THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN R. ROSSELL,
Grievant,

v. **Docket No. 2011-1058-DOC**

DIVISION OF FORESTRY,
Respondent.

ORDER DENYING DEFAULT

John R. Rossell, Grievant, filed a claim of default with the Grievance Board against his employer, Division of Forestry, on February 22, 2011, alleging a default had occurred at level one of the grievance procedure. A hearing was held at the Grievance Board's Elkins office location on April 12, 2011, before the undersigned Administrative Law Judge, for the purpose of taking evidence on the issue of whether a default had taken place. Grievant appeared *pro se*, and Respondent was represented by William R. Valentino, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' written arguments on April 29, 2011.

Synopsis

Grievant argued a default occurred when the chief administrator did not act in good faith to resolve the case at the level one conference when he allowed Investigator Specialist Samuel R. Butcher to attend the conference. Nothing in the Grievance Board's statute prohibits an employee of the chief administrator from attending a level one conference. Grievant also argued a default occurred when the chief administrator failed to include any notice of his rights as an employee in his written reprimand. These assertions do not provide grounds for a claim of default under the circumstances presented

in this case. Grievant's remaining claims are procedural issues or have no relevance to the issue of default. Accordingly, the request to enforce the grievance by default is denied.

The following findings of fact are based upon the record of this grievance.

Findings of Fact

1. Grievant received a written reprimand on December 7, 2010, and filed his first grievance challenging the merits of Respondent's actions against him.[1]

2. On January 18, 2011, Grievant filed the above grievance alleging failure of Respondent to inform him of his grievance rights in the reprimand letter at issue in Docket No. 2011-0866-DOC.

3. On February 28, 2011, Grievant filed his request for default challenging the way in which the level one conference for grievance Docket No. 2011-1058-DOC was conducted.

4. Grievant alleges that Respondent permitted an investigator to be present at the conference, the written reprimand in his case did not inform him of his rights as an employee, and the Respondent failed to act in good faith in holding the level one conference.

Discussion

When a grievant asserts that his employer has failed to respond to the grievance in a timely manner, resulting in a 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

[1]This grievance was acknowledged as Docket No. 2011-0866-DOC.

(Mar. 21, 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-2-3(b)(1). (Emphasis added.) 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 argues that the "chief administrator allowed Investigator Specialist Samuel R. Butcher to attend the conference to 'observe' and take notes in attempt to gather evidence against the grievant. Investigator Specialist Butcher did not participate in the grievance in any way. 6C-2-4 (2) of the WV Code allows for the chief administrator to 'permit other employees and witnesses to attend and participate in a conference.' The law makes no allowance for the attendance of observers or investigators at the conference."

There is no provision in W. VA. CODE § 6C-2-1, *et seq.*, that prohibits an employee of the chief administrator from attending a level one conference, or, at the request of the chief administrator, to observe and take notes. In addition, Grievant failed to demonstrate by a preponderance of the evidence that bad faith existed on the part of Respondent. While it is understandable that Grievant was not pleased that the investigator was allowed to observe and take notes, ostensibly to gather evidence contrary to the interest of Grievant, it does not meet the statutory definition of default. A default occurs when the employer fails to timely respond to the grievance. However, it should be noted that the level one decision following the conference makes note that Mr. Butcher was made available to Grievant in the event he wanted to question the investigator.

Grievant's next default claim rests upon the fact that he was not informed of his rights as an employee in the written reprimand. 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.

There is no provision in W. VA. CODE § 6C-2-1, *et seq.*, that requires an employer to place an appeal paragraph or notice of employee rights in a written reprimand. It should be noted, that in the instant, case the written reprimand issued to Grievant did provide that, "any repeat of such behavior, or any other infraction of a similar or even different nature, will be considered gross insubordination and gross misconduct and will result in progressive disciplinary action, up to and including dismissal. If you wish to respond to the matters of this letter in person or in writing, you may do so provided you respond within ten (10) working days of the receipt of this letter."

The Grievance Board has previously discussed the failure to include an appeal paragraph in a decision, with a ruling that this omission does not automatically constitute a default. *Id.; Deel v. Bureau of Empl. Programs*, Docket No. 00-BEP-256D (Nov. 17, 2000). Grievant cites to some sample paragraphs in his proposals, the origin of which is not clear, to be used by employers in disciplinary letters. The undersigned concedes that these guidelines, which Grievant represents are from the Division of Personnel, do provide a catch-all paragraph providing notice of the right to grieve a disciplinary action of an employer to level one or level three by agreement of the chief administrator or when dismissed, suspended without pay, or demoted or reclassified resulting in a loss of compensation or benefits. While it may have been a sound approach to include grievance

rights notification in the reprimand letter, the failure to do so in this case does not constitute default.

Respondent timely set this matter for a level one conference on February 2, 2011, and timely rendered a decision on February 11, 2011. 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.*

Finally, in Grievant's proposals, he claimed the default should be granted because Respondent did not object to the default claims filed on February 22, 2011. The Motion for Default was acknowledged by the Grievance Board on March 1, 2011, with a request for the parties to provide dates for a default hearing. Thereafter, the undersigned conducted the default hearing on April 12, 2011. W. VA. CODE § 6C-2-3(b)(2) provides, in pertinent part, "if the chief administrator objects to the default, then the chief administrator may, within five days of the filing of the notice of intent [to enforce the default], request a hearing before an administrative law judge for the purpose of stating a defense to the default . . ." The record reflects, in essence, that Respondent did object to the default motion by complying with the request of the Grievance Board to provide dates to conduct a default hearing. Grievant is seeking to turn this proceeding into a procedural quagmire, where one technical slip-up would result in his grievance being granted, whether there is any merit to it or not. "The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure." *Rutherford v. W. Va. Bureau of Emp. Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003).

The following conclusions of law support the decision reached.

Conclusions of Law

1. When a grievant asserts that his employer has failed to respond to the grievance in a timely manner, resulting in a 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. There is no provision in W. VA. CODE § 6C-2-1, *et seq.*, that prohibits an employee of the chief administrator from attending a level one conference.

3. There is no provision in W. VA. CODE § 6C-2-1, *et seq.*, that requires an employer to place an appeal paragraph or notice of employee rights in a written reprimand.

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).

4. Respondent, in good faith, responded to the grievance, issuing a written decision stating the reasons for the decision. The allegations made by Grievant in support of his request to enforce this grievance by default do not constitute a default. In addition,

the record reveals that Mr. Butcher was present at the level one conference and made available to Grievant for questioning.

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, 1596 Kanawha Boulevard East, Charleston, WV 25311.

Date: June 16, 2011

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Ronald L. Reece
Administrative Law Judge