

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CHRISTINE G. ROBINETT,
Grievant,**

v.

Docket No. 2021-2208-DOC

**WORKFORCE WEST VIRGINIA
and DIVISION OF PERSONNEL,
Respondents.**

ORDER DENYING DEFAULT

Grievant, Christine G. Robinett, was employed by Respondent, WorkForce West Virginia. On February 11, 2021, Grievant filed this grievance against Respondent alleging misclassification. Grievant failed to properly complete her grievance statement indicating whether she desired a hearing or conference at level one. By letter dated February 18, 2021, the Grievance Board notified Grievant that she was required to inform Respondent's chief administrator whether she wished to proceed by hearing or conference. On the same date, Grievant was informed of the same by Grievance Board staff over the telephone. Also, on February 18, 2021, Grievant sent an email to Carrie Sizemore, Respondent's human resources director and chief administrator's designee, requesting a level one conference. Respondent WorkForce West Virginia did not conduct a level one conference. By email dated April 28, 2021, Grievant claimed Respondent WorkForce West Virginia was in default. By order dated May 7, 2021, Respondent Division of Personnel was joined as a necessary party.

A default hearing was held on November 12, 2021, before the undersigned in the Charleston, West Virginia office of the Grievance Board. Grievant appeared *pro se*¹.

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Respondent WorkForce West Virginia appeared by Carrie Sizemore, and was represented by counsel, Kimberly A. Levy. Respondent Division of Personnel appeared by Wendy Mays and was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on December 15, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law. Respondent Division of Personnel declined to file Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant made a claim for relief by default when Respondent failed to hold a level one grievance conference within the statutory timeframe. Respondent pursued a settlement agreement rather than conducting the grievance conference. Grievant did not assert default until after she received a copy of the settlement agreement that she declined to sign. Grievant failed to make a claim for default within the statutory timeframe. Accordingly, Grievant's claim for relief by default is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant filed her grievance with Respondent WorkForce West Virginia and the Grievance Board on February 11, 2021, but did not properly complete the form to choose whether she wished to proceed by conference or hearing.
2. By letter dated February 18, 2021, the Grievance Board notified Grievant that she was required to inform Respondent's chief administrator whether she wished to

proceed by hearing or conference. On the same date, Grievant was informed of the same by Grievance Board staff over the telephone.

3. Also, on February 18, 2021, Grievant sent an email to Carrie Sizemore, Respondent's human resources director, requesting a level one conference.

4. Ms. Sizemore was acting as the designee of Respondent's chief administrator at level one.

5. Respondent WorkForce West Virginia did not conduct a level one conference.

6. On March 10, 2021, Ms. Sizemore sent Grievant an email notifying her that she was "submitting a settlement agreement to DOP for review for the processing delay in your reallocation. DOP must review and approve this agreement."

7. On April 15, 2021, Ms. Sizemore sent Grievant the proposed settlement agreement by email.

8. By email dated April 28, 2021, Grievant claimed Respondent WorkForce West Virginia was in default for failing to conduct a level one conference.

Discussion

A grievant who alleges a default at a lower level of the grievance process has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). "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

junction, 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 Env'tl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

“The chief administrator shall hold a conference within ten days of receiving the grievance.” W.VA. CODE § 6C-2-4(a)(2). 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). In this case, as Grievant had not properly filed her grievance form, Respondent WorkForce West Virginia was not required to respond until Grievant made her selection between proceeding by conference or by hearing, which she did on February 18, 2021. Therefore, Respondent WorkForce West Virginia was required to hold the level one conference by March 4, 2021.

Respondent WorkForce West Virginia failed to hold a level one conference and instead pursued a settlement agreement. Grievant was notified by email on March 10, 2021, that Ms. Sizemore was submitting the settlement agreement to Respondent Division of Personnel for review. On April 15, 2021, Ms. Sizemore sent Grievant the proposed settlement agreement by email. It was only after Grievant determined that she would not accept the settlement agreement that she claimed default on April 28, 2021.

Respondent admits that it failed to hold the level one conference within the timeframe required but asserts this failure was excused because Ms. Sizemore was pursuing a settlement agreement. Respondent also asserts default judgement must be denied as Grievant failed to timely claim default.

Although the same should have been memorialized by an abeyance order or some writing memorializing an agreement not to hold the conference, it does appear Grievant initially acquiesced to the pursuit of a settlement agreement in lieu of the conference. Grievant did not respond to the March 10, 2021, email regarding the submission of the settlement agreement to assert her desire to go forward with the conference or state that she was unwilling to settle. It was only after she received the settlement agreement on April 15, 2021, and did not agree to its terms that Grievant claimed default.

Grievant was required to claim default “[w]ithin ten days of the default.” W.VA. CODE § 6C-2-3(b)(2). March 4, 2021, was the date by which Respondent was required to hold the conference and failed to do so. Grievant was required to file her intent to enforce default within ten days, which was March 18, 2021. Grievant did not file for default until April 28, 2021, more than a month late. 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-DORDEF (May 4, 2015); *Fletcher v. Div. of Highways*, Docket No. 2017-0673-DOTDEF (Apr. 14, 2017); *Wood v. Kanawha County Bd. Of Educ.*, Docket No. 2019-1789-KanED (Jan. 24, 2020). Therefore, Grievant’s claim for default judgment must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has the burden of proving the default 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. “The chief administrator shall hold a conference within ten days of receiving the grievance.” W.VA. CODE § 6C-2-4(a)(2).

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. “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).

6. 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-DORDEF (May 4, 2015); *Fletcher v. Div. of Highways*, Docket No. 2017-0673-DOTDEF (Apr. 14, 2017); *Wood v. Kanawha County Bd. Of Educ.*, Docket No. 2019-1789-KanED (Jan. 24, 2020).

7. Although Respondent failed to hold a level one grievance conference within the statutory timeframe, Grievant failed to timely file her claim for default.

Accordingly, Grievant’s claim for relief by default is **DENIED**. This matter is remanded to level one of the grievance process. Respondent shall hold a level one grievance conference within ten days of receipt of this order.

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 *a/so* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 27, 2022



Billie Thacker Catlett
Chief Administrative Law Judge