievance on its merits. Respondent's actions in fact and circumstances of this matter constitute substantial compliance.

4. "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 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). In the absence of bad faith, substantial compliance is deemed acceptable. *Duruttya, supra; Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also Deel v. Bureau of Employment Programs*, Docket No. 00-BEP-256D (Nov. 17, 2000)*; Toothman v. Marion County Bd. Of Educ.,* Docket No. 05-24-036D (April 15, 2005)*; Waters v. Tucker County Bd. of Educ.*, Docket No. 07-47-006D (May 3, 2007); *Mayhew v. Hampshire County Health Dep't, Docket No. 2009-0222-HamCH (Jan 12, 2009).*

5. 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 Resources*, Docket No. 99-HHR-326D (Oct. 14, 1999); *Smith v. Division of Highways*, Docket No. 05-DOH-094D (July 1, 2005).

6. Grievant did not establish that Respondent was in violation of W. VA. CODE § 6C-2-4 (2007).

Accordingly, Grievant's request for relief by default is **DENIED**. This matter is hereby **REMANDED** to level one for a hearing on the merits of the grievance, and the

hearing shall be held within **10 WORKING DAYS** of the date of this Order, unless otherwise agreed to in writing by the parties.

Date:_February 19, 2009

Landon R. Brown
Administrative Law Judge