

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**SUSAN EVANS and NANCY KETTERMAN,
Grievants,**

v.

Docket No. 2016-1884-CONS

**UPSHUR-BUCKHANNON HEALTH DEPARTMENT,
Respondent.**

ORDER GRANTING DEFAULT

Grievants, Susan Evans and Nancy Kettermann, were employed as Nurse Directors by the Upshur-Buckhannon Health Department. On or about May 3, 2016, Ms. Evans and Ms. Kettermann were discharged from their positions for alleged misconduct. On or about May 11, 2016, Ms. Evans and Ms. Kettermann filed grievances challenging their termination of employment with the Health Department and requesting a Level One hearing. Grievants seek to be placed back in their positions with the Health Department with back pay and restoration of all benefits.

On or about June 9, 2016, Grievant Susan Evans filed a Motion for Default. On or about June 16, 2016, Grievant Nancy Kettermann filed a Motion for Default. These matters were consolidated for purposes of a Hearing on Default conducted before the undersigned on September 2, 2016, at the Randolph County Development Authority, Elkins, West Virginia. Grievants appeared in person and by their counsel, Vincent Trivelli, Law Office of Vincent Trivelli, PLLC. Respondent appeared by its counsel, Michael J. Spooner, Steptoe & Johnson, PLLC. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 3, 2016.

Synopsis

Grievants proved that Respondent failed to hold a Level One hearing within the mandatory time frame set out in WEST VIRGINIA CODE § 6C-2-4. Under the unique facts of this case, the record supports a finding that Grievants were in substantial compliance with the filing requirements for the Public Employees Grievance Board. Nothing in the record suggests that Respondent did not receive a copy of Grievants' Level One grievance forms. Grievants mailed the forms to the highest ranking administrator at the Upshur-Buckhannon Health Department. Respondent failed to prove that it was prevented from holding the Level One hearing as a result of any of the acceptable reasons set out in WEST VIRGINIA CODE § 6C-2-3. Accordingly, Grievants prevail by default.

The following Findings of Fact are based upon the record developed in this case.

Findings of Fact

1. Grievants were employed as Nurse Directors by the Respondent Department of Health.
2. Grievants filed a Level One grievance dated May 11, 2016, challenging their termination from employment. Grievants were instructed by the Respondent not to contact any employees of the Respondent. Grievants, at the time of their termination, both verbally informed the Respondent that they would be filing grievances as a result of their termination.
3. Both underlying grievances were placed in the U.S. Mail by Grievant Evans on May 16, 2016. The Public Employees Grievance Board acknowledged the receipt of both grievances by correspondence dated May 17, 2016.

4. On May 16, 2016, Grievant Evans mailed a copy of each grievance to the Director of the Division of Personnel.

5. The record established that during the time period relevant to this case, the administrator of the Health Department was on leave or in some manner removed from his position with Respondent.

6. The record established that Dr. Joseph B. Reed was the highest ranking administrator of Respondent. Dr. Reed is the Chief Health Officer of Respondent. Dr. Reed routinely received official mail on behalf of Respondent at 1341 Brushy Fork Road, Buckhannon, West Virginia.

7. The record also established that Dr. Reed is a member of the Board of Health. Charliena Eubank, Chairperson of the Board of Health, indicated that, in the past, Dr. Reed had made a point to share with the Board all of the mail that he received. It was undisputed that Grievant Evans contacted the Division of Personnel and was informed to serve Dr. Reed with a copy of the grievance forms.

8. On May 16, 2016, Grievant Evans mailed a copy of each grievance to Dr. Reed, Health Officer, 1341 Brushy Fork Road, Buckhannon, WV 26201.

9. Both Grievants requested a Level One hearing. The record demonstrates that neither Grievant, prior to the filing of their Motions for Default, received any notice or other information concerning a Level One hearing. No such hearings were held.

Discussion

Grievants who allege a default at a lower level of the grievance process have 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 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). The issue to be decided at this time is whether a default occurred, and, if so, whether the employer has a statutory excuse for not responding within the time required by law. See *Dunlap v. Dep’t of Env’tl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

Default grievances are generally bifurcated. In the first hearing, it is determined whether a default actually occurred. If a default is found to have occurred, a second hearing is conducted to determine whether any of the remedies sought by Grievants are “contrary to law or contrary to proper and available remedies.” W. VA. CODE § 6C-2-3(b)(2). If default occurs, Grievants prevail, and are 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 time lines for one of the reasons listed in West Virginia Code § 6C-2-3(b)(1), Grievants are 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 argues that it cannot be found in default because it had justified delay in failing to respond as it was not provided with proper service by Grievants. Respondent asserts that sending a copy of the grievance forms to Dr. Reed did not meet the requirements of WEST VIRGINIA CODE § 6C-2-2(b) as he was not Respondent's Chief Administrator. Accordingly, this does not constitute proper filing in accordance with the requirements set forth in WEST VIRGINIA CODE § 6C-2-1, *et seq.* Respondent asserts that the grievance forms should have been properly mailed to Charliena Eubank, Chairperson of the Board of Health. The undersigned disagrees.

The record established that during the time period relevant to this case, the administrator of the Health Department was on leave or in some manner removed from his position with Respondent. The record established that Dr. Joseph B. Reed was the highest ranking administrator of Respondent. Dr. Reed is the Chief Health Officer of Respondent. Dr. Reed routinely received official mail on behalf of Respondent at 1341 Brushy Fork Road, Buckhannon, West Virginia. The record also established that Dr. Reed is a member of the Board of Health. Charliena Eubank, Chairperson of the Board of Health, indicated that, in the past, Dr. Reed had made a point to share with the Board all of the mail that he received. It was undisputed that Grievant Evans contacted the Division of Personnel and was informed to serve Dr. Reed with a copy of the grievance forms. Grievants reasonably viewed Dr. Reed as a designee of the previous chief administrator.

Grievants mailed the forms to the highest ranking administrator at the Upshur-Buckhannon Health Department. Grievants reasonably believed that Dr. Reed, for the

purpose of filing their grievance forms, was the appropriate person to notify of their grievances and the request for a Level One hearing. This Board has held that Respondent's failure to have a process in place to track, process the mail and grievance documents effectively is no excuse for the failure to conduct a Level One hearing or conference in a timely manner. *Thomas v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2013-1820-MAPS (July 19, 2013).

There is nothing in the record to suggest that Grievants knew, or should have known, that Charliena Eubank was the appropriate person to whom the grievance forms should have been sent. Under the unique facts of this case, the record supports a finding that Grievants were in substantial compliance with the filing requirements for the Public Employees Grievance Board. Respondent failed to prove that it was prevented from holding the Level One hearing as a result of any of the acceptable reasons set out in WEST VIRGINIA CODE § 6C-2-3. Accordingly, Grievants have proved by a preponderance of the evidence that Respondent defaulted by failing to hold a Level One hearing within the time period required by WEST VIRGINIA CODE § 6C-2-4(a)(3).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievants who allege a default at a lower level of the grievance process have 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); *Dunlap v. Dep't of Env'tl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008). 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).

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 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).

4. Grievants proved by a preponderance of the evidence that Respondent failed to hold a Level One hearing within the time period required by WEST VIRGINIA CODE § 6C-2-4(a)(3).

5. 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.”

6. Respondent failed to prove by a preponderance of the evidence any excuse for the default.

Accordingly, this default is **GRANTED**, and Respondent may proceed 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 (3) mutually agreeable dates** for scheduling the remedy hearing, or, in the alternative, indicate what other course of action they would like to take in this grievance.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. 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 *a/so* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: November 16, 2016

Ronald L. Reece
Administrative Law Judge