WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAULA JAYNE THOMAS,
Grievant,

v. **Docket No. 2013-1820-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTHWESTERN REGIONAL JAIL,
Respondent.

DEFAULT DECISION

Grievant, Paula Thomas, is employed by Respondent, Regional Jail and Correctional Facility Authority ("Authority") as a Correctional Officer 3 ("CO 3") assigned to the Southwestern Regional Jail. Grievant filed a level one grievance form dated May 1, 2013, alleging:

> I was suspended for 10 working days without good cause for "failing to report or document the existence of an unusual incident that occurred during working hours at the Southwestern Reg. Jail."

As relief Grievant sought:

> Reimbursement for 10 working days pay. Reinstatement any time in seniority in rank or annual time that may have been lost due to the suspension. I would also like to have the suspension letter removed from my file and reimbursement on any expenses that [may] occur in travel or preparation for all levels grieved.

Grievant filed a second form dated May 23, 2013, in which she alleges:

> Respondent failed to make any effort to provide any justified delay in holding a Level One Conference within the time limits established in W. Va. Code 6c-2-3(b)(1).

Due to the default, Grievant seeks to be awarded all of the relief she sought in her original grievance form.

A Default Hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on June 12, 2013. Grievant appeared *pro se* and Respondent was represented by Shane McCullough, General Counsel for the Authority. Neither party chose to file Proposed Findings of Fact or Conclusions of Law. This matter became mature for decision on July 15, 2013.[1]

Synopsis

Grievant proved that Respondent failed to hold a level one conference within the mandatory time frame set out in W. VA. CODE § 6C-2-4. Respondent failed to prove that it was prevented from holding the level one conference as a result of any of the acceptable reasons set out in W. VA. CODE § 6C-2-3. Accordingly, Grievant prevails by default.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Thomas is employed as a CO 3 at the Southwestern Regional Jail which is operated by the Respondent.

2. Grievant filed a level one grievance dated May 1, 2013, challenging a ten-day suspension. She mailed the form to the Respondent,[2] the Grievance Board, and the Division of Personnel on that day. The grievance form was received at the West Virginia Public Employees Grievance Board by the United States Mail on May 2, 2013.

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[1] The parties were given twenty working days to file Proposed Findings of Fact and Conclusions of Law pursuant to W. VA. CODE § 6C-2-3(n)(1).

[2] Grievant mailed a copy to her immediate supervisor and the administrator of the Southwestern Regional Jail.

3. By letter dated May 6, 2013, the Grievance Board notified the parties that a level one grievance had been filed requesting a level one conference, and providing a docket number to be used to identify the grievance in future correspondence.

4. Wayne Armstrong, Respondent's Human Resources Director, has been off work for an extended period of time due to medical problems. Katrina Kessell, an Administrative Services Assistant has been the Acting Human Resources Director in Mr. Armstrong's absence.

5. While Mr. Armstrong has been absent, his mail has been placed under his closed door. A paralegal gets that mail and distributes it.[3] Ms. Kessell gets some of the mail sent to Mr. Armstrong.

6. Ms. Kessell testified that the confirmation letter from the Grievance Board was not in the Respondent's file. She stated that the Respondent may not have received the letter or, due to Mr. Armstrong's absence, it is very possible that the letter was somehow lost. It is more likely than not, that Respondent received the letter and it was misplaced.

7. Grievant's level one grievance form was delivered to Respondent, but it is not known to whom or when it was delivered.[4] Respondent produced a copy of the level one grievance form with the initials "P. O." and the date "5-14-13."[5] Respondent's counsel represented that the initials were those of Paul O'Dell, Deputy Director of the Authority. Paul O'Dell did not testify at the hearing.[6]

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[3] There was no testimony as to how often this is done.
[4] Level three testimony of Acting Human Resources Director, Katrina Kessell.
[5] Respondent's Exhibit 1.
[6] Assuming that counsel's representations are correct, the initials are those of Paul O'Dell and he placed the date on it, there is no way of knowing if that date is when the form came to the Authority or when it made its way to Mr. O'Dell's desk.

8. It is more likely than not that Respondent received the level one grievance form on or about May 2, 2013, as did the Grievance Board and it did not get to Deputy Director O'Dell until May 14, 2013.

9. Grievant filed a notice of default dated May 23, 2013, alleging no level one conference had been held or scheduled. The notice form was received by the United States Mail at the Grievance Board on May 24, 2013. No level one conference had been scheduled before the notice was filed.

Discussion

A grievant who alleges a default at a lower level of the grievance process has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). "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 decided, at this juncture, 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 hearings within proper limits as well. *Hanlon v. Logan County Bd. of Educ.,* 201 W.Va. 305, 496 S.E.2d 447 (1997). Obviously, the same holds true for the obligation to hold a conference, which is an alternative to a hearing. Therefore, Grievant may seek relief for

default based upon the failure to hold a Conference within the time period mandated by statute.

Grievant placed her level one grievance form in the mail on Wednesday, May 1, 2013. She marked on her form that she was requesting a conference. W.VA. CODE § 6C-2-4(a) (2) requires that "The chief administrator shall hold a conference within ten days of receiving the grievance." W. VA. CODE § 6C-2-2(c) defines "days" as "working days exclusive of Saturday, Sunday, official holidays. . . ." It is more likely than not that the Respondent's representatives received the grievance form on May 2, 2013, like the Grievance Board. Even if Respondent did not receive the grievance form until the following Monday, May 6, 2013, the conference would have to have been held by May 20, 2013, to meet the statutory mandate.

Respondent points to the copy of the level one form initialed by Paul O'Dell as demonstrating the grievance form was received on May 14, 2013. If that were the date, the conference could have been held after the notice of default and still been timely. Unfortunately, it was abundantly clear that Respondent is experiencing problems with distributing mail related to grievances in the absence of Director Armstrong, to the extent that Ms. Kessell testified that it was "very possible" that the grievance confirmation letter from the Grievance Board was somehow lost.[7] Under these circumstances, it is much more likely that the grievance form reached Respondent on or about May 2, 2013. Accordingly, Grievant proved by a preponderance of the evidence that Respondent defaulted by failing to hold a level one conference within the time period required by W. VA. CODE § 6C-2-4(a)(2).

[7] Default hearing testimony of Katrina Kessell.

The next issue is whether Respondent has a statutory defense for the failure to hold the hearing in the time allowed. The statute allows the employer to escape default if it can be proven that the chief administrator was prevented from making a timely response for one of three reasons: "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). *Dunlap, supra.* Ms. Kessell testified that Respondent would not have had the problems with processing the grievance related mail and forms if Mr. Armstrong had not been absent due to illness. Consequently, Respondent argues that the default should be excused do to Mr. Armstrong's illness.

Mr. Armstrong was ill and absent from the Authority before the grievance was filed. Ms. Kessell is Acting Human Resources Director in his absence. Therefore, Mr. Armstrong had no responsibility in processing this grievance. It was not his illness that led to the conference not being held, but Respondent's failure to have a process in place to track, process the mail and grievance documents effectively. Respondent did not prove the existence of a statutory excuse for the default. Accordingly, default is GRANTED.

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002); *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 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). *Dunlap, supra.*

3. 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 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 or conference within the time period mandated by statute.

4. Grievant proved by a preponderance of the evidence that Respondent failed to hold a level one conference within the time period required by W. VA. CODE § 6C-2-4(a)(2).

5. 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); *Brown v. Logan County Bd. of Educ.,* Docket No. 2008-0567-LogED (Oct. 24, 2008).

6. Respondent did not prove by a preponderance of the evidence the existence of a statutory excuse for the default.

Accordingly, default is GRANTED and Respondent may attempt to show that the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. The parties are directed to confer with one another and provide the

Grievance Board with at least **three mutually agreeable dates** for scheduling the remedy hearing, no later than August 1, 2013.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE JULY 19, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE