WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN WAYNE ROBINSON,
Grievant,

v. **Docket No. 2012-0253-MAPS**

DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTER,
Respondent.

ORDER DENYING DEFAULT

Grievant, John Robinson, filed a written notice of default with the West Virginia Public Employees Grievance Board dated September 28, 2011, alleging he was entitled to prevail by default in a grievance filed against his employer, the West Virginia Division of Corrections/Anthony Correctional Center, Respondent. The underlying grievance was filed on September 3, 2011, after Grievant had been demoted, without loss of pay, from a Correctional Officer V position to a Correctional Officer II position. Grievant contends that his Level One hearing was held outside of the fifteen day time frame as set forth in WEST VIRGINIA CODE § 6C-2-4(a)(3). A default hearing was scheduled and conducted on January 27, 2011, before the undersigned Administrative Law Judge, for the purpose of taking evidence on the issue of whether a default had occurred. The hearing was held in the Grievance Board's Beckley office. Grievant appeared *pro se*. Respondent appeared through counsel, John Boothroyd, Assistant Attorney General.

This matter became mature for decision on February 17, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant asserts he is entitled to prevail by default in a grievance filed against his employer, because his grievance had been received by Respondent and the Level One hearing was held one day outside of the prescribed fifteen day time frame set forth in WEST VIRGINIA CODE § 6C-2-4(a)(3). Respondent asserts that Grievant was offered hearing dates within the fifteen day time frame. Grievant, in effect, rejected the prospective hearing dates and requested additional dates. Respondent asserts that they offered Grievant the next available date on its hearing examiner's calendar. Grievant agreed to the date. Grievant does not dispute that he was offered dates within the fifteen day time frame. Evidence of record established that the one day delay occurred because Respondent accommodated Grievant's wishes as to scheduling the hearing date. The delay was not done out of negligence, or in an attempt to delay proceedings. Respondent has established proper justification for its actions. See W. VA. CODE § 6C-2-3(b)(1). Accordingly, Grievant's claim for default is **DENIED**.

After a detailed review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. On September 3, 2011, Grievant filed the following grievance:

> I feel that I was unjustly demoted from the rank of C.O.V to C.O. II and also being subjected to harassment and being placed in a hostile work environment.

2. The grievance was received by Respondent on September 6, 2011.

3. On September 7, 2011, Debbie Meadows, on behalf of Respondent, contacted Grievant by telephone in order to schedule a Level One grievance hearing. Ms. Meadows initially offered Grievant two dates for the hearing which were prior to September 28, 2011. After each of these dates were offered, Grievant informed Ms. Meadows to the effect that the proposed dates were not good for him and that a different date would be preferable. Ms. Meadows then offered the next available date open on the hearing examiner's calendar, which was September 28, 2011. Grievant agreed to this date and the Respondent scheduled the hearing for September 28, 2011. On September 7, 2011, Ms. Meadows sent a letter to the Grievant which confirmed that the Level One grievance hearing would be held on September 28, 2011.

4. Ms. Meadows did not schedule a Level One hearing on either of the first two proposed dates because Grievant did not want those dates.

5. Ms. Meadows was aware of the fifteen day time period for scheduling Level One hearings. Ms Meadows was under the mistaken belief that September 28, 2011 was within fifteen working days from the date Respondent had received Grievant's grievance form.

6. Fifteen working days from September 6, 2011 ends on September 27, 2011.

7. On September 28, 2011, Grievant moved for default. Grievant stated that he had noticed three to four days, prior to the scheduled Level One hearing, that this hearing would not be held within fifteen days from the receipt of the grievance. Grievant did not bring it to the attention of Respondent or inform Respondent that the agreed upon hearing date was no longer acceptable prior to September 28, 2011.

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). 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); W. VA. CODE § 6C-2-3(b). 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). 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 if the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

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). A Level One hearing is to 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) and § 6C-2-2(c). A grievant may seek relief for default based upon the failure to hold a hearing within the time period mandated by statute.

"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. 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 received the Statement of Grievance on September 6, 2011. As such, the Level One hearing should have been held by September 27, 2011. Once a grievant establishes that a default occurred, the respondent/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 attempted to schedule the Level One hearing within the required fifteen day period and, in fact, would have scheduled the hearing within the fifteen day period had

the Grievant not told the Respondent that the dates being offered were not good for him. Respondent's decision to delay the Level One hearing date was made in order to accommodate Grievant's request for Respondent to not hold the Level One hearing on the first two dates offered to him, and was made based upon Grievant's agreement to have the Level One hearing date scheduled on September 28, 2011. The general practice of scheduling Level One hearings in a manner which accommodates the Grievant's schedule is not unjustified. It has been held by this Grievance Board that time lines may be extended by the actions of the grievant and by the agreements of the parties.[1] *Gerencir v. Kanawha County Bd. of Educ.,* Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 01-20-038D (Apr. 10, 2001). In the present case, Respondent has shown that the delay by the Respondent in holding the Level One hearing was justified and the delay was not caused by the Respondent's own negligence or intent to delay the grievance process. Respondent has established proper justification for its actions. See W. Va. Code § 6C-2-3(b)(3).

Furthermore, where the grievant has consented to a delay by not objecting to a continuance, it has been found that default is not appropriate. *Hanlon v. Logan County Board of Education*, 201 W.Va. 305, 316, 496 S.E.2d 447, 458 (1997) ("A party simply cannot acquiesce to, or be the source of, an error during proceeding before a tribunal and

[1] In as much as the Grievant argues that WEST VIRGINIA CODE § 6C-2-3(a) (2) required a written agreement, Respondent sent out written confirmation of the agreed upon date to Grievant on September 7, 2011. Mailed letters are presumed to have been received after three business days or, in this case, on or about September 12, 2011. Upon receipt, Grievant was informed that he could contact Respondent if the date was not acceptable or agreeable. Grievant has not claimed that he did not receive the letter (which was attached to his own motion for default) or that the letter did not reflect the agreed upon date reached between himself and Respondent.

then complain of that error at a later date."). Thus, even if the Respondent did err by holding the Level One hearing, September 28, 2011, one day later than the prescribed fifteen day period, such error had been brought about by Grievant's own actions and Grievant is not entitled to benefit from such an error in the form of default.

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

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); W. VA. CODE § 6C-2-3(b).

2. Once a 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). 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 if the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

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) and § 6C-2-2(c).

4. “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.

5. “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).

6. It has been held by this Grievance Board that time lines may be extended by the actions of the grievant and by the agreement of the parties. *Gerencir v. Kanawha County Bd. of Educ.*, Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ.,* Docket No. 01-20-038D (Apr. 10, 2001).

7. Respondent established, by a preponderance of the evidence, that the delay in not scheduling the Level One hearing within the fifteen day time frame was due to Grievant’s requests for Respondent to not schedule the hearing on two proposed dates within the fifteen day time frame.

8. Respondent established, by a preponderance of the evidence, that Grievant agreed to the Level One hearing date of September 28, 2011.

9. Respondent established by a preponderance of the evidence that the delay in holding the Level One hearing was justified and was not due to negligence or intent to delay the grievance process.

Accordingly, Grievant's request for judgement 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: July 31, 2012

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Landon R. Brown
Administrative Law Judge