

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ELIZABETH M. LOY,
Grievant,**

v.

Docket No. 2018-1195-BOE

**BOARD OF EDUCATION,
Respondent.**

ORDER GRANTING DEFAULT REMEDY

Grievant, Elizabeth M. Loy, filed this action against her employer on May 11, 2018.

Her unedited statement of grievance reads as follows:

1. On May 2, 2018, I filed a grievance asserting that the recommendation of RESA 8 that my employment be terminated deprived me a constitutionally protected property interest in continued employment without due process of law.
2. On May 2, 2018, I submitted, through counsel, to the W.Va. Board of Education a statement regarding RESA 8's actions, along with copies of annual evaluations of my work at RESA 8 over the past fourteen years, all of which evaluations were entirely positive.
3. On May 9, 2018, the W.Va. Board of Education terminated my employment with RESA 8, again depriving me of a constitutionally protected property interest in continued employment without due process of law.
4. The May 9, 2018 letter from the W.Va. Board of Education instructed me to contact Shannon Johnson, Director of Human Resources for RESA 8 to arrange a time to retrieve my personal items.
5. On May 10, 2018, I called Ms. Johnson, who asked that I send a list of all my personal items so RESA 8 could gather them for me.
6. I told Ms. Johnson that, after 14 years of work at RESA 8, I could not prepare an accurate list of all my personal items.

7. Ms. Johnson insisted that I prepare a list, as “they” did not want me on RESA 8 property.
8. I asked Ms. Johnson for a copy of my personnel file, a file to which I am entitled under RESA 8 policies.
9. Ms. Johnson said that she would prepare a copy of my personnel file, but after I had sent her a list of my possessions.
10. Ms. Johnson next said that she would put me in touch with Sherry Barnett to discuss COBRA and related termination matters, implying that she would do this after she received a list of my possessions.
11. Later that day, May 10, 2018, I received an email from Ms. Barnett related to COBRA and related termination issues.
12. The refusal of RESA 8 to allow me to collect my possessions, refusal to promptly provide a copy of my personnel file and threat to delay providing information about COBRA and related termination issues is in retaliation for my filing of a grievance on May 2, 2018 and for submitting information to the W.Va. Board of Education on May 2, 2018.

Grievant sought immediate access to her possessions, compensation for any possessions that have been damaged or destroyed and a copy of her personnel file.

Respondent did not hold a conference on the instant grievance within ten days of receiving this grievance. On June 5, 2018, Grievant notified RESA 8 of her intent to enforce a default with regard to her May 11, 2018 grievance. Respondent acknowledged that default had occurred. The matter came before the undersigned on October 11, 2018, for a telephone hearing pursuant to the Notice of Remedy Hearing issued on August 29, 2018. Grievant appeared by phone and by counsel, Garry G. Geffert. Respondent appeared by phone and by counsel, Sherri Goodman Reveal, and by Shannon Johnson, RESA 8 Human Resources Director. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on November 19, 2018.

Synopsis

The record indicates that Respondent defaulted, and has acknowledged that it has no statutorily accepted excuses for its default. Since Grievant prevailed on the merits by

default, the sole issue is whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. The Respondent has the burden of proving this affirmative defense by a preponderance of the evidence. Grievant stipulated that the sole item of relief now sought is a copy of the report of an investigation conducted regarding Grievant. Since the suspension and investigation were matters of discipline, the report of investigation should have been part of Grievant's personnel file pursuant to Respondent's applicable policy. The request for this report is not contrary to law or contrary to proper and available remedies.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant worked as Director of West Virginia Birth to Three Program at the Regional Education Service Agencies Eight.

2. On April 9, 2018, Grievant was suspended with pay pending an investigation by an outside investigator into allegations that Grievant harassed employees and created a hostile work environment.

3. Grievant and her attorney met with the outside investigator on April 23, 2018, for the purpose of answering the investigator's questions. Grievant complained that she had not been given details of the allegations nor who made the allegations.

4. On April 30, 2018, RESA 8 Executive Director Willard L. Aikens notified Grievant that the RESA 8 Regional Council recommended she be terminated and that he was recommending the same to the West Virginia Board of Education. Grievant was to remain on suspension with pay.

5. On the same day, West Virginia Board of Education counsel, Mary Catherine Tuckwiller, notified Grievant that the West Virginia Board of Education would

consider and vote on this recommendation at its May 9, 2018 meeting. The letter informed Grievant that she could choose to attend the meeting and make a statement to the Board prior to its vote.

6. Also on this date, Grievant's attorney sent a statement to the West Virginia Board of Education. Counsel stated that there was no meaningful purpose in Ms. Loy attending the meeting because she had not been given notice of the reasons for her termination.

7. The West Virginia Board of Education voted on May 9, 2018, to terminate Grievant's at-will employment, and she was notified of this by letter dated May 9, 2018. The letter directed her to schedule a time with the RESA 8 Director of Human Resources, Shannon Johnson, to retrieve personal items, return any RESA 8 property in her possession and discuss her benefits.

8. Grievant contacted Ms. Johnson on May 10, 2018, and asked about benefits, retrieving personal items left in her office, and receiving a copy of her personnel file. Grievant wanted her file right away, but Ms. Johnson told her that was not possible. Ms. Johnson asked Grievant to make a list of her personal items so that they could be boxed up and arrangements made for them to be picked up or delivered. Concerning Grievant's benefits questions, Ms. Johnson requested that RESA 8 employee, Sherry Barnett, contact Grievant that same day.

9. On May 11, 2018, Ms. Johnson communicated with Grievant that she could come to the office to pick up her belongings the next day, or sometime the next week. She also communicated that the personnel file was ready and she could pick it up when Grievant came to pick up her belongings.

10. Grievant came to the RESA 8 office after work hours on Monday, May 14, 2018, to pick up her belongings and a copy of her personnel file.

11. On May 16, 2018, Grievant's counsel wrote to complain that the personnel file did not contain any documents relating to the complaints supposedly made against her, and no documents relating to the investigation of those complaints. Counsel stated that Grievant was entitled to a copy of the "entire file" upon written request, and that the grievance filed on May 11, 2018 and this letter constitute such a request.

12. Mr. Aikens provided Grievant with the four letters she had previously received relating to her suspension and termination. Mr. Aikens did not provide any documents related to the investigation conducted by the outside investigator.

13. RESA 8 Employee Manual provides that the contents of an employee's personnel file include:

basic employee identification, completed employment applications and other hiring related documents, position announcements, certification and training records, notices of salary adjustments and benefit coverage information, performance evaluations, disciplinary records and other relevant job-related information or documents deemed essential by the Executive Director.

14. RESA 8 did not consider the investigation documents to be a "disciplinary record" that would be part of Grievant's personnel file. Ms. Johnson indicated that she kept investigative documents in a separate file that were kept in a safe.

15. Respondent did not hold a conference on the instant grievance within ten days of receiving this grievance, which would have been May 18, 2018. The staff felt that Grievant had been provided with all information and documents to which she was entitled, and focused on defending the other grievances.

16. On June 5, 2018, Grievant notified RESA 8 of her intent to enforce a default with regard to her May 11, 2018 grievance.

Discussion

Respondent has acknowledged that default has occurred in this grievance. Once the default is established, the second hearing addresses the remedies requested by the grievant. At that hearing, the respondent has the opportunity of showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. These issues are sometimes matters of law that may not require the presentation of evidence, but to the extent that proof is required, the respondent has the burden of proving this affirmative defense by a preponderance of the evidence. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). See *Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and *Flowers v. W.Va. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999) p. 3 of 8.

The record indicates that Respondent defaulted, and has acknowledged that it has no statutorily accepted excuses for its default. Since Grievant prevailed on the merits by default, the sole issue is whether the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. The sole remedy sought by Grievant is that she be provided with a copy of materials relating to an investigation conducted at the request of Respondent of allegations that Grievant had created a hostile work environment.

Respondent's personnel manual clearly states that at the written request of an employee, Respondent will provide copies of documents on file to the employee.

Respondent's personnel manual also provides that an employee's personnel file contain disciplinary records and other relevant job-related information. It is axiomatic that an "administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec 20, 1994).

Respondent argues that Grievant is not entitled to a copy of the investigative report of the allegations of a hostile work environment made against her because the indefinite suspension of Grievant with pay did not constitute a disciplinary action. This argument is without merit and inconsistent with prior Grievance Board decisions. *Blaney v. Wood County Bd. of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004); *Hays v. Hampshire County Bd. of Educ.*, Docket No. 03-14-327 (Jan. 30, 2004); *Blackburn v. Brooke County Bd. of Educ.*, Docket No. 2009-0618-BroED (May 27, 2009).

Respondent also argues that Grievant has no standing to raise this grievance, as Grievant is no longer an employee of RESA 8. Grievances filed after the person is no longer employed are routinely adjudicated through the grievance process. The instant case is not the type which has been dismissed due to the prior separation from employment of the person filing the grievance. This is not a situation where an employee has voluntarily ended her employment, and removed herself from the statutory provisions of the grievance procedure. Nor is this a situation where the grievance was filed after Grievant obtained other employment. In any event, this argument in opposition to providing the requested relief is without merit and inconsistent with prior Grievance Board decisions. *Cambell v. Raleigh County Bd. of Educ.*, Docket No. 2011-1443-RaLED (Nov.

18, 2011); *Marsicano v. Marion County Bd. of Educ.*, Docket No. 2009-0500-MrnED (April 23, 2009).

Accordingly, since the suspension and investigation were matters of discipline, pursuant to Respondent's policy, Respondent has violated its own policy in this matter in resisting Grievant's request to provide the investigative report. In addition, the record of this case does not support a finding that this relief is contrary to law or contrary to proper and available remedies.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In the remedy phase of a default grievance, the respondent has the burden of proving by a preponderance of the evidence, that the remedies requested by the grievant are contrary to law or contrary to proper and available remedies. W. Va. Code § 6C-2-3(b); Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *See Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and *Flowers v. W.Va. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. Respondent failed to demonstrate by a preponderance of the evidence that the remedy requested by the Grievant was contrary to law or contrary to proper and available remedies.

Accordingly, the relief requested by Grievant is **GRANTED**.

Respondent is **ORDERED** to provide Grievant with a copy of materials relating to an investigation conducted at the request of Respondent of allegations that Grievant had

created a hostile work environment. Respondent is granted leave to redact this document in the interest of employee privacy to the extent necessary.

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* 156 C.S.R. 1 § 6.20 (2018).

Date: December 21, 2018

Ronald L. Reece
Administrative Law Judge