SHARON HUTCHENS LOWE,

Grievant,

v. Docket No. 05-WCC-009D

WORKERS' COMPENSATION COMMISSION,

Respondent.

ORDER GRANTING DEFAULT

This default proceeding arises out of a grievance filed by Sharon Hutchens Lowe ("Lowe") against her employer, the respondent West Virginia Workers Compensation Commission ("WCC"), on December 13, 2004. Lowe claims that a default occurred at Level II when a written decision was not issued within the requisite five-day period after the Level II conference. The default claim was received by the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on January 6, 2005.

A Level IV default hearing was held on February 28, 2005, at the Grievance Board's Charleston office. The purpose of the hearing was to afford Lowe an opportunity to substantiate, by a preponderance of the evidence, her claim that there was a default by WCC at Level II during the processing of her December 13 grievance. (See footnote 1) Lowe represented herself at the default hearing. WCC was represented by attorney David M. Fryson. The default issue matured for decision on April 6, 2005, upon receipt of WCC's written proposed findings of fact and conclusions of law. No post-hearing submission was received from Lowe. After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

I 1. Lowe filed a grievance on or about December 13, 2004, arising out of her reclassification. Grievant's Exhibit 2 at Level IV.

II 2. Lowe executed a document entitled "Waiver" on December 14, 2004, which stated that she agreed to waive her grievance "to Level 3 in accordance with W. Va. Code § 29-6A-3b(c) [sic]." (See footnote 2) Respondent's Exhibit 1 at Level IV.

III 3. On December 15, 2004, Lowe was notified that a Level II conference would be held on December 16, 2004. The conference took place, as scheduled.

IV 4. After the conference Lowe overheard another WCC employee telling the Level II grievance evaluator, Lisa Teel, that she had seven days in which to issue the decision.

V 5. A decision denying Lowe's grievance at Level II was issued on December 28, 2004.

VI 6. Friday, December 24, 2004 was a state holiday, which means that the Level II decision was issued seven working days after the Level II conference was held.

VII 7. Lowe claimed a default because the Level II decision was not issued within five working days of the Level II conference.

Discussion

Lowe submitted a written grievance form, dated January 4, 2005, in which she stated as follows:

> I am filing a written claim of default for level 2 hearing. Hearing was held on December 16, 2004. Decision should have been issued by December 23, 2004, as per guidelines. "Administrator or designee must issue written decision within five (5) days of conference." Administrator failed to issue decision within the required 5 days.

In terms of relief, Lowe asks "[t]o be made whole in every way."

There are express statutory provisions specifying the consequences of a default. West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that "[t]he grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." Lowe bears the burden of proving, by a preponderance of the evidence, that a default occurred. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). "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. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

At Level II, the grievance evaluator is required to hold a conference with the grieving employee and issue a written decision "within five days of the conference." W. Va. Code § 29-6A-4(b). For

purposes of the grievance process, "days" are defined as working days. W. Va. Code § 29-6A-2(c). In this case, there is no dispute that the Level II decision was not issued within five working days of the Level II conference. There is, however, at least one complicating factor. At the outset of the grievance process, Lowe and a representative of WCC executed a document entitled "Waiver," which contained a statement that the parties agreed to "waive the grievance filed by Sharon Hutchens Lowe on December 14, 2004, to Level 3 in accordance with W. Va. Code § 29-6A-3b(c) [sic]." (See footnote 3) Respondent's Exhibit 1 at Level IV (footnote omitted). As set forth in the sole footnote to the Waiver, West Virginia Code section 29-6A-3(c) (See footnote 4) provides that

> [t]he grievant may file the grievance at the level vested with authority to grant the requested relief if each lower administrative level agrees in writing to filing the grievance at the higher level. In the event a grievance is filed at a higher level, the employer shall provide copies to each lower administrative level.

The obvious import of the Waiver was that the parties were in agreement that Lowe's grievance should proceed at Level III.

Nonetheless, on December 15, 2004, Lowe received an e-mail informing her that a "Level II Grievance Hearing" was to be held on December 16, 2004, in the office of Lisa Teel ("Teel"), Director of Employer Services. What WCC hoped to achieve by setting a Level II hearing after the parties had agreed that the grievance should go directly to Level III is not particularly clear. The decision to do so related to the fact that a massive, agency- wide review of employee classifications had resulted in a number of positions, including Lowe's, being reclassified. This, in turn, led to a plethora of grievances.

Generally, grievances relating to classification issues are not addressed by WCC below Level III of the grievance process. However, because there were so manygrievances flowing from the reclassification project, WCC decided to conduct Level II conferences, even if a waiver to Level III had already been executed. As noted, it is not clear why WCC thought that this would be helpful. Nonetheless, this is why Teel scheduled a Level II conference for Lowe.

At the conclusion of the Level II conference, Lowe overheard Associate Director of the Human Resources Division for WCC, Nickole Price ("Price"), inform Teel that she had seven days in which to issue a Level II decision. At that time, Lowe knew that the actual time allowed was five working days, but Lowe did not say or do anything to correct this misstatement on the part of Price. (See footnote 5)

The Level II conference was held on Thursday, December 16, 2004. Friday, December 24, 2004,

was a holiday. Teel issued a written Level II decision on December 28, 2004, denying Lowe's grievance. (See footnote 6) The Level II decision was issued seven, rather than the required five working days after the conference was held. Lowe's claim of default ensued.

At the Level IV default hearing, Price explained that WCC presumed that the statutory time requirements no longer applied because Lowe had signed the Waiver, which Price described as a waiver of the time frames. In this respect, WCC misunderstood the import of its own waiver form. It is not synonymous with a time frame waiver. Rather, insigning the Waiver, Lowe gave up her right to have her grievance addressed at Levels I and II.

In any event, the evidence does not support the assertion that WCC believed that the statutory time frames no longer applied. As noted, Price advised Teel that she had seven days in which to issue the Level II decision. The fact that Price gave Teel a time limit for issuing the decision makes it clear that WCC did, in fact, believe the statutory time frames were applicable to the gratuitous Level II hearing and decision. Having voluntarily undertaken a Level II conference, WCC subjected itself to the mandatory five-day deadline for issuing a decision.

Clearly, the five-day deadline for issuance of the Level II decision was not met. However, there remains the question of what effect, if any, should be attributed to Lowe's silence when she heard Price tell Teel that she had seven days to issue a Level II response.

WCC claims that, because Lowe was aware that Teel was “operating under erroneous information yet did not inform her and is now attempting to gain advantage through the mistake is a form of 'fraud' that is being perpetrated in this matter.” This is undoubtedly an effort on the part of WCC to bring this case within the ambit of the statutory exceptions that excuse a default. Specifically, West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that “[t]he grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud.” In her dissenting opinion, which was joined by Justice Maynard, in *Dailey v. Bd. of Review*, 214 W. Va. 419, 429, 589 S.E.2d 797, 807 (2003), Justice Davis noted that “[i]t has been recognized that the concept of fraud is quite broad” and that fraud

> is sometimes defined as “[a] generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning dissembling, and any unfair way by which another is

> cheated." *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 473, 583 S.E.2d 80, 96, 2003 W. Va. LEXIS 42 (2003) (Davis, J., concurring) (quoting *Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex.Ct.App. 1993)). This Court has held that "actual fraud is intentional, and consists of an intentional deception or misrepresentation to 'induce another to part with property or to surrender some legal right, and which accomplishes the end designed.'" *Gerver v. Benavides*, 207 W. Va. 228, 232, 530 S.E.2d 701, 705 (1999) (quoting *Stanley v. Sewell Coal Co.*, 169 W. Va. 72, 76, 285 S.E.2d 679, 683 (1981)).

As reflected in the foregoing, fraud is characterized by an intentional, often affirmative effort to deceive or mislead. The Supreme Court of Appeals of West Virginia has also defined fraud "'as including all acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious to another, or by which undue and unconscientious advantage is taken of another.' *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 76, 285 S.E.2d 679, 682 (1981)." *Smith v. First Community Bancshares*, 212 W. Va. 809, 575 S.E.2d 419 (2002).

Lowe's silence when she thought Price was misstating the time frame for Teel's Level II decision was more opportunistic than anything else. Her silence does not rise to the level of noncriminal fraud, the essential elements of which are as follows:

> "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that hewas damaged because he relied upon it." *Horton v. Tyree,* 104 W.Va. 238, 242, 139 S.E. 737 (1927).

Smith, 212 W. Va. at 822, 575 S.E.2d at 432 (2002)(quoting Syl. pt. 1, *Lengyel v. Lint,* 167 W. Va. 272, 280 S.E.2d 66 (1981)).

Because fraud is an affirmative defense to a claim of default, WCC has the burden of proving fraud by a preponderance of the evidence. WCC has failed to prove that Lowe's failure to correct Price's misstatement regarding the Level II deadline constitutes fraud. Thus, WCC may not evade a declaration of default on this ground.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

Conclusions of Law

I 1. The burden of proof is upon a grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Stanley v. Higher Educ. Policy Comm'n,* Docket No. 01-HEPC-503D (Dec. 20, 2001) (citing *Friend v. Dep't of Health & Human Res.*, Docket No. 98-HHR-346D (Nov. 25, 1998)).

II 2. A preponderance of the evidence is generally recognized as evidence of greater weight or which is more convincing than the evidence that is offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

III 3. West Virginia Code section 29-6A-3(a)(2) provides, in pertinent part, that "[t]he grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in thisarticle, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud."

IV 4. The Waiver executed by Lowe merely waived her right to have her grievance decided at Levels I and II. It was not a waiver of the applicable statutory deadlines and time frames.

V 5. Despite the Waiver, WCC gratuitously conducted a Level II conference. Having voluntarily assumed the burden of going forward at Level II, WCC was required to comply with the statutory deadline for issuing the Level II decision.

VI 6. WCC did not issue a timely Level II decision.

VII 7. WCC has attempted to invoke the affirmative defense of fraud, which is one of the statutory bases for excusing the untimely issuance of a grievance decision. W. Va. Code § 29-6A-3(a)(2). Because this is an affirmative defense, WCC bears the burden of proving the elements of fraud by a preponderance of the evidence.

VIII 8. The Supreme Court of Appeals of West Virginia has defined fraud "'as including all acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious to another, or by which undue and unconscientious advantage is taken of another.' *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 76, 285 S.E.2d 679, 682 (1981)." *Smith v. First Community Bancshares*, 212 W. Va. 809, 575 S.E.2d 419 (2002). Lowe had no duty to speak when she overheard Price misstating the time frame for issuing the Level II decision. Nor could it be said that, by failing to give her employer legal advice on the time frames for employee grievances, Lowe took "unconscientious advantage" of WCC. Lowe's silence does not constitute fraud. IX 9.

WCC failed to prove that the delay in issuing the Level II decision was attributable to fraud on the part of Lowe. Accordingly, such delay was not excused.

X 10. Because Lowe has proven that a default occurred at Level II, this grievance may, at the option of WCC, now be set for an evidentiary hearing to determine whether the relief requested is

"contrary to law or clearly wrong." W. Va. Code § 29-6A-3(a)(2).

Accordingly, Lowe's request for a finding of default is **GRANTED**. If WCC desires a hearing, as described above, the parties are **DIRECTED** to consult with each other and provide at least five mutually agreeable dates for a Level IV hearing at which the default remedy will be addressed. The hearing dates shall be provided to Cricket Powell at the Charleston office of the Grievance Board on or before July 15, 2005.

Date: June 27, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The merits of the underlying grievance are not at issue herein.

Footnote: 2

The correct citation is to West Virginia Code section 29-6A-3(c).

Footnote: 3

Lowe's signature on her statement of grievance is dated December 13, 2004.

Footnote: 4

See note 2, above.

Footnote: 5

This may not actually have been a misstatement if Price made it clear she was referring to calendar days. Due to the intervening weekend, the fifth working day after the conference was actually the seventh calendar day.

Footnote: 6

In the introductory paragraph, Teel incorrectly stated that "[b]y waiver on December 14, 2004, you sought to go directly to Level II and not have the Level I heard by your direct supervisor." As noted above, the Waiver was to move Lowe's grievance directly to "Level 3[.]"