THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT PAUL TATE, JR.,
Grievant,

v.

Docket No. 2017-1184-MAPS

DIVISION OF CORRECTIONS/ PARKERSBURG CORRECTIONAL CENTER,
Respondent.

DECISION ON DEFAULT HEARING

Grievant, Robert Paul Tate, Jr., at all times relevant to this grievance, was employed by Respondent, the Division of Corrections ("DOC")/Parkersburg Correctional Center on or about the time he filed this grievance. Grievant filed a notice of default with the Grievance Board against the DOC/Parkersburg Correctional Center on December 21, 2016. On November 30, 2016, a Level I hearing was held before a Hearing Examiner for the Commissioner of the West Virginia Division of Corrections. On December 20, 2016, a Level I Decision was issued and mailed via certified mail. On December 21, 2016, Grievant filed a notice of intent, requesting entry of default judgment. On January 5, 2017, Grievant made a Level II appeal. A Level II mediation was not held. A default hearing was held on January 31, 2016, at the West Virginia Public Employees Grievance Board in Charleston, West Virginia to take evidence on the issue of whether a default had occurred. Grievant appeared *pro se* and Respondent was represented by Assistant Attorney General, John Boothroyd. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, which were filed by Grievant on March 24, 2017, and by Respondent on February 9, 2017. This matter became mature for decision on March 24, 2017.

Synopsis

Grievant filed a grievance challenging his non-selection as case manager at the Parkersburg Correctional Center. Respondent scheduled and provided a Level I hearing within ten days of receipt of the grievance, and a decision was timely issued, denying the grievance. However, Grievant requested discovery regarding the successful applicant and the interview process. The requested discovery required review and redaction and, at the Level I hearing, Respondent failed to provide Grievant with redacted copies of the responsive discovery documents. Grievant asserts he is entitled to the entry of default judgment due to the fact that Respondent did not timely respond to his discovery requests, in violation of W. Va. Code § 6C-2-3(k). Though Respondent violated W. Va. Code § 6C-2-3(k) in failing to give Grievant copies of the discovery material that Respondent submitted to the hearing examiner at the Level I hearing, there is no authority to permit the Grievance Board to grant default judgment due to this violation. Therefore, Grievant has failed to prove by a preponderance of the evidence that he is entitled to entry of default judgment and default is denied.

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

Findings of Fact

1. At all times relevant to this grievance, Grievant was an employee of Respondent, Division of Corrections ("DOC"), working at either the Parkersburg Correctional Center or at another location for the DOC.

2. On November 15, 2016, Grievant filed a grievance challenging his non-selection for case manager at the Parkersburg Correctional Center and requested a hearing.

3. On November 17, 2016, Grievant requested discovery regarding the successful applicant and the interview process. The requested discovery required review and redaction.

4. On November 30, 2016, a Level I hearing was held before a Hearing Examiner for the Commissioner of the West Virginia Division of Corrections.

5. Grievant did not receive the requested discovery documentation prior to the Level I hearing.

6. At the hearing, Respondent had unredacted documentation that was responsive to Grievant's discovery request.

7. Because this documentation was unredacted, the Hearing Examiner admitted the documentation into evidence at the hearing, but did not provide Grievant with an unredacted copy of the documentation.

8. At the Level I hearing, Grievant discussed continuing the hearing due to his inability to have the requested documentation at the hearing. The Hearing Examiner determined that the hearing could be held and the matter was not continued.

9. On December 20, 2016, the Commissioner of the West Virginia DOC denied the grievance and mailed the decision to the Grievant by certified mail. The grievance decision contained all of the redacted documentation used at hearing in the attached exhibits.

10. On December 21, 2016, Grievant filed a notice of intent, requesting entry of default judgment.

Discussion

The default provisions of W. Va. Code § 6C-2-4(a)(2) require that written notice of a Level I conference must be given and the conference held within ten days of receipt of a grievance by Respondent. 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). 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 evidence shows that the Level I hearing was held on November 30, 2016, and the written decision was issued on December 20, 2016, and mailed to Grievant by certified mail. Pursuant to the definition of "days" in W.Va. Code § 6C-2-2(c), December 20, 2016, was the fourteenth day after the Level I hearing. There is no dispute that Respondent timely scheduled and provided a Level I conference within ten days of receipt of the grievance and that a decision was timely issued.

Nonetheless, Respondent did not provide Grievant with redacted copies of the documents it provided to the Hearing Examiner, which were used at the Level I hearing.

These documents contained some sensitive information, which had not been redacted. The hearing examiner wisely did not permit Grievant to review the unredacted documents, which would have improperly disclosed protected information. Grievant believed he was placed at a disadvantage because the requested discovery documents were not produced in advance of the hearing, preventing him from reviewing them and fully preparing for the Level I hearing. Additionally, once at the Level I hearing, he was not provided with a redacted copy of the documents Respondent brought to hearing. Therefore, Grievant requested a continuance of the Level I hearing. The hearing examiner did not order a continuance, but instead permitted use of the information contained in the documents, while protecting the confidential information therein.

Based upon Respondent's failure to provide the requested discovery, as described above, and its asserted adverse effect upon the outcome of the Level I hearing, Grievant contends he is entitled to default judgment. In support of his position, Grievant points to W. Va. Code § 6C-2-3(k) "Discovery – The parties are entitled to copies of all materials submitted to the chief administrator or the administrative law judge by any party." The record is clear that Respondent violated W. Va. Code § 6C-2-3(k) in failing to provide copies of the documents produced at the Level I hearing, properly redacted, to Grievant, which it provided to the Hearing Examiner for the Level I hearing, which likely hampered this *pro se* Grievant's efforts to effectively and fully prosecute his grievance at Level I. However, Respondent contends that entry of default judgment is not an available sanction for a party's failure to provide discovery. *Ferrell and Marcum v. Regional Jail and Correctional Facility Authority/Western Regional Jail*, Docket No. 2013-1005-CONS (June 4, 2013) "The Grievance Board has no authority to grant a default judgment

granting a grievance as a sanction for bad faith." *Wendling v. West Virginia Real Estate Commission*, Docket No. 94-REC-514 (May 16, 1996). As such, there is no authority permitting the Grievance Board to enter a default judgment against Respondent. In consideration of all the foregoing, Grievant has failed to prove by a preponderance of the evidence that he is entitled to entry of default judgment and default judgment is denied.

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). 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). The issues to be resolved 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).

3. A Level I conference must be provided within the ten-day period mandated under W. Va. Code § 6C-2-4(a)(2).

4. “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 resolved 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).

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).

6. W. Va. Code § 6C-2-3(k), “Discovery,” provides, “The parties are entitled to copies of all materials submitted to the chief administrator or the administrative law judge by any party.”

7. Respondent violated the requirement of W. Va. Code § 6C-2-3(k) at Level I.

8. Default, however, is not an available sanction for a party's failure to provide discovery. *Ferrell and Marcum v. Regional Jail and Correctional Facility Authority/Western Regional Jail*, Docket No. 2013-1005-CONS (June 4, 2013).

9. The Grievance Board has no authority to grant a default judgment as a sanction for bad faith. *See Wendling v. West Virginia Real Estate Commission*, Docket No. 94-REC-514 (May 16, 1996).

10. There is no authority permitting the Grievance Board to grant default judgment due to Respondent's failure to timely provide discovery.

11. Grievant did not meet his burden of proving default by Respondent.

Accordingly, Grievant's claim for relief by default is **DENIED** and it is hereby **ORDERED** that the parties confer with one another and forward to the Grievance Board at least five (5) mutually convenient dates upon which this matter may be scheduled for Level II mediation. These dates must be submitted by **June 2, 2017**. If agreed upon dates are not received by this date, the hearing will be scheduled according to the Grievance Board's discretion.

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

DATE: May 18, 2017

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Susan L. Basile
Administrative Law Judge