

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERRY LYNN DUNLAP,
Grievant,

v.

Docket No. 2019-1560-MAPS

WEST VIRGINIA STATE POLICE,
Respondent.

ORDER DENYING DEFAULT and REMANDING TO LEVEL ONE

Sherry Dunlap, Grievant, is employed by Respondent, West Virginia State Police ("State and Police"), as a Human Resource Associate. Ms. Dunlap filed a level one grievance form dated April 29, 2019, alleging discrimination because she was not granted the same pay increase which was granted to five other employees.¹ Grievant seeks, "[t]o be paid the total 19% pay increase that was shown on the email, the remaining \$2,354."

Grievant filed a notice of default dated May 21, 2019, alleging Respondent had failed to hold a level one conference within mandatory time limit specified by statute. Respondent filed an objection to the default dated May 28, 2019, requesting a hearing to state a defense.

A hearing on default was held in the Charleston office of the West Virginia Public Employees Grievance Board on July 8, 2019, before Administrative Law Judge ("ALJ") Landon R. Brown. Grievant, Sherry Dunlap appeared *pro se*,² and Respondent was represented by Roy A. Moss, Esquire, State Police Legal Division. Following the hearing

¹ This is an abbreviated version of Grievant's statement which was attached to the original grievance form and is incorporated herein by reference.

² "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

ALJ Brown notified the parties if they wished to provide Proposed Findings of Fact or Conclusions of Law they needed to do so prior to July 23, 2019. Neither party submitted a proposal and the matter became mature for decision on default on that date.³

Synopsis

Grievant filed a level one grievance form with the West Virginia Public Employees Grievance Board. Approximately twenty days after the grievance was sent to the Grievance Board, Grievant gave notice of a claim for default alleging Respondent failed to hold a conference within ten days of receiving the grievance form. Grievant failed to prove that Respondent received the original grievance form. Accordingly, Grievant's notice of default was filed before Respondent had an opportunity to meet its statutory obligation.

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. Sherry Dunlap, Grievant, is employed by Respondent, West Virginia State Police ("State and Police") as a Human Resource Associate.
2. Ms. Dunlap filed a level one grievance form dated April 29, 2019, with the Grievance Board. Grievant mailed the form on April 30, 2019,⁴ and it was received by the Grievance Board on May 1, 2019.
3. Grievant requested a level one conference on her grievance form.

³ For administrative reasons, this matter was assigned to the undersigned to render a decision. The undersigned has reviewed all written materials in this matter and carefully listened to the recording of the hearing.

⁴ Grievant's testimony.

4. Prior to filing the grievance, Grievant's supervisor showed a copy to her supervisor, Major White, who told Grievant's supervisor to send it if she wanted to. No one left a copy of the grievance with Major White.

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 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).

WEST VIRGINIA CODE § 6C-2-4(a). related to level one of the grievance process states:

(1) Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

(2) Conference. -- The chief administrator shall hold a conference within ten days of receiving the grievance. . . *Id.*

Grievant Dunlap mailed her grievance to the Grievance Board on April 30, 2019. She did not prove that she sent a copy of the grievance to the Respondent's chief administrator. Grievant testified that her supervisor showed the grievance to Major White prior to the grievance being filed. However, the intent of this was to let her supervisor know that it might be coming. Major White told her to send it in if she wanted to. There is no evidence that a copy of the grievance was left with Major white or that he was made aware at any time that the grievance was subsequently filed. Additionally, Major White is not Respondent's chief administrator. Grievant also stated an email was sent to Respondent on May 2, 2019, notifying the agency that the grievance had been filed. But no copy of the email was offered and there was no indication regarding who sent the email or to whom it was sent.

Grievant's have been found to have timely filed their grievance when they mistakenly gave it to the wrong person or failed to meet the technical filing requirements of the statute. See *Duruttya v. Board of Educ.*, 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity). In those instances, Respondent was not prejudiced by the Grievant's error. However, where Respondent would lose by default it must be shown that it was more likely than not that Respondent received the grievance and failed to act.

Ultimately, Grievant did not prove by a preponderance of the evidence that Respondent received the grievance. Consequently, Grievant did not prove that Respondent failed to hold a conference within fifteen days of receiving the grievance. Accordingly, the request for default must be **DENIED**.

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. WEST VIRGINIA CODE § 6C-2-4(a). related to level one of the grievance process states:

(1) Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

(2) Conference. -- The chief administrator shall hold a conference within ten days of receiving the grievance. . . *Id.*

4. Grievant did not prove by a preponderance of the evidence that Respondent received the grievance. Consequently, Grievant did not prove that Respondent failed to hold a conference within fifteen days of receiving the grievance.

Accordingly, the request for default is **DENIED**. This grievance is **REMANDED** to level one for a hearing before the chief administrator or designee. The hearing must be held within fifteen days of receipt of this ORDER by Respondent, unless the parties mutually agree in writing to a subsequent date.

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: August 12, 2019

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE