THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ERNEST JOSEPH GOODING, and,
KENNETH SHAWN RUBENSTEIN,
Grievants,

v. **Docket No. 2019-1533-CONS**

DEPARTMENT OF EDUCATION,
Respondent.

ORDER GRANTING DEFAULT

Grievants, Ernest Joseph Gooding and Kenneth Shawn Rubenstein, were employed by Respondent, West Virginia Department of Education ("WVDE") in the Office of Diversion and Transitions Programs. They each served as principals for education programs in multiple jails and correctional facilities. Mr. Gooding and Mr. Rubenstein both filed level one grievance forms dated October 29, 2018. The grievances allege that both Grievants were dismissed from employment for allegedly performing work for Ashland University at times when they were supposedly working in their state jobs. Both Grievants denied the allegations. Grievants offered various explanations for the time disparities. And state:

> WVDE disregarded all of this and demanded that if Grievants wanted to remain employed with them, the Grievants needed to accept a demotion. Although Grievants believed the demotion to be unjustified and unfair, they were willing to accept the WVDE's demotion under protest. Thereafter, the WVDE added a condition to the demotion requiring that Grievants waive all rights to grieve their case or pursue any type of legal action stemming from the WVDE's actions. Grievants did not want to forfeit their legal rights, but repeatedly indicated that they would accept the demotion as per the initial offer they accepted. Nonetheless, WVDE conditioned Grievant's continued employment on their waiver of any grievance. When Grievants refused to [waive their grievance procedure rights], WVDE terminated Grievants.

Finally, Grievants allege that their "terminations were unjust, unfair, and contrary to the public policy of West Virginia as set out in *Wounaris v. W. Va. State College,* 214 W. Va. 241."[1] As relief, Grievants seek reinstatement and backpay. Grievants requested a level one hearing on their grievance form. Grievants also asked for their grievances to be consolidated for hearing and decision.

Respondent neither scheduled nor held a level one hearing. By letter dated December 3, 2018, Grievants gave to Respondent written notice to enforce default pursuant to WEST VIRGINIA CODE § 6C-2-3(b)(2). Respondent filed an Objection to Issuance of a Default the next day. Respondent filed a Motion to Dismiss the grievances at the same time alleging that the remedy of reinstatement was unavailable to Grievants because they were at-will employees.

A hearing for both grievances was held to hear the default claim and the motion to dismiss on April 29, 2019, before Chief Administrative Law Judge, Billie Catlett. Judge Catlett ordered the two grievances consolidated at the beginning of the hearing. Grievants appeared and were represented by Kirk Auvil, Esquire, The Employment Law Center, PLLC. Respondent was represented by Sherri Goodman Reveal, Esquire, WVDE. This matter became mature for decision on May 29, 2019, upon receipt of the last Proposed Findings of Fact and Conclusions of law.[2]

[1] The full statement of the grievances is attached to the level one form, which gave a long recitation of the facts alleged. Only some sections of the statement are quoted herein. The full state of the Grievants is in the case file and incorporated herein by reference.

[2] For administrative reasons, this consolidated grievance has been reassigned to the undersigned to render a written decision after listening to the recorded hearing and making a thorough study of the pleadings submitted by the parties.

Synopsis

Grievants claim that they are entitled to prevail on the merits of the grievances because Respondent failed to hold a level one hearing within the time limits prescribed by the grievance statute. Respondent admits that no level one hearing was held and initially argued that it was justifiably delayed. Respondent also argues that the remedy of reinstatement is unavailable to Grievants because they were at-will employees and did not provide credible proof that a substantial public policy was violated. The violation alleged in the consolidated grievance did raise a violation of a substantial public policy as a matter of law. Whether Grievants could have proven that violation by a preponderance of the evidence does not matter because they prevail on the merits by default. Since Grievants prevailed on the matter of a violation of substantial public policy, reinstatement is a legal and appropriate remedy.

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. These facts appear to be undisputed by the parties.

Findings of Fact

1. Grievants, Ernest Gooding and Kenneth Rubenstein, were employed by Respondent, West Virginia Department of Education ("WVDE") in the Office of Diversion and Transitions Programs. They each served as principals for education programs in multiple jails and correctional facilities.

2. Both Grievants were at-will employees.

3. After an investigation, Respondent decided to dismiss Grievants for allegedly performing work for a second job with a private entity during the time they were scheduled to be performing their duties for the WVDE. Grievants denied the allegations.

4. During a predetermination meeting, Grievants were told that they could take a demotion to teaching positions rather than be dismissed. Grievants agreed to take the demotions "under protest."

5. After the meeting,[3] Grievants were told that in order to receive the demotions they would have to waive any rights to contest their discipline including all rights set out in the Public Employees Grievance Procedure (W. VA. CODE § 6C-2-1 *et seq.*).

6. Grievants refuse to waive their rights to seek redress through the grievance procedure. Respondent terminated their employment.

7. Mr. Gooding and Mr. Rubenstein file separate level one grievance forms.

8. Respondent did not provide notice of or hold a level one hearing.

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.

[3] When the Grievan's were told they would have to waive their rights to the grievance procedure is disputed by the parties. Grievants allege that it was communicated on a separate day after they had accepted the offer to take a demotion under protest. Respondents appear to argue that the necessity to waive their rights was relayed to the Grievants at the meeting, or on the same day as the initial meeting.

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).

"For 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 CSR 1 § 3 (2008); *See Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74, (W.Va. 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. W. Va. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (Dec. 8, 2008), *aff'd,* Kanawha Cnty. Cir. Ct., Docket No. 09-AA-73 (Sept. 10, 2009).

Respondent may also assert the affirmative defense of "showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law." W. Va. Code § 6C-2-3(b)(1).

Grievants alleged that they were unjustly dismissed from their principal positions in violation of West Virginia public policy. They allege that they were dismissed because they would not voluntarily surrender their rights to file a grievance pursuant to the procedures set out in W. Va. Code § 6C-2-1 *et seq.* They both filed their grievances at level one on October 29, 2018 and requested a level one hearing.

WEST VIRGINIA CODE § 6C-2-4 requires that "The chief administrator shall hold a level one hearing within fifteen days of receiving the grievance." Respondent neither scheduled nor held a level one hearing and Grievants properly sought a ruling on default.

In its objection to default, Respondent noted that counsel "repeatedly misread the grievance as a level three hearing" and was waiting for the Grievance Board to request dates for a level three hearing and rule on the issue of consolidation. Respondent argued that this was not negligence and constituted a justified delay. There is no need to reach the issue of negligence since misreading the grievance form is not an unexpected event, that was outside of Respondent's control as set out in *Dunlap, supra.* Additionally, at the hearing Respondent admitted default and agreed that the defenses of injury, illness or a justified delay did not apply. Respondent argues that the remedy of reinstatement of Grievants to their principal positions would violate common law since they are at-will employees. Respondent also argues that Grievants only vaguely alleged a violation of public policy and could not articulate credible facts to support that claim.

There is no dispute that Grievants were at-will employees. As at-will employees, Grievants may be terminated for good reason, no reason, or bad reason, provided that they are not terminated for a reason that violates a substantial public policy. *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860, (2012); *Williams v.*

Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993); *Harless v. First Nat'l Bank,* 162 W. Va. 116, 246 S.E.2d 270 (1978); *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D (May 18, 1999), ***aff'd,*** Kanawha Cnty. Cir. Ct., Docket No. 99-AA-76 (May 26, 1999), *appeal refused,* W. Va. Sup. Ct. Docket No. 001067 (July 6, 2000).

The Grievance Board has held that since an at-will employee's claim of unlawful discharge is subject to dismissal for failure to state a claim upon which relief can be granted, then an at-will employee cannot prevail by default, unless he alleges a violation of a substantial public policy. *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D*, supra*.[4] (citing, ***Wilhelm v. Dep't of Tax & Revenue***, Docket No. 94-L-038 (Sept. 30, 1994)). In *Wounaris* the Grievant alleged that he was discriminated against based upon race.[5] The Administrative Law Judge ("ALJ") found that protection against racial discrimination is a substantial public policy. The ALJ found that even though Mr. Wounaris was employed at-will, he was entitled to any relief due resulting from the employer's default, including reinstatement to his position with back pay and interest. *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D, *supra.*

In the present case, Grievants claim they were dismissed because they would not waive their right to contest their demotion through the Public Employee's Grievance Procedure. A second *Wounaris* case arose from the fact the W. Va. State College again

[4] The *Wounaris* decision relied upon W. VA. CODE § 18-29-1 et seq., The West Virginia School Employees Grievance Act, because the grievant was an employee of a state institution of Higher Education. That procedure was merged into the West Virginia Public Employees Grievance Act in 2007. Some significant changes were made to the default provision in the prior act. However, none of those changes were implicated in the *Wounaris* decision. Accordingly, *Wounaris* is applicable to the present matter under the present combined grievance procedure.

[5] Grievant complained that he was disciplined because he was a white employee in a traditionally black college.

dismissed him the day after he was reinstated as a result of the ALJ's decision. The College had appealed the decision to circuit court but fired Mr. Wounaris while the appeal was pending. Mr. Wounaris alleged that the second termination was a wrongful discharge because it denied him his rights under the grievance procedure. In deciding for Mr. Wounaris, the West Virginia Supreme Court of Appeals found:

> "The legislative intent expressed in *W. Va. Code, 18-29-1* (1985), is to provide a simple, expeditious and fair process for resolving problems." Syl. pt. 3, *Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990)*. We glean from the above that the grievance process contained in *W. Va. Code § 18-29-1, et seq*., advances a substantial public purpose, and that public policy considerations demand that an employer not be permitted to violate the rights an employee enjoys under this process.[6]

Wounaris v. W. Va. State College, 214 W. Va. 241, 588 S.E.2d 406 (2003).

That decision was based upon the grievance procedure set out in W. VA. § 18-29-1 *et seq*. Specifically, the Supreme Court in *Wounaris* stated:

> [It] is clear from expressions of legislative intent and the case law that this procedure exists in support of the substantial public purpose "that good morale may be maintained, effective job performance may be enhanced, and the citizens of the community may be better served." W. Va. Code § 18-29-1 (1992).

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used in the present grievance procedure is virtually identical. [7]

"A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syl. pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). Based upon the forgoing, Grievant raised a substantial public of being permitted to exercise their rights under the grievance procedure. After the existence of a substantial public policy has been established as a matter of law, the grievant must prove a that the discharge was based upon an unlawful contravention of that policy by a preponderance of the evidence. *See, Syl. Pt. 5,* Wounaris *v. W. Va. State College*, 214 W. Va. 241, 588 S.E.2d 406, (2003).

In this matter, just as in the *Wounaris* grievance decision, the Grievants prevail upon the merits due to Respondent's default. W. Va. Code § 6C-2-3(b)(1). Respondent wished to put on evidence that it had not contravened the public policy because it dismissed Grievants for misconduct and the demotion was part of a settlement offer. However, this evidence goes to the merits of Grievants claim of the contravention of public policy. Because Grievants prevailed upon the merits through default, Respondent's evidence is irrelevant. The Grievance Board has routinely provided the relief of reinstatement, back pay, benefits, and interest to employees who have been found to be improperly discharged. *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D,

[7] W. VA. CODE § 6C-2-1 states:
(a) The purpose of this article is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.
(b) **Resolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia.** (emphasis added).

supra. Such relief is legal, proper, and available in this matter as well. Accordingly, the consolidated grievance is **GRANTED**.

Nothing in this decision should be construed to mean that employers violate employees' rights to participate in the grievance procedure by negotiating agreements wherein the employees voluntarily waive their rights to the grievance procedure in exchange for reduced discipline. The issue of whether Grievant's voluntarily waived their rights was not reached in this matter due solely to Respondent's default.

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).

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. "For 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 CSR 1 § 3 (2008); *See Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74, (W.Va. 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. W. Va. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (Dec. 8, 2008), *aff'd,* Kanawha Cnty. Cir. Ct., Docket No. 09-AA-73 (Sept. 10, 2009).

4. Respondent may also assert the affirmative defense of "showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law." W. Va. Code § 6C-2-3(b)(1).

5. WEST VIRGINIA CODE § 6C-2-4 requires that "The chief administrator shall hold a level one hearing within fifteen days of receiving the grievance."

6. At-will employees, Grievants may be terminated for good reason, no reason, or bad reason, provided that they are not terminated for a reason that violates a substantial public policy. *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860, (2012); *Williams v. Brown,* 190 W. Va. 202, 437 S.E.2d 775 (1993); *Harless v. First Nat'l Bank,* 162 W. Va. 116, 246 S.E.2d 270 (1978); *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D (May 18, 1999), *aff'd,* Kanawha Cnty. Cir. Ct., Docket No. 99-AA-76 (May 26, 1999), *appeal refused,* W. Va. Sup. Ct. Docket No. 001067 (July 6, 2000).

7. An at-will employee cannot prevail by default, unless he alleges a violation of a substantial public policy. *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D*, supra*. (citing, *Wilhelm v. Dep't of Tax & Revenue*, Docket No. 94-L-038 (Sept. 30, 1994)).

8. "The legislative intent expressed in W. Va. Code, 18-29-1 (1985), is to provide a simple, expeditious and fair process for resolving problems." Syl. pt. 3, *Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990)*. We glean from the above that the grievance process contained in W. Va. Code § 18-29-1, *et seq*., advances a substantial public purpose, and that public policy considerations demand that an employer not be permitted to violate the rights an employee enjoys under this process. *Wounaris v. W. Va. State College*, 214 W. Va. 241, 588 S.E.2d 406 (2003).

9. It is clear from expressions of legislative intent and the case law that this procedure exists in support of the substantial public purpose "that good morale may be maintained, effective job performance may be enhanced, and the citizens of the community may be better served." W. Va. Code § 18-29-1 (1992). *Wounaris v. W. Va. State College*, 214 W. Va. 241, 588 S.E.2d 406 (2003).

10. "A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syl. pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984).

11. Grievant raised a substantial public policy of being permitted to exercise their rights under the grievance procedure.

12. After the existence of a substantial public policy has been established as a matter of law, the grievant must prove the discharge was based upon an unlawful contravention of that policy by a preponderance of the evidence. *See, Syl. Pt. 5,* Wounaris *v. W. Va. State College*, 214 W. Va. 241, 588 S.E.2d 406, (2003).

13. The Grievants prevail upon the merits due to Respondent's default. W. Va. Code § 6C-2-3(b)(1). *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D (May

18, 1999), *aff'd,* Kanawha Cnty. Cir. Ct., Docket No. 99-AA-76 (May 26, 1999), *appeal refused,* W. Va. Sup. Ct. Docket No. 001067 (July 6, 2000).

14. The Grievance Board has routinely provided the relief of reinstatement, back pay, benefits, and interest to employees who have been found to be improperly discharged. *Wounaris v. W. Va. State College,* Docket No. 99-BOD-033D, *supra.* Such relief is legal, proper, and available in this matter as well.

Accordingly, the consolidated grievance is **GRANTED**.

Respondent is **ORDERED** to immediately reinstate Grievants to the positions they held; pay each of them back pay from the date they were dismissed to the date they are reinstated with statutory interest; and, reinstate all benefits Grievants would have received had they not been dismissed.

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 9, 2019

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE