THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

Dr. CAROLYN SUPPA,

Grievant,

v. DOCKET NO. 06-HE-294D

M. Paul Marteney,

Administrative Law Judge

MARSHALL UNIVERSITY

GRADUATE COLLEGE,

Employer.

ORDER DENYING DEFAULT

To address Grievant's claim, filed August 25, 2006, that Respondent had defaulted at Level III in her grievance, a level four hearing was held in the Grievance Board's Charleston office on October 23, 2006. Grievant was represented by Deirdre H. Purdy, Esq. and Respondent was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General. The matter became mature for decision on November 3, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant claimed Respondent defaulted when it failed to hold a Level III grievance hearing within the statutorily-required timeframe. Although Grievant admits waiving the time limit, she argues the waiver was obtained in bad faith, based on a false representation of the availability of the level three grievance evaluator. Respondent admits the failure to timely schedule a hearing, but claims it was a result of excusable neglect and/or pursuant to a valid waiver.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant filed a grievance on May 31, 2006, claiming she had wrongly been denied a promotion. The grievance proceeded through levels one and two, and was timely appealed to level three on July 18, 2006.

2. Grievant appealed to level three by forwarding her appeal to David Harris, who processes grievances at that level for Marshall University (MU). Mr. Harris scheduled the level three hearing for August 22, 2006, at 10:00 a.m., a date agreed to by Grievant.

3. Mr. Harris then advised Dr. Rosalyn A. Templeton, Dean of the College of Education, of the hearing date, as it would be her responsibility to conduct the level three hearing.

4. Dr. Templeton had previously provided, on August 18, through her secretary, a copy of her schedule to Mr. Harris. The schedule showed she was available on the 22nd in the morning, but not in the afternoon. When Mr. Harris informed her of the hearing date and time, she told him she was not available then. August 22 was the day after the new school term started.

5. When Mr. Harris contacted Grievant's counsel to advise of the scheduling conflict, she agreed to waive the time limit until sometime after August 23, which is when Mr. Harris would return from vacation and would be able to work out a new date.

6. Grievant, by counsel, filed her Petition for Default with the Grievance Board on August 25, 2006.

Discussion

"The 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." (See footnote 1) When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. (See footnote 2)

Here, there is no question that the level three hearing was not held within the time required by statute. Respondent asserts that its failure to timely hold the level three hearing is the result of

excusable neglect, one of the statutory exceptions to the general default rule. The Grievance Board has adopted a definition of “excusable neglect” based upon its interpretation under the Federal Rules of Civil Procedure: "Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance with the time frame specified in the rules. Absent a showing along these lines, relief will be denied." (See footnote 3)

There was conflicting testimony as to whether Dr. Templeton was told the hearing would be in the afternoon of the 22nd at 10:00 that morning. She was told, and knew from experience, that the hearing would consume at least two or three hours. However, it was undisputed that the date was the day after classes started, Dr. Templeton had a busy schedule that whole week, and the dates and times she provided on the 17th were subject tochange. Grievant agreed to waive the time limit on the representation that she was not available at the agreed-upon time, and later learned that the calendar she provided earlier showed Dr. Templeton was available. Nevertheless, both Mr. Harris and Grievant agree the hearing was set for 10:00 a.m., and Dr. Templeton's calendar showed she was only available on that date from 8:00 a.m. to 10:30 a.m.

Under these facts and circumstances, it cannot be found that the waiver was obtained by Mr. Harris in bad faith. He was trying as hard as he could to get a timely hearing scheduled before he left for vacation, balancing the needs of the grievant and the Dean's hectic calendar. Dr. Templeton's calendar, which was relied on by Grievant in her agreement to a waiver, did not show enough time to hold a level three hearing on the planned date. If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse, or that Grievant agreed to waive the time lines. (See footnote 4) Respondent has made a showing that the delay was agreed to by Grievant, who had waived the time limit in which it was required to respond.

The following conclusions of law support this discussion:

Conclusions of Law

1. When a grievant asserts that his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence.

2. If the grievant establishes that the required response was not made in a timely manner,

Respondent may then show that the delay was due to a statutory excuse, or that Grievant agreed to waive the time lines. *See, Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003D (June 6, 2002).

3. Respondent has shown that Grievant agreed to waive the time limit for holding a level three hearing, and that such waiver was knowingly made and based on a good-faith representation that Dr. Templeton was unavailable to conduct the hearing.

For the foregoing reasons, Grievant's Petition for Default is DENIED. This matter is hereby REMANDED to level three of the grievance procedure for completion of the proper proceedings at that level, and is DISMISSED from the docket of the Grievance Board.

November 30, 2006

_____

M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-3(a).

Footnote: 2

Board, et al. v. WVDHHR / Lakin Hosp., Docket No. 99-HHR-329D (Sep. 24, 1999).

Footnote: 3

Bowe v. W. Va. Workers' Compensation Comm'n., Docket No. 04-WCC-054D (April 12, 2004).

Footnote: 4

See, Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).