THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JEANNISE D. GRECO,
Grievant,

v. **DOCKET NO. 2017-0998-MonCH**

MONONGALIA COUNTY HEALTH DEPARTMENT,
Respondent.

ORDER DENYING DEFAULT

Jeannise D. Greco, filed a claim of default with the Grievance Board on October 21, 2016, alleging a default occurred at level one of the grievance procedure. A hearing was held on September 20, 2017, before the undersigned Administrative Law Judge, at the Grievance Board's Westover, West Virginia office for the purpose of taking evidence on the issue of whether a default had occurred. Grievant was represented by Gregory H. Shillace, Esquire, Shillace Law Office, and Respondent was represented by Drew Capuder, Esquire, Capuder Fantasia PLLC.

Neither party requested that the record be left open in order to supplement the record, and the record was closed at the end of the hearing. After the record was closed, Mr. Capuder submitted additional documents consisting of an affidavit, an email which was referenced during the hearing, and a Notice of a level one hearing, which he asked be made part of the record because he believed they were relevant. Mr. Capuder was aware of the existence of the email when this hearing concluded as his witness had testified about it, but he did not request that the record be left open. Mr. Capuder also indicated

that Grievant's counsel had objected to the reopening of the record, although no such objection has been filed with the Grievance Board. The undersigned does not find that good cause has been demonstrated for reopening the record, and the request is **DENIED**. This matter became mature for decision on receipt of Respondent's post-hearing written argument, on October 10, 2017. Grievant declined to submit written argument.

Synopsis

Grievant argued a default occurred when a hearing was held at level one, rather than the conference she requested, when the level one decision was not issued by the chief administrator, that the level one decision was not issued in a timely manner, and that the request for a hearing on the default was made by someone who was not the chief administrator. The level one decision was issued within the statutory time period by the chief administrator. If a hearing was held at level one rather than a conference, this is a procedural error, not a default. Finally, the response to the default was signed by the Secretary for Board of Health, and substantially complied with the statutory requirements.

The following Findings of Fact are made based upon the record developed at the default hearing.

Findings of Fact

1. Grievant is employed by the Monongalia County Health Department ("MCHD") as a part-time employee.

2. On September 19, 2016, Grievant filed a grievance contesting Respondent's application of holiday pay policies for part-time employees. Grievant requested a conference at level one of the grievance procedure.

3. A conference was scheduled at level one on the grievance for September 29, 2016. The Grievant appeared at the scheduled date and place with a representative, and her issues were heard by the five members of the Monongalia County Board of Health.

4. The Monongalia County Health Department is governed by the Monongalia County Board of Health, which Board is composed of five members appointed by the Monongalia County Commission. Samuel A. Chico, III, is the Chair of the Monongalia County Board of Health. The Monongalia County Board of Health adopted bylaws (last amended September 2010) which state that its Chair is authorized to execute legal instruments as authorized by the Board of Health, sign official documents, and serve as official spokesman for the Board of Health.

5. The Monongalia County Board of Health Bylaws state: "[a]s the Chief Administrator, the Board will hear all Level One grievance hearings. Either three or five Board members, will be present to hear each grievance."

6. A level one decision was issued on October 20, 2016, and was signed by Samuel A. Chico, III, Board of Health Chair, "Monongalia County Chief Administrator." October 20, 2016, is the 15th working day after September 29, 2016, if Columbus Day is counted as a working day. Excluding Columbus Day from the calculation, October 21, 2016, is the 15th working day.

7. The Bylaws of the Monongalia County Board of Health state that the Board of Health will employ a Health Officer, and that he will serve "as Secretary to the Board." Dr. Lee Smith is the Health Officer employed by the Monongalia County Board of Health.

8. The Board of Health conducts its business in public meetings, and notice of all meetings is published "in the local media," with five days' notice provided, absent an emergency.

9. Grievant filed her claim of default with the Grievance Board on or about October 21, 2016. The Grievance Board sent a letter to Grievant, her attorney, and Dr. Smith, dated October 25, 2016, acknowledging that a Motion for Default Judgment had been filed, and requesting that the parties confer and provide dates for the scheduling of a default hearing before an Administrative Law Judge.

10. By letter dated November 9, 2016, Dr. Smith submitted agreed upon dates to the Grievance Board for the default hearing. In this letter Dr. Smith further stated, "Monongalia County Health Department refutes any claims by grievant that the Level I Grievance Conference was improper or in bad faith. Our written response will be submitted upon request or following a date set for this hearing."

Discussion

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). "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).

The Grievance Procedure requires an employer to hold a level one conference within 10 days of receipt of a grievance. W. VA. CODE § 6C-2-4(a)(2). It requires that if a level one hearing is desired by the grievant, that the hearing be held within 15 days of receipt of the grievance. W. VA. CODE § 6C-2-4(a)(3). "'Days' means working days exclusive of Saturday, Sunday, official holidays and [a]ny 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).

Grievant made several arguments in support of her default claim. Grievant requested a conference at level one. Grievant does not contend that the conference was not held within the statutory time period, rather Grievant's argument is that a default occurred because she asserts that the proceeding before the Board of Health constituted a hearing not a conference, and she requested a conference. Respondent denies that the proceeding was a hearing, but acknowledges that certain formalities were in place due to the nature of the Respondent as a public board. Whether the proceeding was a hearing or a conference, however, is irrelevant. As was pointed out by the undersigned when the parties first gathered to address this issue, the Grievance Board has ruled that, "[w]hether it was proper for Respondent to schedule a conference rather than a hearing is a procedural matter, not a default issue." *Rossell v. Div. of Forestry*, Docket No. 2014-0176-CONS (May 22, 2014). The same is true when a respondent schedules a hearing rather than a conference.

Grievant also argued the level one decision was not issued within 15 days of the conference. WEST VIRGINIA CODE §§ 6C-2-4(a)(2) and (3) require that the level one decision be issued within 15 working days of the level one conference or hearing. The conference or hearing was held on September 29, 2016, and the decision is dated October 20, 2016. No information was placed into the record regarding whether the decision was actually issued that day, so Grievant is apparently conceding that it was. In counting days, the first day to be counted is September 30.

> "In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. VA. CODE § 29-6A-2(c)[1] provides that "days" means working days exclusive of Saturday, Sunday or official holidays. . . . Further, in computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. *See* W. VA. CODE § 2-2-3; *Brand v. Swindler*, 68 W. Va. 571, 60 S.E. 362 (1911). *See also* W. Va. R. Civ. P. 6(a).

Williamson v. W. Va. Dep't of Tax and Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998)." *Mehra v. W. Va. Univ. Potomac State College*, Docket No. 2015-1080-PSCWVU (Sept. 2, 2015). Fifteen working days from the beginning date of September 30 is October 20. If Columbus Day is counted as a holiday, as it is for state employees, then day fifteen is October 21. The decision was issued within the statutorily required time period.

Grievant's next argument was that the level one decision was not issued by the chief administrator. The level one decision was issued by the Chair of the Monongalia County Board of Health. Grievant asserted that Dr. Smith is the chief administrator. Respondent demonstrated conclusively that the Monongalia County Board of Health is the chief administrator.

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[1] This statutory reference is to the grievance procedure for state employees in effect at the time of the decision. The language in the current grievance procedure is the same.

Finally, when Grievant's counsel recognized that Dr. Smith was not the chief administrator, he argued for the first time at the conclusion of the default hearing, that the default should be granted because the chief administrator did not request a hearing on the default. This argument was based on the fact that it was Dr. Smith who signed the letter refuting any claims of default, not Mr. Chico.

The grievance procedure states that, "the grievant may file with the chief administrator a written notice of intent . . . to enforce the default. If the chief administrator objects to the default, then the chief administrator may, within five days of the filing of the notice of intent, request a hearing before an administrative law judge for the purpose of stating a defense to the default . . . or showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies." Grievant may be technically correct that as the chief administrator, it was Mr. Chico who should have signed any response related to the default. However, as Respondent's counsel pointed out, as Secretary to the Board of Health, Dr. Smith certainly has been delegated some responsibility to act on behalf of the chief administrator, and the grievance procedure does allow the chief administrator to delegate his or her authority to a designee. W. VA. CODE § 6C-2-2(b). On the other hand, if Grievant's argument is accepted, it is quite clear that Grievant did not technically comply with this statute in the first instance, as she did not file a written notice of intent to enforce the default with Mr. Chico or the Board of Health. Were the undersigned to agree with Grievant's technical argument, then the default claim would have to be dismissed for failure to file a written notice of intent with the proper entity or person.

The Grievance Board has been directed in the past that "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). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable. *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also Deel v. Bureau of Employment Programs,* Docket No. 00-BEP-256D (Nov. 17, 2000). While some application of technical requirements is necessary to proper administration of the default provisions, in the case of this final argument, Respondent substantially complied with the statute.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a grievant asserts that his employer is in 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). 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).

2. A level one conference must be held within 10 working days of the date the grievance was received by the chief administrator. W. VA. CODE § 6C-2-4(a)(2). A level one hearing must be held within 15 working days of the date the grievance was received by the chief administrator. W. VA. CODE § 6C-2-4(a)(2).

3. "'Days' means working days exclusive of Saturday, Sunday, official holidays and [a]ny 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).

4. The Grievance Board has ruled that, "[w]hether it was proper for Respondent to schedule a conference rather than a hearing is a procedural matter, not a default issue." *Rossell v. Div. of Forestry*, Docket No. 2014-0176-CONS (May 22, 2014). The same is true when a respondent schedules a hearing rather than a conference.

5. WEST VIRGINIA CODE §§ 6C-2-4(a)(2) and (a)(3) require that the level one decision be issued within 15 working days of the level one conference or hearing. For purposes of the grievance procedure, "in computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. *See* W. VA. CODE § 2-2-3; *Brand v. Swindler*, 68 W. Va. 571, 60 S.E. 362 (1911). *See also* W. Va. R. Civ. P. 6(a). *Williamson v. W. Va. Dep't of Tax and Revenue*, Docket No. 98-T&R-275D (Sept. 30, 1998)." *Mehra v. W. Va. Univ. Potomac State College*, Docket No. 2015-1080-PSCWVU (Sept. 2, 2015).

6. The level one decision was issued by the chief administrator within 15 days of the level one conference.

7. "[T]he 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). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable. *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also Deel v. Bureau of Employment Programs,* Docket No. 00-BEP-256D (Nov. 17, 2000).

8. Grievant did not demonstrate that a default occurred.

Accordingly, Grievant's request for judgment by default is **DENIED**. If Grievant wishes to appeal the level one decision to level two, she has ten (10) days from receipt of this Order to do so.

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BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: November 7, 2017