THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BEVERLY PERRINE,
Grievant,

v. **Docket No. 2011-0926-MAPS**

DIVISION OF VETERAN'S AFFAIRS,
Respondent.

ORDER DENYING DEFAULT AND REMANDING TO LEVEL ONE

Beverly Perrine, Grievant, filed a written notice of default against her employer, Division of Veteran's Affairs, on April 18, 2011. Grievant asserts that she is moving for entry of default judgment granting her grievance due to Respondent's failure to conduct a level one hearing. A phone conference was held on the issue of default before the undersigned Administrative Law Judge on September 21, 2011, originating at the Board's Westover office. Grievant participated in the conference and appeared by her representative, Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent appeared by its counsel, Mary M. Downey, Assistant Attorney General. The matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on September 28, 2011.

Synopsis

Grievant filed this grievance on December 27, 2010, requesting a hearing. A hearing on the grievance was scheduled for an agreed upon date of January 12, 2011. Neither Grievant nor her representative appeared for the hearing. A request that the hearing be continued was not filed. Respondent sent Grievant a request to set a new

hearing date; however, the letter was sent to an incorrect address provided on the grievance form. No request for a hearing was made and no other action in the grievance was taken until April 18, 2011. At that time, Grievant's representative filed a motion to enforce the grievance by default judgment. This request is not timely. Accordingly, the request for default judgment is denied. The grievance is remanded to level one for hearing.

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

Findings of Fact

1. Grievant is employed as a Health Service Worker by the West Virginia Veterans Nursing Facility located in Clarksburg, West Virginia.

2. On December 27, 2010, Grievant filed this grievance alleging that Respondent refused to accept a physician's note that Grievant not be mandated to work any shift greater than eight hours in length.

3. Respondent was notified by letter dated December 29, 2010, from the Grievance Board of this grievance.

4. On January 4, 2011, Mike Lyons, Deputy Director of the West Virginia Division of Veterans Affairs contacted Kathy Hess, Director of the Veterans Nursing Home, and asked her to contact Grievant in order to schedule a hearing.

5. Grievant was contacted by Ms. Hess and agreed on a hearing date of January 12, 2011, to be conducted at the Nursing Home with Mr. Lyons.

6. Mr. Lyons traveled from Charleston to Clarksburg for the hearing on January 12, 2011. Grievant did not appear for the hearing.

7. Neither Grievant nor her representative requested a continuance or made any attempt to reschedule the level one hearing.

8. By letter dated January 18, 2011, Mr. Lyons asked Grievant to contact him at her first convenience to reschedule the level one hearing. The letter was sent to the address that was on her grievance form.

9. Grievant's address, provided by her representative, was incorrect. As a result, she did not receive the January 18, 2011 letter.

10. On April 18, 2011, roughly three months after the alleged default, Grievant filed her Motion for Default Judgment. The motion failed to set out a concise statement of its basis, either legal or factual.

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. *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).

The term "response," as used in the default provision, not only refers to the obligation to render decisions within the statutory time limits, but to the holding of conferences and hearings within proper limits as well. *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997). Therefore, Grievant may seek relief for default based upon the failure to hold a hearing with the time period mandated by statute.

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.

There is no dispute in this grievance that Respondent scheduled a level one hearing within the applicable statutory time lines. On January 12, 2011, Mr. Lyons traveled from Charleston to Clarksburg to conduct the hearing. Neither Grievant nor her representative appeared and no continuance request was filed.

Respondent attempted to notify Grievant of the need to provide dates to reschedule the hearing. This letter was sent to an incorrect address provided on the grievance form. Mr. Lyons did concede that he had overlooked the information concerning Grievant's representative on the grievance form. While not germane to the issue at hand, Mr. Lyons did not contact Mr. Simmons at any time regarding the instant grievance. It is also

undisputed that no followup request for another hearing was made by Grievant or Mr. Simmons.

It is well-settled that an employee is allowed to pursue a default claim if she raises it as soon as she becomes aware of the default. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997). As explained by the Court in *Hanlon*, this requirement ensures that the issue, by being presented to the Grievance Board in a timely fashion, is dealt with promptly and preserved for appeal. "Long standing case law and procedural requirements in this state mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal." *Goodall/Phillips v. Workforce W. Va.*, Docket No. 06-WWV-246 (Aug. 30, 2007) (citing *Hanlon*, *supra*). In addition, the current statute and procedural rules require a grievant seeking to prevail by default must file with the chief administrator a written notice of intent to proceed to the next level or to enforce the default within ten days of the default. W. VA. CODE § 6C-2-3(b)(2); Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 7.1 (2008).

The record of this grievance established that Respondent scheduled a level one hearing and was prepared to conduct this hearing within statutory time lines. Grievant and her representative failed to appear and did not request a continuance. Respondent did not receive any communication from Grievant regarding this matter until receipt of Grievant's request for default dated April 18, 2011. Clearly, this was not a timely request. The undersigned finds that, under the circumstances presented, Grievant is not entitled to relief by default. Accordingly, this matter will be remanded to level one for a hearing.

The following conclusions of law support the ruling in this grievance.

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. *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. It is well-settled that an employee is allowed to pursue a default claim if she raises it as soon as she becomes aware of the default. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997).

4. A grievant seeking to prevail by default must file with the chief administrator a written notice of intent to proceed to the next level or to enforce the default within ten

days of the default. W. VA. CODE § 6C-2-3(b)(2); Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 7.1 (2008).

5. Respondent scheduled a timely level one hearing in this grievance. Grievant did not contact Respondent to reschedule a level one hearing date after failing to appear for the level one hearing. Grievant filed a request for default judgment on April 18, 2011. This request was not timely. Grievant failed to file with the chief administrator a written notice of intent to proceed to the next level or to enforce any alleged default claim within ten days of the perceived default.

Accordingly, the request for default is **DENIED**. This grievance is **REMANDED** to level one for a hearing before the chief administrator or designee.

Date: November 4, 2011

Ronald L. Reece
Administrative Law Judge