THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BILLIE JEAN ALLEN,
Grievant,

v. **Docket No. 2018-0919-WooED**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

At all times related to this grievance, Grievant, Billie Jean Allen, was employed by Respondent, Wood County Board of Education ("Board").[1] Grievant was working as a school nurse at Jefferson Elementary Center. Ms. Allen filed a Level One grievance form dated January 29, 2018, alleging that she was being subjected to discrimination, unfair treatment and harassment. As relief, Grievant seeks that the discrimination, unfair treatment and harassment end.

Grievant filed a claim for default dated March 13, 2018, alleging the Chief Administrator for the Board failed to issue a level one decision within the statutory time limit. A default hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board in August 17, 2018.[2] At this hearing, Respondent was represented by Richard S. Boothby, Esquire, Bowles Rice PLLC. Grievant appeared and

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[1] Subsequent to this grievance, on August 14, 2018, Grievant's employment with the Board was terminated, for reasons unrelated to the present grievance. Ms. Allen contested the dismissal by filing a grievance on August 18, 2018. *See,* Docket No. 2019-0347-CONS.

[2] A hearing was set for May 2, 2018, but had to be canceled due to the failure of Respondent's counsel to appear. It was later learned that Respondent's counsel had been in an automobile accident the evening before the hearing.

was represented by John E. Roush, Esquire, AFT-WV, AFL-CIO. This matter became mature for decision on October 1, 2018, upon receipt of the last of the Proposed Findings of Facts and Conclusions of law,

Synopsis

Grievant claimed default when the Chief Administrator failed to issue a Level One decision within the statutory time limit. Grievant and Respondent agreed to extend the issuance of the decision to a date certain. However, Respondent did not issue the decision on the agreed date. Grievant proved default. Respondent did not raise any of the specific statutory defenses. The remedy sought by Grievant was lawful and appropriate.

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

Findings of Fact

1. Grievant, Billie Jean Allen, is a Registered Nurse and was employed by Respondent as Itinerate School Nurse. Grievant has been employed by the Wood County Board of Education for approximately eight years and for the last two she was assigned to the Jefferson Elementary Center.

2. Ms. Allen filed a Level One grievance form alleging that Julie Bertrum, Health Services Coordinator was bullying and harassing her, and treating her disrespectfully. She also alleged that Coordinator Bertrum was deliberately trying to undermine her work. As relief, Grievant seeks "to be treated the same as the other nurses in the county. . . no longer be ridiculed . . . pushed around, and mistreated."[3]

[3] *See* Level One grievance form and attachment.

3. In February 2018, Grievant had a Level One conference with Board Superintendent, John Flint and Board Attorney Sean Francisco.[4]

4. When that meeting ended, Grievant was assured by Mr. Flint and Mr. Francisco that she would receive a decision within fifteen working days of the meeting.

5. On March 7, 2018, Grievant believed fifteen days had passed and she called Mr. Francisco to inquire about the decision. Mr. Francisco told her that the decision had not been written. He told Grievant that he would get the decision in the mail on Monday, March 12, 2018.

6. On March 13, 2018, having received no decision, Grievant filed a notice of default with Respondent and the Grievance Board.

7. No decision was rendered concerning the Level One conference.[5]

Discussion

A grievant who alleges a default at a lower level of the grievance process has 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. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Brown v. Logan County Bd. of Educ.* Docket No. 2008-0567-LogED (Oct. 24, 2008). "The grievant prevails by default if a required response is not made by the

[4] Both Superintendent Flint and Sean Francisco left employment with the Board on or around June 30, 2018.

[5] During a telephone conference regarding scheduling, Mr. Francisco stated that a decision had been made but none was received by Grievant or in any file related to the case. If a decision was even written it was not issued.

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.[6] *Dunlap v. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (Dec. 8, 2008).

W. VA. CODE § 6C-2-4(a)(2) states, "[t]he chief administrator shall issue a written decision within fifteen days of the conference." It is undisputed that a meeting occurred in February 2018, where Grievant, Superintendent Flint and the Board's attorney met to discuss the grievance which was filed on January 29, 2018. However, there is not clear evidence concerning which day in February the meeting took place.[7] Grievant was told by Superintendent Flint and Board Attorney Francisco that she would receive a decision within fifteen working days. Grievant believed that would be around March 6, 2018. When she had not received the decision by March 7, 2018, she call Attorney Francisco to inquire about the status of the decision. At Mr. Francisco's request, they agreed to extend the time for issuing the decision until Monday, March 12, 2018. Mr. Francisco assured Grievant the decision would be placed in the mail on that day. Grievant did not receive the decision on March 12 and filed a notice of default the next day, March 13, 2018.

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[6] Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 7.1 (2018).

[7] W. VA. CODE § 6C-2-4(a)(2) requires that the conference be held within ten working days of the filing of the grievance. If that timeline was followed, the meeting would have occurred on February 12 or 13, 2018. That would be consistent with Grievant's belief that the fifteen days for the decision would end around March 6, 2018.

Respondent argues that Grievant's notice of default was not filed within the statutory time limit. W. VA. CODE 6C-2-3(b) requires that the written notice must be filed with the chief administrator "[w]ithin ten days of the default."[8] Respondent argues that since Grievant could not name the specific date of the conference, it was impossible to conclude that she filed the default form within ten days of the default.

The Grievance Board has consistently noted that "[w]aiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure. *Huston v. W. Va. Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R 469D (Feb. 29, 2000); *Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-296D (Nov. 30, 1999). This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. *Jackson v. Hancock County Bd. of Educ.*, Docket No. 99-15-081D (May 5, 1999)." *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

Even where grievants have agreed to extend the timeline for submitting proposals but not specified a date for the issuance of the decision, the Grievance Board has stated that the decision must be issued within a reasonable time which is determined on a case-by-case basis. *See Shirkey v. Dep't of Transp. and Div. of Highways,* Docket No. 04-DOH-153DEF (July 30, 2004); *Parker v. Dep't. of Health and Human Services,* Docket No. 99-HHR 296D (Nov. 30, 1999); *Bowyer v. Bd. of Trustees and W. Va. Univ.,* Docket No. 99-BOT-197DEF (July 13, 1999); *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-

[8] W. VA. CODE 6C-2-3(b) (2) 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.

0808-DEP (Dec. 8, 2008). Grievant does not waive the right to claim a default by agreeing to extend the time for issuance of the Level One decision. Rather the date when the fault might occur is extended.

In this case the parties agreed to extend the time for issuing the Level One decision to a date certain: March 12, 2018. The default occurred when the Chief Administrator did not issue the decision on that day. Grievant had to file her notice of default "[w]ithin ten days of the default."[9] Grievant filed her notice of default on March 13, 2018, clearly within her statutory time limit. Respondent did not raise any of the statutory defenses listed in W. VA. CODE § 6C-2-3(b)(1). Grievant proved default by a preponderance of the evidence and therefore prevails.

Default grievances are generally bifurcated. In the first hearing, it is determined whether a default actually occurred. If a default is proven, a second hearing is held to determine if any of the remedies requested by the grievant are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2).[10] However, in this matter the parties agree to address the remedy issue in the same hearing.

The remedy sought in the grievance statement Grievant specifically wrote:

> I want to be treated the same as all the other nurses in the county. . . I no longer want to be ridiculed, told I'm incompetent, messed with, pushed around and mistreated.

Grievant's counsel summarized Grievant's desired remedy to be "cessation of the harassment and unfair and discriminatory treatment."[11]

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[9] W. VA. CODE 6C-2-3(b).

[10] *See also,* Public Employees Grievance Board, 156 C.S.R. 1 § 7.1 (2018).

[11] Grievant's Proposed Findings of Fact and Conclusion of Law, FOF 3.

It has been specifically held that, "[t]o the extent that Grievant is asking for harassment and bullying to cease, this relief is not contrary to law or contrary to proper and available remedies. While the undersigned cannot order there to be no yelling in the workplace, the undersigned can order harassment in the work place to cease." *Walker v. Kanawha County Board of Education,* Docket No. 2013-0202-KanED (Mar. 12, 2014) (citing *White v. Monongalia County Bd. of Educ*., Docket No. 93-30-371 (March 31, 1994) which held, "A board of education bears some responsibility to intervene and stop an employee from engaging in conduct which by definition constitutes harassment.") *Id.*

Respondent does not argue that the remedies are, by their nature, contrary to law. Rather, Respondent argues that the remedies are not available to Grievant because her employment has been terminated. Respondent notes that the remedies are not available until the matter of her employment has been resolved in the grievance where Grievant contests her dismissal. The remedy would certainly be unavailable in a case where the Grievant voluntarily resigned. In that instance there would be no possibility that Grievant would be reinstated. In this matter, Grievant may be returned to work when her appeals are resolved. If that happens, the remedy would be proper. *Walker v. Kanawha County Board of Education, supra.* Because the remedy is lawful and proper and there is a possibility that Grievant may be reinstated, the remedy may be granted contingent upon Grievant's reinstatement to employment with the Board. Accordingly, the grievance is GRANTED.

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has 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. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Brown 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).

3. W. VA. CODE 6C-2-3(b) (2) requires the grievant to file a default notice within ten days of the default.

4. "Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure. *Huston v. W. Va. Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R 469D (Feb. 29, 2000); *Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-296D (Nov. 30, 1999).

5. Grievant proved by a preponderance of the evidence that default occurred and that she filed her written notice of default within ten days of the default.

6. "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).

7. W. VA. CODE § 6C-2-3(b)(3) states, "If the administrative law judge finds that the employer has a defense to the default as permitted by subdivision (1) of this

subsection or that the remedy is contrary to law or not proper or available at law, the administrative law judge may deny the default or modify the remedy to be granted to comply with the law or otherwise make the grievant whole."

7. Respondents did not raise a statutory defense to the default as set forth in W. VA. CODE § 6C-2-3(b)(1).

8. The remedy sought by Grievant is not contrary to law and it is proper and available at law. *Walker v. Kanawha County Board of Education* Docket No. 2013-0202-KanED (Mar. 12, 2014).

Accordingly, the grievance is GRANTED by default. If Grievant is reinstated to her employment with Respondent, Respondent is Ordered to take all appropriate and necessary steps to stop and prevent discrimination, harassment and unfair treatment of Grievant.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: October 5, 2018.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE