ROBIN R. MILLER,

Grievant,

v. Docket No. 05-DJS-303D

DIVISION OF JUVENILE SERVICES/
EASTERN REGIONAL JUVENILE CENTER,

Respondent.

ORDER GRANTING DEFAULT

This matter was brought directly to level four by Robin Miller ("Grievant") on August 16, 2005, alleging a default occurred at level two with regard to four separate grievances she had filed. Accordingly, a hearing was conducted in Westover, West Virginia, on October 26, 2005. Grievant appeared by telephone and represented herself, and Respondent was represented by Steven Compton, Assistant Attorney General. The issue of whether a default occurred became mature for consideration at the conclusion of the hearing.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. On August 11, 2005, Grievant filed four separate grievances with her immediate supervisor, which were each denied in writing on the same date.

2. On Friday, August 12, 2005, Grievant took her four grievance forms to the office of Janice McCown, Facility Director and the level two grievance evaluator. Ms. McCown was not there, so Grievant placed the forms in an envelope, which she handed to the office assistant. 3. The grievance forms submitted to Ms. McCown were completed only in the level one section, which indicated that the grievances had been filed and a decision had been rendered at that level on August 11, the preceding day.

4. Ms. McCown was at her office on Saturday, August 13, 2005, and found the grievance forms

on her desk. Concerned about responding in a timely fashion, she authored and mailed her level two response to each of the grievances that day. (See footnote 1) She did not contact Grievant to schedule a level two conference prior to rendering these decisions.

5. Ms. McCown had been involved in each of the grievances in some fashion and had been involved in discussions with Grievant regarding the matters involved, so she did not believe a level two conference was necessary.

6. The four grievances concern the following matters:

> Allegations of a hostile work environment, due to comments made to Grievant by a security staff employee regarding her wardrobe and appearance. Grievant seeks to have the security employee and her supervisors disciplined in this matter, and wants the supervisors to be provided training on dealing with similar issues.
>
> A written counseling session given to Grievant on August 10, 2005, for failure to follow a supervisor's instructions. Grievant seeks to have the disciplinary action expunged from her personnel record.
>
> Another grievance regarding the same counseling session was filed by Grievant, alleging that when she refused to sign the record of the counseling session, her supervisor initialed it for her. This grievance seeks the same relief as the other grievance regarding this counseling session.
>
> A claim that Grievant's work hours have been changed from what she initially agreed to upon her initial hire. She seeks as relief to have her hours returned to what they were she first began working in her position.

7. Grievant resigned from employment with the Division of Juvenile Services on September 3, 2005.

Discussion

The burden of proof is upon the grievant asserting a default has occurred to prove the same 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 generally recognized as evidence of greater weight, or which is more convincing than the evidence which 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). Where the evidence equally supports

both sides, the party bearing the burden has not met its burden. Id.

If a default occurs, Grievant is presumed to have prevailed. W. Va. Code § 29-6A- 3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If Respondent can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A- 3(a), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. ofCorrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

In the instant case, it is undisputed that no attempt was made to schedule or conduct a level two conference. Ms. McCown testified that she was unsure how long the grievance forms had been on her desk when she discovered them on August 13, so she decided to issue her decisions forthwith, in order to avoid any time limit problems. However, under cross examination, Ms. McCown did admit that, although there were no dates or signatures on the forms in the level two section, they had been completed in the level one section, confirming that they had only been on Ms. McCown's desk for one working day. (See footnote 2)

The issue of whether or not failure to hold a level two conference constitutes default was decided affirmatively in Little v. Adjutant General's Office, Docket No. 04-ADJ-348D (Nov. 24, 2004). After a lengthy analysis of the issue, the administrative law judge concluded as follows:

> In light of the express language of the grievance statutes and the pertinent discussion by the [Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 305-306, 465 S.E.2d 399, 407-408 (1995)] Court of what is encompassed by the term “response,” failing to find a default under the circumstances of this grievance would require the Grievance Board to ignore the plain meaning of West Virginia Code section 29-6A-4(a). Although reason and common sense suggest that Grievant did not suffer any harm from Respondent's failure to hold a Level II conference, the pertinent inquiry is whether a default occurred. Grievant has proven that the Level II conference did not take place. Grievance Board precedent and the decisions of the Supreme Court of Appeals of West Virginia lead ineluctably to the conclusion that the statutorily-mandated conference is part of the response required of anemployer. Consequently, Grievant has proven a default on the part of Respondent.

Similarly, Respondent argues in the instant case that no harm has occurred as a result of the failure to conduct a level two conference, because the issues involved had previously been discussed between Grievant and Ms. McCown. However, once these claims had been elevated to the grievance

level, specific statutory requirements must be followed and, even if no real harm has occurred, it has been proven that there was a default. Moreover, as Grievant has pointed out, especially with regard to the disciplinary matters involved here, the “discussion” focused mostly upon the administration's side of things, rather than being a two-way discussion by both parties in an effort to resolve the issue, as would occur in a grievance conference. Respondent has failed to provide any legitimate justification for its failure to conduct a level two conference as required by law. The level two appeals were filed on August 12, and when Ms. McCown received them, she still had four days to schedule a conference, and her failure to do so cannot be excused.

Nevertheless, Respondent did move to dismiss a portion of Grievant's claims during the default hearing, which the undersigned believes is appropriate for discussion at this juncture. Since a default has been found, pursuant to statute and Grievance Board rules, this matter will now proceed to a hearing regarding whether the remedy requested by Grievant is contrary to law or clearly wrong. As noted by Respondent in its motion, at least two of Grievant's claims are now moot. The relief requested in her grievances regarding harassment and working hours cannot be granted, because she is no longer employed at the facility. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, andunavailable from the [Grievance Board]. Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993). The Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." Bragg v.Dept. of Health & Human Res., Docket No. 03-HHR-348 (May 28, 2004); Burkhammer v. Dep't of Health & Human Res., Docket No. 03-HHR-073 (May 30, 2003); Pridemore v. Dep't of Health & Human Res., Docket No. 95-HHR-561 (Sept. 30, 1996). In addition, Grievant has requested that other employees be disciplined, and “[t]his Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against an employee[.].” Graley v. W. Va. Parkways Econ. Dev. & Tourism Auth., Docket No. 99-PEDTA-406 (Oct. 31, 2000)(citing Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994); Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992)). However, Grievant does have a legitimate interest in having the verbal counseling session removed from her personnel file, because it could potentially affect her when applying for other employment or obtaining references from officials at the facility. Accordingly, when

this matter is convened for a default remedy hearing, only the issues surrounding the verbal counseling session of August 10, 2005, will be addressed.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002).

2. If Respondent can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A-3(a), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

3. "A level two conference is a required response under Code § 29-6A-4(b)." Rutherford v. Bureau of Employment Programs, Docket No. 03-BEP-040D (Mar. 24, 2003). 4. By failing to "hold a conference within five days of receipt of the appeal" at level two, Respondent failed "to make a required response in the time limits required[.]" This constitutes a default, within the meaning of West Virginia Code section 29-6A-3(a)(2), unless Respondent can establish that the failure to hold the conference was the result of "sickness, injury, excusable neglect, unavoidable cause or fraud." Sheppard v. Dep't of Health & Human Res., Docket No. 01-HHR-598D (May 9, 2002) (citing Friend v. Dep't of Health & Human Res., Docket No. 98-HHR-346D (Nov. 25, 1998)); See also Little v. Adjutant General's Office, Docket No. 04-ADJ-348D (Nov. 24, 2004)

5. Respondent has failed to establish that any of the statutory defenses to default apply in this case, so Grievant is entitled to prevail by default.

Accordingly, Grievant's request for a determination that default occurred at level two is **GRANTED**.

Pursuant to W. Va. Code § 29-6A-3(a)(2), Respondent may, within five days of the receipt of this notice, request a hearing before a level four hearing examiner for the purpose of showing that the

remedy received by the prevailing grievant is contrary to law or clearly wrong. **If no hearing is timely requested, the relief requested will be granted based on the presumption that Grievant prevailed on the merits of the grievance.**

Date: November 14, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The four grievances apparently were not formally consolidated, but were filed at the same time and have been addressed in simultaneous, separate decisions throughout these proceedings.

Footnote: 2

When computing grievance procedure time limits, "days" means only working days, with weekends and holidays being excluded from the calculation. See W. Va. Code §29- 6A-2(c).