

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DWIGHT RICHARD TESTEMENT,  
Grievant,**

**V.**

**DOCKET NO. 2013-1846-MAPS**

**REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/  
SOUTHERN REGIONAL JAIL,  
Respondent.**

**ORDER GRANTING DEFAULT**

Grievant, Dwight Richard Testement, was employed by Respondent, Regional Jail and Correctional Facility Authority at Southern Regional Jail. On May 7, 2013, Grievant filed this grievance against Respondent protesting his suspension without pay for alleged misconduct and negligence. Grievant requested as relief the removal of the suspension, payment of back pay and benefits, and restoration of rank.

As the Grievance Board's records reflected that no action had been taken on the grievance since the level one conference scheduled to be held May 16, 2013, the Grievance Board sent a letter to the parties notifying them that the grievance would be dismissed for failure to pursue unless timely written objection was received. On May 10, 2016, Grievant filed a timely written objection to the dismissal of the grievance stating that a telephone conference had been held in which he was informed that a formal written decision would be mailed, which he has never received.

By *Order* entered June 8, 2016, the undersigned ordered Respondent to immediately provide a copy of the decision to the Grievance Board and Grievant if a level one decision was completed after the May 16, 2013 hearing. If no decision was completed, the undersigned further ordered Respondent to schedule a level one

conference within ten days of receipt of the order and issue a decision in compliance with W. VA. CODE § 6C-2-1, et seq. and W. VA. CODE ST. R. § 156-1-1, et seq.

On August 1, 2016, Grievant filed for default asserting that Respondent had failed to issue a decision after the original May 16, 2013 conference call, and had failed to provide a copy of the decision or schedule a conference as ordered by the undersigned's June 8, 2016 *Order*.

The undersigned issued a Notice of Default Hearing on January 19, 2017, scheduling the default hearing for March 24, 2017. The default hearing was held on March 24, 2017, in Beckley, West Virginia, at the offices of the Raleigh County Commission on Aging. Due to the undersigned's illness, Administrative Law Judge William B. McGinley conducted the hearing. Grievant appeared *pro se*<sup>1</sup>. Respondent did not appear by representative or counsel. This matter became mature for decision at the conclusion of the hearing on March 24, 2017.

### **Synopsis**

Grievant filed this grievance protesting his suspension. A level one conference was held, but no decision was provided to the Grievance Board or Grievant. Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, the parties were notified by letter that, as no action had been taken in the grievance since the conference, the grievance would be dismissed unless timely written objection was made. Grievant made timely objection and Respondent was ordered to comply with the provisions of W. VA. CODE § 6C-2-1, et seq. by providing the Grievance Board and

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

Grievant with a copy of the level one decision or by scheduling a conference. Respondent failed to comply with order and failed to appear for the default hearing to demonstrate it was 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. Grievant's request for default was not timely, but timeliness is an affirmative defense Respondent failed to raise. Respondent is in default. Accordingly, Grievant's claim for relief by default is granted. A second hearing must be scheduled to allow Respondent opportunity to demonstrate whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies.

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 was employed by Respondent, Regional Jail and Correctional Facility Authority at Southern Regional Jail.
2. On May 7, 2013, Grievant filed this grievance against Respondent protesting his suspension without pay for alleged misconduct and negligence and requesting a level one conference.
3. A level one conference was held on May 16, 2013, by telephone.
4. Neither the Grievance Board nor Grievant received a level one decision following the level one conference.
5. Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, on May 2, 2016, the undersigned sent the parties a letter

notifying them that, as no action had been taken in the grievance since the May 16, 2013 conference, the grievance would be dismissed unless timely written objection was made.

6. By letter dated May 10, 2016, Grievant objected to the dismissal of his grievance. In support, Grievant stated that on May 16, 2013, he had a conference call with Chief of Operations, Steve Crook, and he was informed at the end of the call that he would receive a formal written decision within fifteen working days. Grievant asserted he never received the decision. Grievant stated that he was then dismissed from employment in June 2013, that he protested the dismissal by letter, and never received a response. Grievant stated he had sent letters to Governor Earl Ray Tomblin, Secretary Joseph Thornton, and Senator William Laird complaining of his dismissal from employment. Grievant further stated that, due to the passage of time, he had shredded all relevant documents.

7. By *Order* entered June 8, 2016, the undersigned ordered Respondent to immediately provide a copy of the decision to the Grievance Board and Grievant if a level one decision was completed after the May 16, 2013 hearing. If no decision was completed, the undersigned further ordered Respondent to schedule a level one conference within ten days of receipt of the order and issue a decision in compliance with W. VA. CODE § 6C-2-1, et seq. and W. VA. CODE ST. R. § 156-1-1, et seq.

8. Respondent did not provide a copy of the decision or schedule a conference as ordered. Respondent did not respond to the *Order* in any way.

9. The undersigned issued a Notice of Default Hearing on January 19, 2017, scheduling the default hearing for March 24, 2017. Respondent did not respond to the

notice in any way. Respondent did not request a continuance of the March 24, 2017 hearing.

10. Respondent failed to appear at the March 24, 2017 hearing by representative or counsel. Respondent did not request a continuance of the March 24, 2017 hearing.

### **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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). "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). In addition to the defenses above, Respondent may provide a defense to the default by "showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies." W.VA. CODE § 6C-2-3(b)(2).

"The chief administrator shall hold a conference within ten days of receiving the grievance. A conference is a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The chief administrator may permit other employees

and witnesses to attend and participate in a conference to reach a resolution. The chief administrator shall issue a written decision within fifteen days of the conference.” 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).

In this case, although Respondent held a conference on May 16, 2013, neither the Grievance Board nor Grievant ever received a copy of a level one decision on the grievance. In 2016, while performing a review of open grievances for which no level one decision had been received, Grievance Board staff discovered the instant grievance. The Grievance Board “maintain[s] jurisdiction over procedural matters in the grievance process.” W.VA. CODE § 6C-3-2(1).

“Once no action by a party has been taken on a grievance for two months, the Board will send all parties a letter, by certified mail, advising that the case will be dismissed from the docket of the Board twenty calendar days from the date of the letter, unless any party objects and can demonstrate, in writing, why the case should not be dismissed. If no timely written objection is received by the Board, an order of dismissal will be entered. . . .” W. VA. CODE ST. R. § 156-1-6.15.<sup>2</sup> Pursuant to this rule, on May 2, 2016, the undersigned sent the parties a letter notifying them that, as no action had been taken in the grievance since the May 16, 2013 conference, the grievance would be

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<sup>2</sup> This Rule appears in the section titled “Level Three and Administrative Law Judge Authority Generally” and was exercised under the general authority of the Grievance Board’s administrative law judges to address a procedural matter within the grievance process.

dismissed unless timely written objection was made. Grievant made timely objection to the dismissal of his grievance by letter dated May 10, 2016.

In response, the undersigned entered an *Order* on June 8, 2016, which ordered Respondent to immediately provide a copy of the decision to the Grievance Board and Grievant if a level one decision was completed after the May 16, 2013 hearing. If no decision was completed, the undersigned further ordered Respondent to schedule a level one conference within ten days of receipt of the order and issue a decision in compliance with W. VA. CODE § 6C-2-1, et seq. and W. VA. CODE ST. R. § 156-1-1, et seq. Respondent failed to respond to the order in any way, and by letter dated August 1, 2016, Grievant requested default.

“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). The Order was entered June 8, 2016, and copies to the parties were placed in the first class mail on the same date. Allowing three days for receipt of the order, and not counting the West Virginia Day holiday, Respondent was required to provide a copy of the decision or schedule a conference by June 28, 2016. Grievant was required to file his intent to enforce default within ten days of that date, but did not do so until August 1, 2016. Although Grievant’s own request for default judgment was untimely, timeliness is an affirmative defense. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3. Respondent failed to appear to raise this defense.

The undersigned ordered Respondent to comply with the provisions of W. VA. CODE § 6C-2-1, et seq. by providing the Grievance Board and Grievant with a copy of the

level one decision or scheduling a conference. Respondent failed to comply with the June 8, 2016 *Order* to comply with the provisions of W. VA. CODE § 6C-2-1, et seq. and failed to appear for the default hearing to demonstrate it was 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. "The default proceeding is usually bifurcated into two hearings." W. VA. CODE ST. R. § 156-1-7 (2008). Respondent is in default, but a second hearing must be scheduled to allow Respondent opportunity to demonstrate whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies.

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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3. "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).

4. "The chief administrator shall hold a conference within ten days of receiving the grievance. A conference is a private, informal meeting between the grievant and the



chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The chief administrator may permit other employees and witnesses to attend and participate in a conference to reach a resolution. The chief administrator shall issue a written decision within fifteen days of the conference.” W.VA. CODE § 6C-2-4(a)(2).

5. 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).

6. “Once no action by a party has been taken on a grievance for two months, the Board will send all parties a letter, by certified mail, advising that the case will be dismissed from the docket of the Board twenty calendar days from the date of the letter, unless any party objects and can demonstrate, in writing, why the case should not be dismissed. If no timely written objection is received by the Board, an order of dismissal will be entered. . . .” W. VA. CODE ST. R. § 156-1-6.15.

7. “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).

8. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3.

9. Respondent failed to appear to raise a timeliness defense.

10. Respondent failed to comply with the June 8, 2016 *Order* to comply with the provisions of W. VA. CODE § 6C-2-1, et seq. and failed to appear for the default hearing to demonstrate it was 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.

11. “The default proceeding is usually bifurcated into two hearings.” W. VA. CODE ST. R. § 156-1-7 (2008).

12. Respondent is in default, but a second hearing must be scheduled to allow Respondent opportunity to demonstrate whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies.

Accordingly, default is **GRANTED**. The parties are **ORDERED** to confer with one another and provide the Grievance Board with at least five (5) mutually agreeable dates to schedule a hearing to determine whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. The parties shall submit their agreeable dates to the Grievance Board no later than July 13, 2017.

**DATE: June 27, 2017**

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