

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TIMOTHY D. DEWITT,
Grievant,**

v.

DOCKET NO. 2017-1503-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

ORDER DENYING DEFAULT

Timothy Dewitt ("Grievant") filed a written notice of default against his employer, West Virginia University ("Respondent" or "WVU"), on March 2, 2018, in regard to a grievance he filed at Level One on January 13, 2017. Grievant is asserting that he was not afforded a Level One hearing on his grievance within the fifteen-day statutory time limit. A hearing was held on the issue of default at the Grievance Board's office in Westover, West Virginia, on May 30, 2018. Grievant was represented by Robert G. Glover, a non-attorney lay representative. Respondent was represented by Assistant Attorney General Samuel M. Spatafore. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 22, 2018.

Synopsis

Grievant contends that WVU is in default because a Level One hearing was not held within 15 days of the filing of the grievance. The evidence indicates that the parties made a good-faith effort to find a mutually agreeable date for holding the Level One hearing but were unable to agree on a date and time, in some significant part because Grievant's designated representative needed to travel from South Carolina to participate

in the hearing. In these circumstances, WVU was neither negligent nor shown to have deliberately delayed the grievance process. Thus, any delay which occurred was justified within the meaning and intent of W. Va. Code § 6C-2-3(b)(1). Accordingly, a finding of default is denied.

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

Findings of Fact

1. Grievant initiated his grievance on January 13, 2017, when Robert Glover, his representative, sent a copy of the grievance to the Grievance Board and Sue Keller, Chief Grievance Administrator for West Virginia University ("WVU"), by electronic correspondence at 11:47 p.m.

2. Administrative notice is taken that January 13, 2017, was a Friday.

3. Further administrative notice is taken that the following days, January 14 and 15, 2017, fell on Saturday and Sunday.

4. Further administrative notice is taken that January 16, 2018, the third Monday in January, was a state holiday, Martin Luther King's Birthday. See W. Va. Code § 2-2-1(a)(2).

5. Administrative notice is additionally taken that January 21 and 22, January 28 and 29, and February 4 and 5, 2017, all fell on Saturday and Sunday.

6. Sue Keller is employed by WVU as its Chief Grievance Administrator. In that capacity, Ms. Keller ordinarily conducts Level One hearings for grievances filed by employees of WVU under the statutory grievance procedure for public employees in West Virginia.

7. On January 23, 2017, Ms. Keller sent an e-mail to Robert Glover, Grievant's designated representative, stating: "A level one hearing requested by Grievant must be held no later than February 6, 2017. Please advise when you will be available." G Ex 5.

8. Mr. Glover responded to Ms. Keller's e-mail request later on January 23, 2017, stating: "Do (*sic.*) to having to schedule 24 hour caregiver coverage I can only state at this moment availability for Feb 3-6 in the afternoons; as I will be flying into Morgantown to attend this hearing." G Ex 5.

9. Mr. Glover's address on the grievance form initiating this grievance is listed as "Johns Island, SC." G Ex 1.

10. On January 24, 2017, Samuel Spatafore, Assistant Attorney General, acting as Respondent's representative, sent an e-mail to Mr. Glover and Ms. Keller stating, "WVU is available on Feb 6th at 1pm." G Ex 5.

11. Five minutes later, on January 24, 2017, Mr. Spatafore sent another e-mail to Mr. Glover and Ms. Keller stating as follows:

I apologize. WVU is NOT available on Feb 6th.

WVU is available on Feb 3rd, however a necessary witness is not available until after 2pm.

Would 11am on Feb 3rd work for everyone?

G Ex 5.

12. On January 24, 2017, Ms. Keller wrote an e-mail to Mr. Glover stating:

Given the time restrictions of both parties will you agree to waive the statutory timelines in this case? If so, please provide 2 or 3 future dates you will be available.

G Ex 4.

13. Mr. Glover responded to Mr. Spatafore's e-mail on January 24, 2017, as follows:

Mr. Spatafore,

I had also included February 3, 4th, and 5th, are you not available on those dates either?

How about February 2nd?

G Ex 2.

14. Mr. Spatafore responded to Mr. Glover in an e-mail sent approximately twenty-two (22) minutes later on January 24, 2017, in which he stated:

As I stated in previous email WVU is available on Feb. 3rd from 11am – 2pm.

Feb 4th is a Saturday and February 5th is a Sunday.

If you are now also available on Feb, 2nd, WVU could be available that day at 10am.

G Ex 2.

15. Mr. Glover responded to Mr. Spatafore's e-mail that same day, approximately four minutes later, in which he stated the following:

Sam,

I apologize. I apparently did not absorb your message and its full intent of availability. Friday morning the 3rd of February would be almost impossible from looking at the flight schedules and drive

time from Pittsburgh Airport. Afternoon Friday February 3rd is available.

I have not talked with the Grievant, but I think he may be willing to hold the hearing on February 7th through 8th in the afternoon also. However, I am confused as to the AG office being involved in a level one hearing, as no other hearing has included the AG on a level one.

Sam, please let me know how your week looks Feb 7-10. Then Ms. Keller can give us her input.

G Ex 4.

16. The Level One hearing was not scheduled until March 1, 2017, at which time Ms. Keller set the Level One hearing for April 3, 2017.

17. Grievant filed a civil action in the Circuit Court of Monongalia County which caused the hearing to be cancelled on the morning of April 3, 2017. Once the Circuit Court issued a ruling, Grievant filed this request for a finding of default.

Discussion

When a grievant asserts that his employer has failed to respond to his grievance in a timely manner, resulting in a default, the grievant must establish such default by a preponderance of the evidence. *Frost v. Bluefield State College*, Docket No. 2010-1564-BSC (Mar. 4, 2011); *Dunlap v. Dep't of Env'tl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008). 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); *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997).

The West Virginia Public Employees Grievance Procedure establishes certain time limits for filing and processing grievances. See W. Va. Code §§ 6C-2-3 & 6C-2-4.

The statute also includes a provision allowing a grievant to prevail by default in certain circumstances. “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). Thus, the primary issues to be resolved are whether a default has occurred, and whether the employer has a valid excuse for not responding within the time limit required by law. *Ferrell v. Regional Jail & Correctional Facility Auth.*, Docket No.2013-1030-MAPS (Apr. 26, 2013); *Sawyers v. Dep’t of Health & Human Res.*, Docket No. 2011-0103-DHHR (Nov. 19, 2010).

Grievants filing a grievance at Level One of the grievance procedure have the option of requesting either a conference or a hearing. See W. Va. Code § 6C-2-4(a). In this particular matter, Grievant requested a hearing at Level One. See G Ex 1. The statute requires the employer’s chief administrator to “hold a level one hearing within fifteen days of receiving the grievance.” W. Va. Code § 6C-2-4(a)(3). W. Va. Code § 6C-2-2(c) defines “days” as “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.”

The Procedural Rules of the Public Employees Grievance Board define when a grievance is “filed,” in pertinent part, as follows:

"File" or "filing" means to place the grievance form in the United States Postal Service mail, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard, East, West Virginia 25311, and (2) the agency's chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark. All grievance forms shall be date stamped when received. Grievance forms may not be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules.

* * *

156 C.S.R. 1 § 2.1.4. (2008). Although there is no evidence that this grievance was ever mailed to Respondent or the Grievance Board, or that it was sent by facsimile or hand delivery, the grievance has been processed as if it was properly filed, and the undersigned Administrative Law Judge accordingly finds that there was substantial compliance with the statute and rules whereby the grievance was properly filed as of January 17, 2017, the first business day following its transmission after normal working hours on January 13, 2017.

Once the grievance was filed, WVU had fifteen (15) days to hold a Level One hearing. See W. Va. Code § 6C-2-4(a)(3). In calculating the dimensions of the time frame for holding this Level One hearing, only "working days" are counted. See W. Va. Code § 6C-2-2(c). In her initial communication to Grievant's representative, an e-mail message dated January 23, 2017, Ms. Keller correctly stated the deadline for holding a Level One hearing as February 6, 2017, fifteen working days from receipt of the grievance.

Because the hearing was neither scheduled nor held on or before February 6, 2017, WVU must establish that it was prevented from conducting the hearing within the

statutory time frame for a reason which constitutes “a justified delay not caused by negligence or intent to delay the grievance process.” See W. Va. Code § 6C-2-3(b)(1). In this regard, there is no evidence that WVU was negligent. Although there was credible evidence indicating that the parties have been at loggerheads over this and several other grievances which Grievant has pursued and continues to pursue against WVU, a preponderance of the credible evidence clearly establishes that the parties made a good faith effort to schedule the hearing at a mutually agreeable date within the statutory time frame and simply failed to do so. Whether this grievance is frivolous, as Respondent contends, or this grievance is based upon compelling evidence which assures that Grievant will ultimately prevail, as Grievant posits, the merits of the grievance are not relevant at this stage of the proceedings. The mere fact that the parties are engaged in a contentious and protracted series of disputes, of which this grievance forms a significant part, does not overcome the uncontroverted evidence that the parties failed to agree on a hearing date within the required time limit, despite a mutual effort to find an acceptable date.

Any failure to hold the Level One hearing within the statutory time limit cannot be attributed solely to WVU. WVU’s representative offered to hold the Level One hearing on at least two dates within the permitted time frame. Grievant, through his representative, countered by proposing dates that were beyond the fifteen-day statutory timeline. Moreover, Grievant exercised his right to be represented by a person of his choice, and that person happened to be residing in South Carolina at the time of these events. This purely logistical problem appears to have been the most significant obstacle to finding an agreeable date and time for the Level One hearing. Although

there was evidence that Ms. Keller offered to hold the Level One conference using video conferencing technology, Grievant was not required to participate in this manner. Nonetheless, in order to hold a traditional face-to-face meeting with Grievant's selected representative present, that representative needed to travel from South Carolina to Morgantown, West Virginia.

Ultimately, the hearing was set for April 3, 2017, a date outside the time limit, but the hearing was not held on that date because Grievant filed an action in the Circuit Court of Monongalia County, which resulted in the hearing being held in abeyance. Once the court issued its decision, permitting the matter to move forward, Grievant sought this default determination.

WVU, through Ms. Keller, could have arbitrarily set the hearing for a date and time within the statutory timeline, but this would have inevitably forced Grievant's representative to request a continuance to allow him to travel and participate at a date and time that was workable, given his circumstances. The record indicates that the parties worked toward finding a mutually agreeable date but were unable to agree on a date within the fifteen-day time limit for holding the Level One hearing. Because this failure to reach agreement is not attributable to either party, it constitutes a "justified delay not caused by negligence or intent to delay the grievance process within the meaning and intent of W. Va. Code § 6C-2-3(b)(1). See *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 57 S.E.2d 725 (1950); *Riedel v. W. Va. Univ.*, Docket No. 2015-1774-CONS (Oct. 13, 2016); *Akers v. Higher Educ. Interim Governing Bd.*, Docket No. 01-HE-039D (May 3, 2001).

Grievance procedures should be given a flexible interpretation so as to carry out the legislative intent expressed in § 6C-2-1(b) calling for resolution of “grievances in a fair, efficient, cost-effective and consistent manner.” *Iverson v. Div. Of Highways*, Docket No. 2014-0150-DOT (Mar 13. 2014). See, e.g., *Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 425 S.E.2d 111 (1992); *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990); *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). Grievant cannot benefit from selecting an out-of-state representative whose travel requirements had to be factored into the process of finding an acceptable date for a Level One hearing. A finding that WVU’s delay in scheduling the Level One hearing was justified is fully consistent with the purposes of the grievance procedure. This matter should proceed to be considered on its merits at Level One.

The following Conclusions of Law support the determination that any purported default must be excused in accordance with W. Va. Code § 6C-2-3(b)(1), and Grievant is entitled to no relief.

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. *Donellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). The generally accepted meaning of preponderance of the evidence is “more likely than not.” *Riggs v. Dep’t of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the

evidence equally supports both sides, the grievant has not met his burden. *Leichliter, supra*.

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 Env’tl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

3. If Respondent demonstrates that a default has not occurred because it was prevented from meeting the time lines for one of the reasons listed in W. Va. Code § 6C-2-3(b)(1), Grievant is not entitled to relief. If there is no default, or the default is excused, the grievance will be remanded to the appropriate level of the grievance process. *Sawyers v. Dep’t of Health & Human Res.*, Docket No. 2011-0103-DHHR (Nov. 19, 2010).

4. The record in this case demonstrated that a default did not occur as the facts establish that any delay in scheduling a Level One hearing was the result of justified delay not caused by negligence or intent to delay the grievance process.

Accordingly, Grievant's request for judgment by default is **DENIED**, and this matter is remanded to Level One for a hearing before the chief administrator or designee. Respondent is **ORDERED** to schedule a Level One hearing within fifteen (15) working days of receipt of this Order.

Date: June 29, 2018

LEWIS G. BREWER
Administrative Law Judge