BEFORE THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL L. FROST,
Grievant,

v. **Docket No. 2010-1564-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

ORDER DENYING DEFAULT

Daniel L. Frost ("Grievant") filed a Motion for Default Judgement with the Grievance Board dated August 20, 2010. Grievant alleged that Bluefield State College ("Respondent") did not follow proper procedure by not addressing the grievance at level one in a timely fashion. The underlying grievance was filed on June 4, 2010, alleging the following:

> Bluefield State College had not adhered to the Board of Governors policy #33 by fully funding the salary schedule for fiscal year 2010.

The grievance requested the following relief:

> Full funding of the salary schedule (BOG policy #33) as any back pay due to employees because of the time frame it takes to settle disputes.

Grievant requested a level one hearing. A level one hearing was not scheduled. Grievant filed a Notice of Default on August 20, 2010. Respondent filed an Objection to the Default on September 10, 2010 asserting that Grievant did not file a request for default within ten days of the time he became aware of the default. A hearing was held on January 18, 2011, for the purpose of taking evidence on the issue of whether a default had occurred. Grievant was represented by Ben Barkey, Organizational Development Specialist for the West Virginia Education Association ("WVEA"). Respondent was

represented by Kristi A. McWhirter, Esq., Assistant Attorney General. This matter became mature for decision on February 9, 2011, upon receipt of both parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant argues a default occurred when a level one hearing on his grievance was not scheduled "in a timely fashion". Respondent admits it should have scheduled a level one hearing within fifteen days of receipt of the grievance. Respondent asserts that Grievant failed to timely raise the default issue.

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

Findings of Fact

1. Grievant is classified as a Counselor II for Respondent.

2. In 2001, the Legislature enacted W.Va. Code § 18B-9-3 which established a personnel classification system and salary schedule for classified staff.

3. On June 4, 2010, Grievant filed a grievance alleging the following:

> Bluefield State College had not adhered to the Board of Governors policy #33 by fully funding the salary schedule for fiscal year 2010.

4. Grievant seeks the following relief:

> Full funding of the salary schedule (BOG policy #33) as any back pay due to employees because of the time frame it takes to settle disputes.

5. Grievant requested a level one hearing.

6. Respondent did not schedule the level one hearing within fifteen days of receipt of the grievance.

7. Grievant filed a Notice of Default on August 20, 2010.

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 (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).

Respondent admits it should have scheduled the level one hearing within fifteen days of receipt of the grievance. Respondent asserts that Grievant failed to timely raise the default issue. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384

(Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

W.VA. CODE § 6C-2-4(3) requires the chief administrator to hold a level one hearing within fifteen days of receiving the grievance. Respondent has not demonstrated 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. However, Grievant did not file a notice of default within ten days of the default, as set forth in W.VA. CODE § 6C-2-3(b) and the West Virginia Public Employees Grievance Board Procedural Rule § 156-1-7. The West Virginia Supreme Court of Appeals has held, "[i]n order to benefit from the 'relief by default' provisions... a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default". *Hanlon v. Logan County Bd. of Educ.*, 201 W.Va. 305, 496 S.E.2d 447 (1997).

Respondent should have held a level one hearing within fifteen days of receiving the grievance. Not only did Respondent not timely schedule a level one hearing, but Respondent **never** scheduled a level one hearing. Respondent has not offered any explanation for its failure to schedule a level one hearing. Grievant should have filed a notice of default within ten days of becoming aware of the default. However, Grievant's Notice of Default was filed approximately two months after he became aware of the default.[1] Grievant admits that he and Respondent have both "missed respective timelines

[1]The Grievance Board has held that such a delay amounts to a defacto waiver of the default provision. *Goodall/Phillips v. Bureau of Employment Programs*, Docket No. 02-BEP-045D (Sept. 28, 2004); *Cincotta v. DNR*, Docket No. 07-DNR-359D (Jan. 30, 2008).

therefore the default should be denied and the grievance should be remanded to level one for a hearing."[2] Because both parties failed to meet timelines set by W.VA. CODE and West Virginia Public Employees Grievance Board Procedural Rule, the undersigned remands the original grievance to level one of the grievance procedure.

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).

2. W.VA. CODE § 6C-2-4(3) requires the chief administrator to hold a level one hearing within fifteen days of receiving the grievance.

3. Respondent should have scheduled the level one hearing within fifteen days of receipt of the grievance.

4. W.Va. Code § 6C-2-3(b) and the West Virginia Public Employees Grievance Board Procedural Rule § 156-1-7 require a notice of default to be filed within 10 days of the default.

5. The West Virginia Supreme Court of Appeals has held, "[i]n order to benefit from the 'relief by default' provisions... a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the

[2]Grievant's Proposed Findings of Fact and Conclusions of Law

employee or his/her representative becomes aware of such default". *Hanlon v. Logan County Bd. of Educ.*, 201 W.Va. 305, 496 S.E.2d 447 (1997).

6. Grievant did not timely raise the issue of default.

Accordingly, the claim for default must be DENIED. This case is REMANDED to level one of the grievance procedure. Respondent is ordered to schedule a level one hearing within fifteen days of receipt of this Order.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Jennifer Lea Stollings-Parr
Administrative Law Judge

Date: March 4, 2011