THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DOUGLAS NEWBERRY,

Grievant,

v. **Docket No. 2018-1130-WooED**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

ORDER GRANTING DEFAULT

Grievant, Douglas Newberry, filed a level one grievance against his employer, Respondent, Wood County Board of Education, dated April 26, 2018, stating as follows:

> "WV § 18A-4-14 Duty Free Lunch; WV § 18A-2-12 Evaluation. Grievant is assigned to two school locations requiring him to travel between the locations. His lunch time is included in his travel time. This has left him without a legal schedule this year. While his schedule has been illegal he has been put on a focus support, given a negative evaluation and placed on a corrective action plan. His CAP is loaded with extra work and is onerous while his schedule is making it impossible for him to keep up with completing the mandates of the plan. WV 6c-2-2 Grievance[.]"

As relief, Grievant seeks, "[p]ayment plus interest and related benefits for loss of lunchtime. Removal of Corrective Action Plan and any negative evaluation rating received during the 2017-2018 school term. A fresh start for the 2018-2019 term with a statutorily sound schedule." Grievant submitted a written notice of default against his employer on June 11, 2018, regarding the level one grievance. A hearing was held before the undersigned administrative law judge on September 11, 2018, at the Grievance Board's office in Charleston, West Virginia, for the purpose of taking evidence on the issue of whether a default had occurred at level one. Grievant appeared in person, and

by his representative, Ben Barkey, WVEA. Respondent appeared by counsel, Richard S. Boothby, Esquire, Bowles Rice LLP. Also appearing for Respondent was Superintendent Will Hosaflook. This matter became mature for decision upon receipt of the last of the parties' written proposed Findings of Fact and Conclusions of Law on October 19, 2018.

Synopsis

Grievant argues that a default occurred at level one of the grievance process because the level one decision was not issued within fifteen days after the conclusion of the level one conference as required by statute. Respondent argues that there was no default, but if there were, it was the result of events outside its control; therefore, any delay was justified. Grievant proved by a preponderance of the evidence that a default occurred at level one. Respondent failed to prove by a preponderance of the evidence that its failure to act within the required time limit was the result of an unexpected event, or events, that was outside of the defaulter's control. Therefore, the default was not the result of a justified delay. Accordingly, Grievant prevails by default.

The following findings of fact are based upon the limited record of this grievance:

Findings of Fact

1. Grievant initiated this grievance action on April 26, 2018.

2. The level one conference was conducted on May 15, 2018, at Respondent's central office. In attendance were Grievant, Grievant's representative, Ben Barkey, WVEA, former Superintendent John Flint, and Respondent's former in-house-counsel, Sean Francisco.

3. There was no agreement among those present at the level one conference to extend any applicable statutory deadlines or timelines.

4. Respondent did not renew the employment contracts for Mr. Flint and Mr. Francisco after the close of the 2017-2018 school year.

5. As Grievant had not received a level one decision, by letter dated June 11, 2018, Grievant, by his representative, submitted his written notice of default.

6. A level one decision was issued by Superintendent John B. Flint on June 21, 2018.

Discussion

A grievant who alleges default has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison Cnty. Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002), ***aff'd***, Harrison Cnty. Cir. Ct. Civil Action #02-C-676-3 (Aug. 13, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 050222 (May 9, 2005); *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-0808-DEP (Dec. 8, 2008), ***aff'd***, Kanawha Cnty. Cir. Ct. Civil Action No. 09-AA-73 (Sept. 10, 2009). "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 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. *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-0808-DEP (Dec. 8, 2008), ***aff'd***, Kanawha Cnty. Cir. Ct. Civil Action No. 09-AA-73 (Sept. 10, 2009).

"The chief administrator shall hold a conference within fifteen days of receiving the grievance." W.VA. CODE § 6C-2-4(a)(2). WEST VIRGINIA CODE § 6C-2-4(a)(2) provides, in pertinent part, that "[t]he chief administrator shall issue a written decision within fifteen days of the conference." 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). WEST VIRGINIA CODE § 6C-2-3(n)(2) states:

> A decision, agreement or report shall be dated, in writing, setting forth the reasons for the decision or outcome and transmitted to the parties and, in a private arbitration, to the board, within the time limits prescribed. If the grievance is not resolved, the written decision or report shall include the address and procedure to appeal to the next level.

"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). A grievant's failure to timely file for default will bar default judgment. *Coats-Riley v. W. Va. State Tax Dep't*, Docket No. 2014-1745-DOR (May 4, 2015); *Bumgardner v. Kanawha Cnty. Bd. of Educ.,* Docket No. 2015-0927-KanED (Nov. 19, 2015).

Grievant argues that a default occurred because the level one grievance examiner failed to issue his decision within fifteen days after the conclusion of the level one conference. Respondent, by counsel, argues that those present at the level one conference must have agreed to an extension of the timeframes. It is noted that current counsel for Respondent and now-Superintendent Hosaflook were not present at the level one conference. Grievant, who was present at both the default hearing and the level one

conference along with his representative, testified that he did not recall any talk from Mr. Flint or Mr. Francisco about extending any deadlines. While he did not testify, Grievant's representative also argued in his closing that he and Mr. Francisco did not communicate about any type of extension of the timelines. Neither Mr. Flint nor Mr. Francisco were called to testify at the default hearing, and no sworn statements from either of them were offered. Therefore, Respondent's argument is based on an assumption, or simply a guess.

Based upon the evidence presented, Grievant has met his burden of proving that a default occurred. The level one hearing examiner failed to issue a decision within fifteen days after the conclusion of the level one conference. The conference was concluded on May 15, 2018. The level one decision would have been due on June 6, 2018. Grievant timely filed notice of default on June 11, 2018. The decision was later issued on June 21, 2018. It is noted that the level one decision does not list the date on which the level one conference was held. The decision itself is undated as well, but the certificate of service attached thereto is dated June 21, 2018.

The next issue is whether Respondent has a statutory defense for its failure to timely issue the level one decision. Respondent asserts that " . . . any default that may have occurred in the issuance of the Level One decision in this matter was a direct and proximate result of a disgruntled employee's conduct. *Id.* Mr. Francisco's conduct cannot reasonably be attributed to the respondent Board of Education itself."[1] WEST VIRGINIA CODE § 6C-2-3(b)(1) excuses the employer from making a required response within the statutory time lines if the employer is prevented from making the response "directly as a

[1] *See*, Respondent's proposed Findings of Fact and Conclusions of Law, pg. 4.

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).

> [F]or the defense of, "justified delay not caused by neglect or intent to delay the grievance process" to excuse a default, the employer must prove, by a preponderance of the evidence, that the failure to act within the required time limit, was the result of an unexpected event, or events, that was outside of the defaulter's control. Noncompliance with the time limits cannot be excused for acts of bad faith, inadvertence or a mistake regarding the contents of the procedural rule. Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *See Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74 (1998)*; Martin v. Randolph County Bd. of Educ.,* 195 W.Va. 297, 311 S.E.2d 399 (1995); *Bowe v. Workers Compensation Comm'n,* Docket No. 04-WCC-054D (Apr. 12, 2004).

Dunlap v. Dep't of Envtl. Prot., Docket No. 2008-0808-DEP (Dec. 8, 2008), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 09-AA-73 (Sept. 10, 2009). Further,

> [a] large workload or workplace distractions do not constitute justifiable delay. *See generally Linger v. Dep't of Transp./Dep't of Highways*, Docket No. 05-DOH-358D (Jan. 20, 2006)(finding no "excusable neglect" under the "old" default statute where the employer alleges it defaulted because of a large workload); *Toth v. Div. of Corrections/ Anthony Corr. Cntr.,* Docket No. 98-CORR-344D (Dec. 10, 1998)(recognizing that workplace distractions by a grievance evaluator will not result in "excusable neglect").' *Gray v. Logan County Health Dep't and Div. of Personnel,* Docket No. 2008-1446-LogCH (Dec. 30, 2008).

Vance v. Div. of Juv. Servs., 2014-0024-MAPS (Jan. 31, 2014).

Respondent argues that Mr. Francisco was "primarily responsible for handling and processing grievances and grievance decisions," and that Mr. Francisco's actions in failing to timely issue the level one decision, were out of its control. Therefore, Respondent argues that the default should be excused as the result of justified delay. It appears that before and after Grievant's level one conference was held, Respondent and

Mr. Francisco were having issues concerning his employment. Such was also the case around the time the decision should have been timely issued. Respondent was certainly aware that it voted not to renew Mr. Francisco's employment contract for the next school year well before the level one conference.

The ALJ cannot find this to be a situation where the failure to act within the required time limit "was the result of an unexpected event or events, that was outside the defaulter's control." The failure to timely issue the level one decision was not outside Respondent's control. While it may have been Mr. Francisco who failed to ensure the level one decision was issued timely, it was ultimately Respondent's responsibility to ensure that it occurred. Respondent was aware of the issues concerning Mr. Francisco's employment. Despite this knowledge of the issues and Mr. Francisco's time-sensitive duties, Respondent made the decision to preserve the *status quo,* and made no adjustments to its oversight or its procedure in handling and processing grievances. Respondent had the responsibility to put in place processes to handle employee grievances, including the drafting and issuance of level one decisions. Respondent made a choice to allow Mr. Francisco to continue working on time-sensitive grievance matters despite the status of their working relationship. As such, Respondent has failed to prove by a preponderance of the evidence that the default was the result of justified delay.

The following conclusions of law support the ruling in this grievance:

Conclusions of Law

1. A grievant who alleges default has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison Cnty. Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002), ***aff'd***, Harrison Cnty. Cir. Ct. Civil Action #02-C-676-3 (Aug. 13,

2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 050222 (May 9, 2005); *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-0808-DEP (Dec. 8, 2008), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 09-AA-73 (Sept. 10, 2009).

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 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. *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-0808-DEP (Dec. 8, 2008), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 09-AA-73 (Sept. 10, 2009).

3. "The chief administrator shall issue a written decision within fifteen days of the conference." W. VA. CODE § 6C-2-4(a)(2).

4. "'Days' 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).

5. "A decision, agreement or report shall be dated, in writing, setting forth the reasons for the decision or outcome and transmitted to the parties and, in a private arbitration, to the board, within the time limits prescribed. If the grievance is not resolved, the written decision or report shall include the address and procedure to appeal to the next level." W. VA. CODE § 6C-2-3(n)(2).

6. “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).

7. A grievant’s failure to timely file for default will bar default judgment. *Coats-Riley v. W. Va. State Tax Dep’t*, Docket No. 2014-1745-DOR (May 4, 2015); *Bumgardner v. Kanawha Cnty. Bd. of Educ.,* Docket No. 2015-0927-KanED (Nov. 19, 2015).

8. “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).

9. Grievant proved by a preponderance of the evidence that a default occurred as Respondent failed to issue a level one decision within fifteen days of the conclusion of the level one conference.

10. “[F]or the defense of, ‘justified delay not caused by neglect or intent to delay the grievance process’ to excuse a default, the employer must prove, by a preponderance of the evidence, that the failure to act within the required time limit, was the result of an unexpected event, or events, that was outside of the defaulter’s control. Noncompliance with the time limits cannot be excused for acts of bad faith, inadvertence or a mistake regarding the contents of the procedural rule. Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *See Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74 (1998)*; Martin v. Randolph County Bd. of Educ.,* 195 W.Va. 297, 311 S.E.2d 399 (1995); *Bowe v. Workers Compensation Comm’n,* Docket No. 04-WCC-054D (Apr. 12, 2004).” *Dunlap v. Dep’t of Envtl. Prot.*, Docket No.

2008-0808-DEP (Dec. 8, 2008), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 09-AA-73 (Sept. 10, 2009).

11. Respondent failed to prove by a preponderance of the evidence that its failure to act within the required time limit, was the result of an unexpected event, or events, that was outside of the defaulter's control. Therefore, the default was not the result of a justified delay.

Accordingly, this default is **GRANTED.** This matter shall proceed to a hearing before the undersigned ALJ to address the remedy. Respondent may attempt to show that the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. **The parties are directed to confer with one another and provide the Grievance Board with at least three (3) mutually agreeable dates for scheduling the remedy hearing.** The parties shall submit their agreeable dates to the Grievance Board **no later than December 31, 2018**.

Dated: December 7, 2018.

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Carrie H. LeFevre
Administrative Law Judge