WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

IDA L. SAWYERS,
Grievant,

v. **Docket No. 2011-0103-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL,
Respondent.

ORDER GRANTING DEFAULT

Grievant Ida L. Sawyers filed a grievance against her employer, Welch Hospital, on July 25, 2010. The statement of grievance reads, "On July 19, 2010 I received a supervisory conference for insubordination and was informed that serious disciple [sic] would foll [sic] I was not give [sic] a copy of the write up that was sent to DHHR." For relief, Grievant seeks, "I believe this is a result of my reinstatement after winning my previous grievance I want the harassment and scrutiny of my performance to stop."

On September 3, 2010, Grievant filed a Motion for Default alleging Respondent failed to answer the telephone so as to conduct a level one telephonic conference. A default hearing was held on September 30, 2010, at the Grievance Board's Charleston office. Grievant was represented by Katherine L. Dooley, Esq., and Respondent was represented by Heather L. Laick, Assistant Attorney General. The issue of default became ripe for decision on October 15, 2010, upon the parties' filing findings of facts and conclusions of law.

Synopsis

Respondent scheduled the level one conference on a date when Grievant's attorney was unable to attend due to prior commitments. The conference was rescheduled on a

mutually agreeable date, and the parties determined the conference would take place via telephone. All the parties were notified. On the day of the phone conference, Grievant and her attorney were present, as was the level one hearing examiner from the Department of Health and Human Resources ("DHHR"), Christopher Amos, Esq. However, Mr. Amos could not contact Welch Hospital. Grievant asserts this constitutes default.

Respondent argues that Welch Hospital was having problems receiving in-coming, long distance phone calls, and the Hospital was unaware of this issue until after the phone conference. Respondent asserts the Hospital attempted to contact Mr. Amos during the time of the conference, but was unable to reach anyone. Respondent avers that, due to the phone issue, no default occurred, as there was justifiable delay not caused by the Hospital's negligence.

The default is GRANTED.

Findings of Fact

1. Grievant filed her grievance on July 25, 2010.

2. Respondent scheduled the level one conference for August 13, 2010.

3. Grievant's counsel had a scheduling conflict, and upon agreement of the parties, the conference date was changed to September 3, 2010, at 10:00 a.m.

4. On August 4, 2010, a level one Continuance and Rescheduling Notice was sent to the parties. In that notice, it was made clear that this would be a telephonic conference. The contact phone number of the Hospital was placed in the Notice.

5. On September 3, at 10:00 a.m., Mr. Amos went to a different office within the Grievance Management Unit to attempt the three-way call.

6. Mr. Amos successfully reached Grievant and her attorney at the attorney's office in Charleston.

7. Mr. Amos then tried to reach the Hospital. Between 9:59 a.m. and 10:18 a.m., he tried eleven times. The phone rang, but there was no answer.

8. Walter Garrett, the Chief Executive Officer for the Hospital, was waiting on Mr. Amos to call. When Mr. Garrett did not receive a call from Mr. Amos, he called the three numbers on the hearing notice, but there was no answer. Mr. Garrett left Mr. Amos a voice mail.

9. After about 20 minutes, Mr. Amos explained to Grievant and her attorney that he could not reach the Hospital, and Ms. Dooley informed him that she would be seeking default. The call concluded around 10:20 a.m.

10. Somewhere between 10:30 a.m. and 10:40 a.m., Mr. Amos was able to reach Mr. Garrett.

11. No level one conference was held.

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, 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). 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.

It is uncontested that a level one conference did not take place. Respondent asserts the phone system was not allowing in-coming long distance telephone calls due to a change in the service provider, and that this was not known to the Hospital until this situation. However, during the hearing, Respondent did not provide information regarding when the service provider took over the Hospital's phone system. Respondent did not provide a work order, or testimony about the specific issue with the phone system.

Regardless of the issue with the phone system, Mr. Amos was able to reach Mr. Garrett within a few minutes of concluding the phone call. At that time, Respondent could have attempted to reconvene the level one conference, but made no attempt.

Respondent also argues that, even though the Hospital did not appear for the level one phone conference, default still must be denied because Grievant waived the applicable time requirements by requesting and agreeing to a continuance of the original date of August 13, 2010. "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*.

The rulings allowing the parties to extend the time lines for issuing a decision, are applied to this case where a continuance of the level one hearing was granted at Grievant's

request. The continuance was to ensure Grievant's attorney was available. The date of September 3, 2010, was agreed upon by the parties who were properly noticed. An extension of the statutory time frame to a date certain is merely an extension to that specified date, and does not excuse a party from fulfilling its obligation by that date.

Given the facts presented, Grievant has met her burden of proving default. Respondent did not meet its burden of proving justified delay, as the phone conference could have taken place at any point through the day. Therefore, this default must be GRANTED.

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. "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).

3. 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).

4. 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.

5. Grievant met her burden of proving default.

6. Respondent did not meet its burden of proving a statutory excuse.

7. "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).

8. "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*.

9. 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*.

10. Respondent did not prove Grievant waived her rights.

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 received by the Grievance Board on or before **November 30, 2010.**

DATE: November 19, 2010

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Wendy A. Elswick
Administrative Law Judge