WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LAWRENCE A. BARBER, III,

Grievant,

v. **Docket No. 2011-1304-McDED**

McDOWELL COUNTY BOARD OF EDUCATION and DEPARTMENT OF EDUCATION,

Respondents.

ORDER DENYING DEFAULT AND REMANDING TO LEVEL ONE

Grievant, Lawrence A. Barber, III, filed a written default notice upon his employer, Respondent, McDowell County Board of Education, on March 23, 2011. A hearing was held on May 24, 2011, at the Raleigh County Commission on Aging in Beckley, West Virginia, before the undersigned administrative law judge, for the purpose of taking evidence on the issue of whether a default had occurred at level one. Grievant appeared *pro se*, and Respondent was represented by Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love, PLLC. Also, appearing as Respondent's representative, was James G. Brown, Superintendent of McDowell County Schools. This matter became mature for decision upon receipt of the last of the parties' written proposed Findings of Fact and Conclusions of Law on June 23, 2011.

Synopsis

Grievant argued that a default occurred because he was not given five days' notice of the Level One proceeding, and because that proceeding was scheduled at 3:30 p.m., that being outside his regular work day. Grievant was given only two days' notice of the Level One proceeding. Grievant made the Respondent aware of his default claim when

he appeared in person at the Level One hearing, as scheduled, and read his written default notice into the record. At that point, Respondent, by Superintendent James G. Brown, stayed the Level One proceeding pursuant to the procedural rules.

Respondent had no intent to delay the grievance procedure, and it was not negligent in scheduling the Level One hearing without providing Grievant five days' notice as required. In fact, the very opposite is true. In trying to grant Grievant an expeditious hearing, Respondent mistakenly scheduled the hearing too soon. Under these circumstances, the failure to provide Grievant five days' notice and the failure to schedule the Level One hearing during Grievant's regular work hours was not intended to delay the grievance process; therefore, default cannot be granted.

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

Findings of Fact

1. Grievant is employed as a teacher by the McDowell County Board of Education.

2. On March 14, 2011,[1] Grievant filed this grievance asserting that he should have been selected for the position of Director of Facilities at McDowell County Schools. In his grievance, Grievant is seeking to be instated into the position of Director of Facilities and to recover from the Respondent all wages and benefits lost, attorneys fees and costs, and "all costs associated with the grievance procedure (gas, etc.)" See, Statement of Grievance.

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[1] The Statement of Grievance is dated March 14, 2011. It was mailed to Respondent and the West Virginia Public Employees Grievance Board on March 14, 2011. The Statement of Grievance was received by the WVPEGB on March 15, 2011.

3. Respondent received the Statement of Grievance by mail on March 18, 2011.

4. On that same date, Respondent, by letter dated and mailed on March 18, 2011, notified Grievant that the Level One hearing would be conducted on March 23, 2011, at 3:30 p.m. This letter was sent to Grievant by certified mail and a copy was hand-delivered to Grievant's workplace on March 18, 2011, after Grievant's scheduled work hours.

5. On the morning of March 21, 2011, when he arrived at work, Grievant received the copy of the March 18, 2011 letter. Later that day, Grievant received the original March 18, 2011 letter by certified mail.

6. Grievant's work day begins at 7:15 a.m. and ends at 2:45 p.m., Monday through Friday.

7. On March 23, 2011, Grievant appeared for the Level One hearing as scheduled. However, when the hearing began, citing WEST VIRGINIA CODE § 6C-2-3, Grievant read his written default notice/notice of intent to enforce default ("default notice") into the record, and delivered a copy of the same to Superintendent Brown. At that time, Superintendent Brown stopped the proceeding.

8. In his written default notice, Grievant asserts that a default had occurred because Superintendent Brown's notice of the Level One hearing had not been sent to him at least five days in advance of the hearing as required by WEST VIRGINIA CODE § 6C-2-3(1), and because the hearing was scheduled to begin at 3:30 p.m., rather than during Grievant's regular work hours, as required by West Virginia Code section 6C-2-3(o).

9. As relief in his written default notice, Grievant is seeking to be placed in the position of Director of Facilities, as well as the other relief specified in his Statement of

Grievance dated March 14, 2011.

10. On March 25, 2011, Respondent objected to the default claim and requested a hearing on the matter in its Request for a Hearing on the Grievant's Written Notice of Intent to Enforce an Alleged Default.

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 . . . ." 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 a default occurred because the Level One hearing notice was not sent to him at least five days in advance of hearing, as required by WEST VIRGINIA CODE § 6C-2-3(1), and because the Level One hearing was scheduled to begin at 3:30 p.m., rather than during Grievant's regular work hours as required by WEST VIRGINIA CODE § 6C-2-3(o).

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). "Once a grievance is received, the employer is required by statute to take certain actions, all of which may be said to be in response to the filing of the grievance. One of the acts which is required of the employer is that it send notice of the proceeding 'at least five days prior to the proceeding.'" *Kanehl v. Dep't of Envtl. Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010). Therefore, the sending of notice is a required response to a grievance. *See*, *Id.*

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. *See,* W. VA. CODE § 6C-2-3(b)(2). If Respondent demonstrates that a default has not occurred because it was prevented from meeting the timelines for one of the reasons listed in *See,* 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.

Respondent did not send Grievant notice of the Level One hearing five days in advance of the proceeding. Grievant was granted two days' notice instead of five. Further, the Level One hearing was set outside Grievant's regular work hours. Grievant received notice of the March 23, 2011 Level One proceeding on March 21, 2011. Nonetheless, Grievant appeared at the Level One proceeding on March 23, 2011, at which time, he served his written default notice upon Superintendent Brown, and read the same into the

record. At that time, Respondent stayed all proceedings at Level One as required by the rules. *See*, 156 C.S.R. 1 § 7.1.

"The grievance process is intended to be a fair, expeditious, and simple procedure, and not a procedural 'quagmire.'" *Harmon v. Fayette County Bd. of Educ.,* Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See, Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. *Id*. at 743. *See, Edwards v. Mingo County Bd. of Educ.*, Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

WEST VIRGINIA CODE § 6C-2-3(b)(1) excuses the employer from making a required response within the statutory time lines if the employer is prevented from making the response "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). Further, "[t]he 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 for Emp. Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003).

Respondent did not provide Grievant five days' notice of the Level One hearing as required by statute. Also, the Level One hearing was scheduled outside the Grievant's

regular work hours. Superintendent Brown testified that his inexperience with this state's grievance process lead to his sending the notice fewer than five working days in advance of the proceeding. Further, Superintendent Brown testified that he would have, and could have, rescheduled the hearing within the statutory time limits, had he known of the five-day notice requirement. However, because Grievant filed the default notice, the Level One proceeding was stayed, and it could not be rescheduled.

From the evidence presented, it is obvious that Respondent did not intend to delay the proceedings at Level One by scheduling the hearing on March 23, 2011 at 3:30 p.m., and by sending Grievant the hearing notice on March 18, 2011. To the contrary, Superintendent Brown was attempting to have the matter heard most expeditiously. Grievant appeared on March 23, 2011, at the scheduled time, read his written default notice into the record, and advised that he would not proceed on the grievance at Level One. Grievant raised no objection to the date of the hearing or to its scheduled time, in advance of the proceeding. However, it is noted that Grievant had time to prepare a written notice of default before the March 23, 2011 proceeding.

Clearly, Grievant is trying to prevail on the merits of his grievance based upon a procedural technicality. In doing so, Grievant is attempting to turn this proceeding into a procedural quagmire, where trapping the Respondent with technicalities results in him winning his grievance, regardless of its merit. Accordingly, the undersigned concludes that, under the circumstances presented, default cannot be granted. No timelines were exceeded and Respondent did not delay the Level One proceedings. Therefore, this matter should be remanded to Level One for a hearing on the merits of the grievance.

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. WEST VIRGINIA CODE § 6C-2-3(b)(1) excuses the employer from making a required response within the statutory time lines if the employer is prevented from making the response "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).

3. A Level One hearing must be held within fifteen working days of the date the grievance was received by the chief administrator. *See,* W. VA. CODE § 6C-2-4(a)(3); W. VA. § 6C-2-2(c).

4. Notice of a Level One hearing must be sent to all parties at least five working days in advance of the hearing. *See,* W. VA. CODE § 6C-2-3(l); W. VA. § 6C-2-2(c).

5. 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. *See*, 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).

6. "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).

7. 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. *See, Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997).

8. "Once a grievance is received, the employer is required by statute to take certain actions, all of which may be said to be in response to the filing of the grievance. One of the acts which is required of the employer is that it send notice of the proceeding 'at least five days prior to the proceeding.'" *Kanehl v. Dep't of Envtl. Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010).

9. "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a procedural 'quagmire.'" *Harmon v. Fayette County Bd. of Educ.,* Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. *Id*. at 743. *See, Edwards v. Mingo County Bd. of Educ.*, Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the

absence of bad faith, substantial compliance is deemed acceptable.

10. "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 for Emp. Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003).

11. Respondent acted in good faith in attempting to schedule and conduct the Level One hearing within the statutory timelines. Further, Respondent did not act with intent to delay the grievance process, and it was not negligent in scheduling the Level One hearing.

Accordingly, Grievant's request for judgment by default, granting him the relief specified in his Statement of Grievance dated March 14, 2011, is **DENIED**. This grievance is **REMANDED** to Level One for a hearing before the chief administrator, or designee, on its merits.

Dated: November 22, 2011.

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CARRIE H. LEFEVRE
ADMINISTRATIVE LAW JUDGE