**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CARI J. STONE,**
**Grievant,**

**v.** **Docket No. 2017-1366-DEA**

**DIVISION OF REHABILITATION SERVICES,**
**Respondent.**

## ORDER ON DEFAULT

Grievant, Cari J. Stone, is employed by Respondent, Division of Rehabilitation Services. By Grievance Form dated December 2, 2016, Grievant filed this grievance against Respondent stating,"1) WVDRS failure to comply with doctor's orders. 2) WVDRS failure to comply with policy and procedure for reasonable accommodation. 3) WVDRS failure to meet ADA compliance for building, entrances, and mobility. 4) WVDRS continued harassment, hostile work environment, and discrimination. 5) Unlawful docking of pay and taking of leave without signature or justification."

After a dispute regarding the scheduling of the level one hearing, by email dated January 3, 2017, Grievant requested default and "a level two hearing." On January 24, 2017, Respondent, by counsel, filed its *Response to Grievant's Motion for Default Judgement*, requesting the Grievance Board deny the request for default judgment. A default hearing was held on March 21, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*[1]. Respondent appeared by counsel, Katherine A. Campbell, Assistant Attorney General. Proposed Findings of Fact and Conclusions of Law ("PFFCL") were ordered due on April 18, 2017. By email dated April 14, 2017, Grievant requested "extension or elimination" of the PFFCL

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

stating she is not an attorney, that PFFCL are "usually prepared during a Level 3 or 4 hearing when grievances have gone on for a long time or of a class action nature," and that "it is nearly impossible for me to even know what was stated during the default hearing" citing the lack of a transcript and that she has "no way to listen to the CD provided."[2] By email dated, April 17, 2017, Respondent, by counsel, objected to Grievant's request. By *Order* entered April 18, 2017, the undersigned found she had explained the PFFCL to Grievant twice during the default hearing and that Grievance Board staff had provided a recording of the hearing on a compact disc along with the program required to listen to the recording. However, because Grievant is representing herself, the undersigned extended the deadline to submit PFFCL to May 2, 2017. This matter became mature for decision on May 3, 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 claiming Respondent failed to meet level one timeframes and for "non-communication between parties." Grievant objected to the locations proposed by Respondent for the level one hearing due to privacy concerns. Grievant sought the Grievance Board's intervention in resolving the hearing location dispute. Due to time constraints, the Grievance Board was unable to make a decision regarding the hearing location before the scheduled level one hearing, and instructed Respondent to continue the level one hearing. Before an order on the hearing location dispute could be issued, Grievant claimed default. Grievant's claim for default must be

[2] Grievant stated in her Proposed Findings of Fact and Conclusions of Law that she does not have a home computer, but offered no explanation of why she could not listen to the recording on her work computer.

denied as Respondent's failure to hold the level one hearing within the statutory timeframe was justified as Grievant had disputed the hearing location, had sought Grievance Board intervention, and Respondent had been instructed by the Grievance Board to continue the hearing. 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 her grievance by Grievance Form dated December 2, 2016, and mailed by first class mail. Although the form was dated December 2, 2016, it was not postmarked until December 8, 2016, and was not received by the Grievance Board or Respondent until December 9, 2016.

2. By letter dated December 9, 2016, Respondent, by Charlotte K. Stiltner, Human Resources Senior Manager, notified Grievant that the level one hearing would be held on December 27, 2016, at Respondent's administrative offices.

3. By letter dated December 12, 2016, Grievance Board staff acknowledged the grievance filing and assigned the above docket number.

4. By email dated December 16, 2016, Grievant raised several concerns. Grievant asserted that Ms. Stiltner had a conflict of interest because she was part of what the grievance concerned and that having the hearing at Respondent's administrative offices would be a conflict of interest because staff know Grievant and Grievant's privacy would not be maintained. Grievant further questioned the validity of the hearing, questioning whether the letter should have come from the Grievance Board and which administrative law judge would preside.

5. By email dated December 19, 2016, Ms. Stiltner explained that her role was concerning the logistics of the hearing being scheduled, that the notice of hearing was valid because level one hearings are scheduled by the agency and not the Grievance Board, and that Jim Wells would preside over the hearing as a hearing officer and not an administrative law judge. Ms. Stiltner stated Respondent would be willing to move the hearing to the Kanawha City or Nitro office, but that to do so would require the hearing to be rescheduled and "a timeframe waiver would need to be approved by all parties…"

6. Grievant responded by email dated December 19, 2016, requesting the hearing be moved to a "neutral location." Grievant asserted at length that holding the hearing at any of Respondent's locations would not ensure Grievant's privacy and anonymity and that she had been discriminated against at all three locations where Respondent had proposed holding the hearing. Grievant further stated, "Let this email communication document the attempt of making a true grievance hearing non-partial by 1) having documentation come from the Grievance Board, 2) to have any hearings, meetings, etc. regarding docket #2017-1366-DEA to be held in private, non-WVDRS locations to secure anonymity, 3) to adhere to timely responses, and 4) to ensure that discrimination and clear communication are kept."

7. Ms. Stiltner called the Grievance Board office to request use of the Grievance Board's facilities to hold the level one hearing. After consulting the undersigned, Grievance Board staff informed Ms. Stiltner that the level one hearing could not be held at the Grievance Board's facilities.

8. By email dated December 22, 2016, at 2:25 p.m., Ms. Stiltner informed Grievant that the Grievance Board had denied her request to use the Grievance Board's

facilities for the level one hearing and informed Grievant the hearing would go forward as scheduled unless Grievant requested to move the hearing to the Kanawha City or Nitro offices by December 23, 2016. Ms. Stiltner also provided Grievant with a link to the grievance procedure statute.

9. By email dated December 22, 2016, at 2:49 p.m., Grievant again requested "a neutral location" and requested that "the Grievance Board get involved now with deciding a place if this is not possible on your end."

10. At the direction of the undersigned, by email dated December 22, 2016, at 3:38 p.m., Grievance Board staff acknowledged Grievant's request for the intervention of the Grievance Board and informed the parties that the undersigned could not resolve the issue prior to the scheduled hearing due to the lateness of the request and the holidays for the next two working days, that the hearing should be continued, and that the undersigned would review the request and issue a decision the next week.

11. By email dated January 3, 2017, Grievant requested default and a level two hearing[3] "due to timeframes for Level 1 scheduling not occurring and non-communication between parties…"

12. Due to the holidays, unexpected absences, and other proceedings, the undersigned had not issued an order on the location dispute, prior to Grievant's January 3, 2017 request for default, and, as Grievant requested default, the undersigned did not further review her dispute of the level one hearing location at that time.

[3] The grievance procedure does not include hearings at level two. Level two is alternative dispute resolution through mediation or arbitration. Hearings are held at level one by the agency and at level three by a Grievance Board administrative law judge.

13. Grievant has concerns regarding the privacy of her medical information because all three of the hearing locations proposed in Respondent's offices are enclosed in glass and she is known by employees at all three locations.

**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). "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. 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, as permitted by subdivision (1) of this subsection. . . ." W.VA. CODE § 6C-2-3(b)(2).

"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 holidays on December 23, 2016, December 26, 2016, and January 2, 2017, Respondent was required to hold a hearing by January 4, 2017. Respondent scheduled a hearing to be held December 27, 2016, well within the time-limits. The hearing was not held due to Grievant's objections regarding the location of the hearing and late request to the Grievance Board for a decision on the dispute.

There is no evidence Respondent was negligent or had any intent to delay the grievance process. Respondent set a hearing at a time and place that were proper under normal circumstances. Grievant, in her original objections, was clearly confused regarding the grievance process, insisting the hearing was to be held by an administrative law judge at a neutral location. Level one proceedings are not held by the Grievance Board. Level one proceedings are to be conducted by the agency's chief administrator or designee and are customarily held at the agency's place of business.

Respondent's staff made attempts to explain the process to Grievant and to accommodate her requests. Respondent initially offered to move the hearing to one of two local agency offices, and when Grievant refused those locations as well, Respondent requested the use of Grievance Board facilities. The undersigned denied Respondent's request due to the Grievance Board's busy calendar and limited space. When Grievant requested the Grievance Board's intervention in the scheduling dispute, the undersigned, through an email sent by Grievance Board staff, instructed Respondent to continue the hearing in order to make a decision on the dispute. Therefore, Respondent's failure to hold the hearing within the time-frame was justified.

As default has not occurred, Grievant's original objection to the location of the level one hearing is again at issue. "All proceedings shall be scheduled during regular work

hours in a convenient location accessible to all parties in accommodation to the parties' normal operations and work schedules. By agreement of the parties, a proceeding may be scheduled at any time or any place. Disagreements shall be decided by the administrative law judge." W. VA. CODE § 6C-2-3(o). Pursuant to this statute, Grievant had previously requested a decision by an administrative law judge on the proper location of the level one hearing. As stated above, the undersigned had not come to a decision on the issue before Grievant filed her request for default.

At the conclusion of the default hearing, the undersigned encouraged the parties to continue efforts to resolve the dispute. To that end, Respondent, by counsel, proposed to Grievant as an alternate location for the level one hearing the conference room of the West Virginia Attorney General's office at 812 Quarrier Street, Charleston, West Virginia. Grievant, by email, indicated she had no objection to the location, although she did not agree to withdraw her default claim. The location proposed by Respondent is a location convenient to the parties that address Grievant's medical information privacy concerns she raised regarding conducting the hearing in the previous locations and, therefore, is proper.

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. "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. 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, as permitted by subdivision (1) of this subsection. . . ." W.VA. CODE § 6C-2-3(b)(2).

4. "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).

5. Grievant's claim for default must be denied as Respondent's failure to hold the level one hearing within the statutory timeframe was justified as Grievant had disputed the hearing location, had sought Grievance Board intervention, and Respondent had been instructed by the Grievance Board to continue the hearing.

6. "All proceedings shall be scheduled during regular work hours in a convenient location accessible to all parties in accommodation to the parties' normal operations and work schedules. By agreement of the parties, a proceeding may be scheduled at any time or any place. Disagreements shall be decided by the administrative law judge." W. VA. CODE § 6C-2-3(o).

7. Following the default hearing, the parties came to an agreement on a location to hold the level one hearing, which the undersigned accepts as proper.

Accordingly, Grievant's claim for relief by default is **DENIED** and this matter is remanded to level one. The level one hearing shall be held in the conference room of the West Virginia Attorney General's office at 812 Quarrier Street, Charleston, West Virginia, and shall be held within fifteen days of Respondent's receipt of this order. Respondent shall consult Grievant to determine a mutually-convenient date and time for the hearing.

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: July 7, 2017**

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