

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RUSSELL EDMOND FLETCHER,**  
**Grievant,**

**v.**

**Docket No. 2017-0673-DOT**

**DIVISION OF HIGHWAYS,**  
**Respondent.**

**ORDER DENYING DEFAULT**

Grievant, Russell Edmond Fletcher, is employed by Respondent, Division of Highways. On August 15, 2016, Grievant filed this grievance against Respondent protesting Respondent's refusal to return him to work at light duty. On October 20, 2016, Grievant filed for default.

A default hearing was held on December 28, 2016, before the undersigned in the Charleston, West Virginia office of the Grievance Board. Grievant appeared *pro se*<sup>1</sup>. Respondent was represented by counsel, Jesseca R. Church. This matter became mature for decision on January 27, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

**Synopsis**

Grievant made a claim for relief by default when Respondent failed to hold a hearing within the statutory time-frame. Respondent, instead of holding a hearing, drafted a dismissal order, but failed to file the order with the Grievance Board or send the order to Grievant. Respondent did not make a required response within the timeframe and was not prevented from doing so directly as a result of injury, illness or a justified delay.

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<sup>1</sup> For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6<sup>th</sup> ed. 1990).

Respondent's failure is negligent, but Grievant's claim for relief was itself not timely filed. Accordingly, Grievant's claim for relief by default is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. Grievant filed his grievance with the Grievance Board on August 15, 2016, requesting a level one hearing.

2. Grievant did not file his grievance with the Division Of Highways' chief administrator as required.

3. The Division Of Highways' Hearings Examiner, Sandra J. Castillo, is the designee of the chief administrator.

4. Ms. Castillo did not receive a copy of the grievance until August 24, 2016, when a member of her staff requested a copy from the Grievance Board after receiving communication from the Grievance Board regarding the filing of the grievance that Ms. Castillo had not received.

5. On August 30, 2016, Respondent, by counsel, filed a *Motion to Dismiss* with Ms. Castillo.

6. Respondent failed to serve Grievant with a copy of the *Motion to Dismiss* as the motion was mailed to Grievant at an incorrect address.

7. After the mail to Grievant was returned undeliverable, Respondent re-mailed the motion to Grievant's correct address and Grievant received the motion on September 8, 2016.

8. Grievant was not provided a time-frame within which to respond to the motion and did not respond to the motion.

9. On September 14, 2016, Ms. Castillo prepared an order dismissing the grievance as untimely without holding a hearing.

10. The order was not filed with the Grievance Board or mailed to Grievant.

11. During this time, Ms. Castillo was very busy. Ms. Castillo is responsible for all grievances for the Division of Highways and has only one part-time assistant. In addition, Ms. Castillo had been temporarily assigned responsibility for the Division of Motor Vehicles' grievances.

12. On October 20, 2016, Grievant filed for default.

13. September 5, 2016 and October 10, 2016 were state holidays.

### **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 Env'tl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

“The chief administrator shall hold a level one hearing within fifteen days of receiving the grievance.” W.VA. CODE § 6C-2-4(a)(2). For purposes of the grievance process, “[d]ays’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W.VA. CODE § 6C-2-2(c). Excluding weekends and the September 5, 2016 holiday, Respondent was required to hold a hearing by September 15, 2016.

Respondent failed to hold a hearing by September 15, 2016, instead drafting a dismissal order that it then failed to file with the Grievance Board or provide to Grievant. Respondent asserts that it is not in default as the dismissal order was drafted within the fifteen-day timeframe and the failure to mail the dismissal order was “not due to an intent to delay the grievance process, but rather due to harmless clerical error.”

[F]or the defense of, “justified delay not caused by neglect or intent to delay the grievance process” to excuse a default, the employer must prove, by a preponderance of the evidence, that the failure to act within the required time limit, was the result of an unexpected event, or events, that was outside of the defaulter’s control. Noncompliance with the time limits cannot be excused for acts of bad faith, inadvertence or a mistake regarding the contents of the procedural rule. Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); See *Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74 (1998); *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 311 S.E.2d 399 (1995); *Bowe v. Workers Compensation Comm’n*, Docket No. 04-WCC-054D (Apr. 12, 2004).

*Dunlap v. Dep’t of Env’tl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

While the undersigned agrees that Ms. Castillo did not have any intent to delay the grievance process and was merely overwhelmed by her caseload, the failure to

send the dismissal order to Grievant is clearly not “harmless” and resulted in the delay of the grievance procedure.

‘[A] large workload or workplace distractions do not constitute justifiable delay. See generally *Linger v. Dep’t of Transp./Dep’t of Highways*, Docket No. 05-DOH-358D (Jan. 20, 2006)(finding no “excusable neglect” under the “old” default statute where the employer alleges it defaulted because of a large workload); *Toth v. Div. of Corrections/Anthony Corr. Cntr.*, Docket No. 98-CORR-344D (Dec. 10, 1998)(recognizing that workplace distractions by a grievance evaluator will not result in “excusable neglect”).’ *Gray v. Logan County Health Dep’t and Div. of Personnel*, Docket No. 2008-1446-LogCH (Dec. 30, 2008).

*Vance v. Div. of Juv. Serv.*, 2014-0024-MAPS (Jan. 31, 2014). Ms. Castillo’s failure to mail the dismissal order was negligent. See *Thomas v. Marion County Bd. of Educ.*, Docket No. 2014-0499-MrnED (July 9, 2014).

However, Respondent also asserts that Grievant’s request for default judgment was itself untimely. Respondent was required to hold a hearing by September 15, 2016. “Within ten days of the default, the grievant may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default.” W.VA. CODE § 6C-2-3(b)(2). September 15, 2016, was the date by which Respondent was required to make a response and failed to do so. Grievant was required to file his intent to enforce default within ten days, which was September 29, 2016. Grievant did not file for default until October 20, 2016, fourteen days late, not counting the October 10, 2016 holiday. A Grievant’s failure to timely file for default will bar default judgment. *Coats-Riley v. W. Va. State Tax Dep’t*, Docket No. 2014-1745-DOR (May 4, 2015); *Bumgardner v. Kanawha County Bd. of Educ.*, Docket No. 2015-0927-KanED (Nov. 19, 2015).

The following Conclusions of Law support the decision reached.

## **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).

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 chief administrator shall hold a level one hearing within fifteen days of receiving the grievance. W.VA. CODE § 6C-2-4(a)(2).

4. For purposes of the grievance process, “[d]ays’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W.VA. CODE § 6C-2-2(c).

5. “Within ten days of the default, the grievant may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default.” W.VA. CODE § 6C-2-3(b)(2).

6. A Grievant’s failure to timely file for default will bar default judgment. *Coats-Riley v. W. Va. State Tax Dep’t*, Docket No. 2014-1745-DOR (May 4, 2015); *Bumgardner v. Kanawha County Bd. of Educ.*, Docket No. 2015-0927-KanED (Nov. 19, 2015).

7. Respondent did not make a required response within the timeframe and was not prevented from doing so directly as a result of injury, illness or a justified delay.

8. Respondent was negligent, but Grievant failed to timely file for default.

Accordingly, Grievant's claim for relief by default is **DENIED**. If Grievant wishes to continue in the grievance process, Grievant may proceed to level two mediation by completing the applicable section of the grievance form and filing it with the Public Employees Grievance Board at 1596 Kanawha Boulevard East, Charleston, WV 25311, with a copy mailed to Respondent. This form must be filed with the Grievance Board within ten days of Grievant's receipt of this Order on Default.

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 *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: April 14, 2017**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**