WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALVIE DEAL, et al.,
Grievants,

v. **Docket No. 2010-0238-CONS**

DIVISION OF HIGHWAYS,
Respondent.

ORDER DENYING DEFAULT AND REMANDING CASE TO LEVEL 2

Grievants Alvie Deal, Darren Paxton, and Michael Glenn O'Dell filed a grievance on August 18, 2009, alleging, "The DOH violated 29-6A-2(d) and any other policies, practices or statutes which may apply by providing an employee benefit (laundered uniforms and work boots) at a substantial cost per employee. Certain DOH employees were unfairly left out of this benefit in a discriminatory manner that is not related to actual job responsibilities."

For relief the Grievants seek, "The complete 'uniform/work boots' benefit should be promptly provided to these DOH employees who were initially left out (mechanics, storekeeper, etc.) and they should be made whole. This grievance is filed on behalf of a group of similarly situated DOH employees who have filed a grievance form stating his/her intent to be included."

Because the three grievances were identical, these cases were consolidated at level one. On October 17, 2009, Grievants filed a Notice of Intent to Enforce Default. A default hearing was held at the Grievance Board's office in Beckley on February 2, 2010. Grievants were represented by Ed Hartman, American Federation of State, County and Municipal Employees, AFL-CIO, and Respondent was represented by Robert Miller, Esq.

The claim of default became mature on March 19, 2010, upon receipt of the parties' findings of fact and conclusions of law.

Synopsis

On October 17, 2009, after receiving the level one decision, Grievants filed a Notice of Intent to Enforce Default. Grievants assert they agreed to an extension of the level one decision to October 8, 2009, but did not receive it until October 17, 2009. They argue this constitutes default.

Respondent avers that Grievants did not raise the issue of default as soon as they became aware of the default. Respondent argues there is no evidence of negligence or bad faith on its part.

Because Grievants did not file a claim for default until after the level one decision was received, this grievance must be Denied.

Findings of Fact

1. The grievance was filed on August 18, 2009.

2. A level one grievance hearing was held September 10, 2009, before Debbie L. Farnsworth.

3. The level one decision was due on October 1, 2009.

4. On September 30, 2009, Ms. Farnsworth e-mailed Mr. Hartman, Grievants' representative, and requested an extension to file her decision.

5. Mr. Hartman agreed to an extension until October 8, 2009.

6. The level one decision is dated October 13, 2009, and was not received by Grievants and their representative until October 17, 2009.

7. On October 17, 2009, Grievants filed a Notice of Intent to Enforce Default.

Discussion

Grievants who allege a default at a lower level of the grievance process have 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. *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 resolved are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

If default occurs, Grievants prevail, and are 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). 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), Grievants are 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.

"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)." *Waters v. Tucker Co. Bd. of Educ.*, Docket No. 07-47-0006D (May 3, 2007).

Ms. Farnsworth, the level one evaluator, contacted Mr. Hartman, Grievants' representative, and they agreed to an extension of the time limit, giving Ms. Farnsworth until October 8, 2009 to submit the level one decision. Unfortunately, due to an overwhelming work load, Ms. Farnsworth did not draft the decision until October 13, 2009, five days after the agreed submission date expired. Yet, Grievants did not file for default until they received the level one decision.

Grievants are required to submit a 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); *Hedrick v. Dep't. of Health and Human Resources*, 06-HHR-087DEF (June 30, 2006); *Amos v. Div. of Highways*, 05-DOH-311DEF (Nov. 2, 2005).

For Grievants to wait until the level one decision is received and then submit a claim for default only after learning they did not prevail at that level is contrary to the holding in *Hanlon* which states that default must be asserted as soon as it is discovered. Grievants cannot sit on their rights and claim default only after an unfavorable result.

Because Grievants did not file a claim for default until after the level one decision had been received, the default is Denied.

Conclusions of Law

1. Grievants who allege a default at a lower level of the grievance process have 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. *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008).

2. If default occurs, Grievants prevail, and are 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). 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), Grievants are 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.

3. "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)." *Waters v. Tucker Co. Bd. of Educ.*, Docket No. 07-47-0006D (May 3, 2007).

4. Grievants are required to submit a 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); *Hedrick v. Dep't. of Health and Human Resources*, 06-HHR-087DEF (June 30, 2006); *Amos v. Div. of Highways*, 05-DOH-311DEF (Nov. 2, 2005).

5. Grievants did not submit their default claim until after they received the level one decision.

Accordingly the claim for default must be DENIED. This case is REMANDED to level two of the grievance procedure. The parties are ORDERED to submit three mutually agreeable dates to the Grievance Board so that mediation may be conducted.

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 § 6.19 (eff. Dec. 27, 2007).

Date: July 30, 2010

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Wendy A. Elswick
Administrative Law Judge