THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SAMANTHA JO ASHBY,

Grievant,

v. **Docket No. 2019-0737-PSCWVU**

WEST VIRGINIA UNIVERSITY POTOMAC STATE COLLEGE,

Respondent.

ORDER DENYING DEFAULT

Grievant, Samantha Ashby, filed a level one grievance against her employer, Respondent, West Virginia University Potomac State College, dated January 8, 2019, stating as follows:

> "I was called into Carol Combs office on November 28, 2018 to discuss a 'Written Warning and Probationary Period Extension.' Please find attached document one. Upon reading over the warning, there are several discrepancies. …"

Grievant did not include a request for relief, but implied that the written warning, or at least the alleged discrepancies therein, should be removed and the probationary period terminated.[1] On January 29, 2019, Grievant submitted a written Notice of Intent to Enforce Default against Respondent. On March 12, 2019, a hearing was held before the undersigned at the Grievance Board's office in Westover, 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 counsel, Aubrey Sparks of the firm Mountain State Justice Inc. Respondent appeared by counsel, Samuel Spatafore, Assistant Attorney General.

[1] On January 9, 2019, Respondent provided Grievant an Intent to Terminate letter and Grievant emailed Respondent a copy of her grievance. Grievant did not amend or file another grievance thereon.

This matter became mature for decision on March 25, 2019, after receiving the last of the parties' written proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant contends that a default occurred at level one of the grievance process because the level one hearing was not held within fifteen days of Respondent's receiving the grievance as required by statute and Respondent failed to send Grievant notice of the hearing at least five days prior to the February 1, 2019, hearing deadline. Grievant contends its Notice of Intent to Enforce Default was timely filed on January 29, 2019, because Respondent could not thereafter comply with the five-day notice of hearing requirement. In addition to claiming her notice was untimely filed, Respondent asserts that Grievant promised to reply to Respondent's request to waive the hearing timeline after contacting her attorney, but that Grievant never replied. Grievant asserts that Respondent was obligated to contact her attorney directly. Respondent counters that Grievant's attorney never made an appearance prior to filing the notice of default. Grievant prematurely filed her notice of default. Respondent reasonably relied on Grievant's promise to respond and did not act with intent to delay the grievance process. As such, default is denied.

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

Findings of Fact

1. Grievant has been employed by Respondent since June 19, 2018.

2. Grievant filed a level one grievance on January 8, 2019, wherein she requested a level one hearing.

3. Respondent received the grievance filing on January 10, 2019. (Ms. Keller's testimony and level one grievance)

4. Respondent and its employees observed Martin Luther King Jr. Day as a holiday on January 21, 2019.

5. On January 23, 2019, level one hearing examiner Sue Keller emailed Grievant: "Mr. Spatafore, WVU counsel, has requested that the level one grievance proceeding be delayed to allow the parties an opportunity to discuss a possible settlement. Do you agree to waive the time lines to allow for this discussion?" (Respondent's Exhibit 1)

6. Grievant responded by email to Ms. Keller the same day, stating: "I would like to speak to my attorney, Aubrey Sparks; with Mountain State Justice, before discussing a possible agreement. I will either email, or call you, with a decision as soon as I speak to Ms. Sparks. Thank you." (Respondent's Exhibit 1)

7. Grievant never contacted hearing examiner Keller or Respondent with her decision on the request for timeline waiver. (Ms. Keller's testimony)

8. Grievant's attorney did not file a notice of appearance or contact either Ms. Keller or Respondent prior to filing the Notice of Intent to Enforce Default. (Ms. Keller's testimony)

9. Grievant filed the Notice of Intent to Enforce Default with the Grievance Board on January 29, 2019.

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 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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994).

"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).

Grievant contends that Respondent defaulted by not scheduling a level one hearing within the fifteen-day statutory timeline of filing her grievance. Respondent asserts that the latest the hearing could have been held was February 1, 2019, and that it still had time to hold the hearing when Grievant filed its Notice of Intent to Enforce Default on January 29, 2019. Grievant counters that Respondent was required to send Grievant notice of this hearing at least five days prior to the hearing, which would have been January 25, 2019. Respondent claims that Grievant filed her notice of default

prematurely and that, even if it did default, it had a valid excuse after the hearing examiner emailed Grievant asking if she would waive the statutory timeline for hearing in order to facilitate a request for settlement discussion by Respondent's attorney. Respondent asserts that when Grievant promised to email or call back with a decision after speaking with her attorney, Respondent justifiably relied on Grievant's representation and Grievant never replied with her decision. Grievant counters that her email notifying the hearing examiner and Respondent that she had an attorney obligated them to communicate through her attorney, in spite of Grievant assuring the hearing examiner she would reply with her decision. Respondent asserts that Grievant's attorney never filed a notice of appearance and never communicated with Respondent or its hearing examiner until the attorney filed a notice of default.

"The chief administrator shall hold a level one hearing within fifteen days of receiving the grievance..." W.VA. CODE § 6C-2-4(a)(3). 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). "[I]n computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. VA. CODE § 2-2-3; *Brand v. Swindler*, 68 W. Va. 571, 60 S.E. 362 (1911). … *Williamson v. W. Va. Dep't of Tax and Revenue*, Docket No. 98-T&R-275D (Sept. 30, 1998)." *Mehra v. W. Va. Univ. Potomac State College*, Docket No. 2015-1080-PSCWVU (Sept. 2, 2015). After excluding weekends, holidays, and the day grievance was received, fifteen working days from January 10, 2019, is February 1, 2019. The first day Respondent would have been

in default for not holding a level one hearing would have been the next working day, February 4, 2019.

Grievant contends that Respondent was required to provide her with notice at least five days prior to a level one hearing and that by January 29, 2019, there were less than five days until the hearing deadline of February 1, 2019. "Reasonable notice of a proceeding shall be sent at least five days prior to the proceeding to all parties and their representatives and shall include the date, time, and place of the proceedings." W. VA. CODE § 6C-2-3(l). Interestingly, the legislature chose to use "sent" rather than "received". This choice is significant because of the contrasting meaning of the two words. "'In the interpretation of statutory provisions the familiar maxim expression *unius est exclusio alterius,* the express mention of one thing implies the exclusion of another, applies.' Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984)." *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 27, 488 S.E.2d 20, 27 (1997). Had the legislature instead used the word "received", Grievant could have justifiably claimed that Respondent missed the notice deadline at the time she filed her Notice of Intent to Enforce Default on January 29, 2019. However, Grievant had no way of knowing on January 29, 2019, whether Respondent had sent her notice of a level one hearing the requisite five days prior to February 1, 2019. She needed to wait until February 1, 2019, to see if notice would arrive in the mail, whereupon she could have checked the postmark date. Because Grievant could not predict with any modicum of statistical accuracy by the time she filed her Notice of Intent to Enforce Default that Respondent had not sent a notice of hearing, she could not argue when she filed her notice that January 29, 2019, should be treated as the default

date for purposes of acknowledging and utilizing the statutory ten-day window of opportunity to file her notice.

The fact that Grievant filed before February 1, 2019, absolved Respondent of the obligation to thereafter hold the level one hearing. "Once a grievant files a written claim for relief by default with the Board, or the chief administrator files an objection, all proceedings at the lower levels are automatically stayed until all default matters have been ruled on unless all parties agree in writing that lower level proceedings can go forward." W. VA. CODE ST. R. § 156-1-7.1 (2018). Grievant did not file her Notice of Intent to Enforce Default within the statutory window.

Further, Grievant theoretically had the right to file a notice of intent to enforce default within ten workdays of February 4, 2019, had she waited until this date for a 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 statutory window that Grievant was permitted to file in was between February 4, 2019, and February 14, 2019. Grievant instead prematurely filed her notice of default on January 29, 2019. 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 did not have the right to file before Respondent actually defaulted, regardless of its assessment of the probability of default. Therefore, Grievant's Notice of Intent to Enforce Default was premature.

An employer is excused from making a required response within the statutory time limits where the delay in response is not caused by negligence or intent to delay the

grievance process. W.VA. CODE § 6C-2-3(b)(1). The undersigned must also keep in mind that "[t]he time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. *Jackson, supra; Gaskins v. W. Va. Dep't of Health*, Docket No. 90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. *See, e.g., Lilly v. Raleigh County Bd. of Educ*., Docket No. 94-41-195 (Nov. 28, 1994). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. *Ara v. Erie Insurance Co*., 182 W. Va. 266, 387 S.E.2d 320 (1989). *Rhodes v. Randolph County Bd. of Educ.*, Docket No. 00-42-233D (Jan. 17, 2001)." *Kanehl v. Dep't of Envrt'l Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010).

Respondent contends that it was not negligent and did not intend to delay the grievance process when it relied in good faith on Grievant's representation that she would get back to the hearing examiner with her decision as to whether she was going to waive the timeline for holding a level one hearing. Grievant asserts that it provided the hearing examiner the name of her attorney, and that Respondent should have contacted her attorney with its timeline waiver request. Respondent was not negligent in failing to contact Grievant's attorney, because Grievant's attorney had not made an appearance in the case. *Pro se* litigants sometimes say they have an attorney, but often representation never materializes. Grievant never presented any evidence that Respondent acted in bad faith when it directly asked her to waive the timeline for hearing. Grievant told the hearing examiner that she would respond with her decision, but filed her Notice of Intent

to Enforce Default without communicating any further. Grievant could have easily gotten back to the hearing examiner as she had promised and timely held her level one hearing. She instead utilized the situation as an opportunity to prevail on an alleged technical error she helped manufacture through her acquiescence. "[A] party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Rhodes v. Randolph County Bd. of Educ*., Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-326D (Oct. 14, 1999). *See, e.g., State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) ('Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.'); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)('[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.')(Citations omitted). *Miller v. Fairmont State Univ*., Docket No. 08-HE-005 (Jan. 8, 2009)." *Kanehl v. Dep't of Envtl. Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010).

Grievant cites this Board's decision in *Browning* in support of her contention that because Grievant never waived the timeline for scheduling her level one hearing, Respondent was obligated to hold and provide notice of the hearing within the statutory timeframe. *Browning v. Logan County Board of Education*, Docket No. 2008-0567-LogED (October 24, 2008). *Browning* held that the respondent improperly relied on the grievant's failure to respond to its request to waive the timeline for issuing a level one decision when the respondent failed to timely issue the decision. *Browning*, however, can be distinguished from the current action in that our Grievant did reply to Respondent's

request for waiver of a timeline. Grievant clearly delineated that she would let the hearing examiner know her decision by email or phone, thus justifying any reliance thereon by Respondent.

This Grievance Board has in the past been directed that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ*., Docket No. 98-10-111 (July 9, 1998), *citing Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ*., 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ*., Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. *Id*. at 743. *See Edwards v. Mingo County Bd. of Educ*., Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable. Respondent substantially complied with its obligations when it contacted Grievant on January 23, 2019, and requested she waive the timeline, because Respondent still had more than the requisite 5 days to hear back from Grievant and send Grievant notice of a hearing for the February 1, 2019, deadline had Grievant denied its' request. Respondent therefore justifiably relied on Grievant's promise to reply with her decision. It is clear that Respondent did not act with intent to delay the grievance process.

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). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994).

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 hold a level one hearing within fifteen days of receiving the grievance..." W.VA. CODE § 6C-2-4(a)(3).

4. 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).

5. “[I]n computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. *See* W. VA. CODE § 2-2-3; *Brand v. Swindler*, 68 W. Va. 571, 60 S.E. 362 (1911). … *Williamson v. W. Va. Dep’t of Tax and Revenue*, Docket No. 98-T&R-275D (Sept. 30, 1998).” *Mehra v. W. Va. Univ. Potomac State College*, Docket No. 2015-1080-PSCWVU (Sept. 2, 2015).

6. “Reasonable notice of a proceeding shall be sent at least five days prior to the proceeding to all parties and their representatives and shall include the date, time, and place of the proceedings.” W. VA. CODE § 6C-2-3(l).

7. "Once a grievance is received, the employer is required by statute to take certain actions, all of which may be said to be in response to the filing of the grievance. One of the acts which is required of the employer is that it send notice of the proceeding 'at least five days prior to the proceeding.'" *Kanehl v. Dep't of Envtl. Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010).

8. “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).

9. “Once a grievant files a written claim for relief by default with the Board, or the chief administrator files an objection, all proceedings at the lower levels are automatically stayed until all default matters have been ruled on unless all parties agree in writing that lower level proceedings can go forward.” W. VA. CODE ST. R. § 156-1-7.1 (2018).

10. An employer is excused from making a required response within the statutory time limits where the delay in response is not caused by negligence or intent to delay the grievance process. W.VA. CODE § 6C-2-3(b)(1).

11. "The time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. *Jackson, supra*; *Gaskins v. W. Va. Dep't of Health*, Docket No. 90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. *See, e.g., Lilly v. Raleigh County Bd. of Educ*., Docket No. 94-41-195 (Nov. 28, 1994). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. *Ara v. Erie Insurance Co*., 182 W. Va. 266, 387 S.E.2d 320 (1989). *Rhodes v. Randolph County Bd. of Educ*., Docket No. 00-42-233D (Jan. 17, 2001)." *Kanehl v. Dep't of Envrt'l Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010).

12. "[A] party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Rhodes v. Randolph County Bd. of Educ*., Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-326D (Oct. 14, 1999). *See*, e.g., *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) ('Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.'); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)('[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.')(Citations omitted). *Miller v. Fairmont*

State Univ., Docket No. 08-HE-005 (Jan. 8, 2009).” *Kanehl v. Dep't of Envtl. Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010).

13. This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ*., Docket No. 98-10-111 (July 9, 1998), *citing Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ*., 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ*., Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. Id. at 743. *See Edwards v. Mingo County Bd. of Educ*., Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

14. Grievant did not prove by a preponderance of evidence that Respondent defaulted.

15. Respondent at all times acted in good faith in attempting to respond to the grievance within the statutory timelines and did not act with intent to delay the grievance process.

16. If there is no default or the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

Accordingly, Grievant's request for judgment by default is **DENIED**. This grievance is **REMANDED TO LEVEL ONE** of the grievance process for a hearing to be held within 15 days of receipt of this ORDER by the chief administrator.

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 W. VA. CODE ST. R. § 156-1-6.20 (2018).

Dated: April 23, 2019.

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Joshua S. Fraenkel
Administrative Law Judge