THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GEORGE WILKINSON,

Grievant,

v. **Docket No. 06-CORR-066D**

DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant, George Wilkinson, filed a default claim against his employer, Mount Olive Correctional Complex ("MOCC"), on February 15, 2006. The default was granted, and this matter proceeded to a hearing regarding whether the requested remedy was contrary to law or clearly wrong, which was held at the Grievance Board's Charleston office on August 7, 2006. Grievant was represented by Christopher Moorehead, Esq., and Respondent was represented by John H. Boothroyd, Assistant Attorney General. This case became mature on September 8, 2006, upon the parties' submission of findings of fact and conclusions of law. The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by MOCC as a Correctional Officer 3. Grievant worked in the Canine Unit at that facility.

2. On January 31, 2006, Grievant filed a grievance alleging:

Corporal George Wilkinson has filled [sic] this grievance due to the issue of promotions in the West Virginia Division of Corrections Canine Unit. The job of lead CDS trainer at Huttonsville Correctional

Center was filled without Officer Wilkinson being allowed to interview for the position.In past history, Delena Sanford was promoted from sergeant to lieutenant and thus the sergeant's position was left open. Cpl. Wilkinson was the ranking officer with the most experience and time in the canine unit, but was told that the position had to be posted and interviewed and could not be an appointed position. Due to the process, Jarrod Wilson received the promotion and became supervisor in the canine unit.

Officer Wilkinson believes that due to a previous class-action grievance filed, he was held responsible for the action of many and therefore is being punished for this legal grievance procedure. Corporal Wilkinson believes that he has been overlooked for promotions since this action. Comments were made by senior personnel during the previous grievance that his career and occupations would be in jeopardy if he proceeded with the grievance.

It has recently come to Officer Wilkinson's attention that a promotion was appointed to an officer at the Huttonsville Correctional Center Canine Unit without benefit of the interview process. When Corporal Wilkinson questioned Lieutenant Collet about posting the position he was told that "it did not have be posted a Huttonsville but only down there (implying Mount Olive.)"

Relief Sought:
Since jobs have been appointed in the past and are currently being appointed to, I am seeking the promotion of Sergeant and back paid [sic] effective from 01 December 2004. This date was the day that Jarrod Wilson was promoted to Sergeant of the Canine Unit at Mount Olive. I am also seeking the promotion to CDS Lead Trainer effective the date of Kevin Vandevander's appointment to this position at Huttonsville Correctional Center. I feel that I am the most qualified person in the Division of Corrections to have this job due to my having the most experience as an active CDS Handler with over 6 years of experience. (See footnote 1)

3. On October 12, 2004, MOCC posted a position for Correctional Officer 4 for the Canine Unit at that institution. This was the first time the position had been vacant. Up until October, 2004, Delena Sanford had held the position. Ms. Sanford had been reallocated to the position years before.
4. The position was filled by a competitive interview process.
5. Both Grievant and Jarrod Wilson applied for the position, along with others.
6. Both men were interviewed for the position. Because Wilson was the highest scoring

candidate during the interview, he was offered the position.

7. Sgt. Wilson has continually held that position since December 1, 2004.

8. In December, 2005, a thirteen week canine training class was conducted at Huttonsville Correctional Center ("HCC"). This training course was focused on training the dogs, not the staff.

9. In the middle of the training session, a trainer at HCC resigned. Because the training session needed to be completed, Sgt. Kevin Vandevander was temporarily assigned the duties of trainer.

10. This temporary assignment did not include a change in salary and was not permanent. This temporary position was not posted.

11. Sgt. Vandevander was housed at HCC. Grievant was housed at MOCC, some two and a half hours away from HCC.

12. In filing the position temporarily, HCC did not consider anyone outside of their penal institution.

11. HCC intends to post the trainer position in the future, at which time applications will be accepted from other employees housed at other institutions.

12. Grievant informed Respondent he would be filing for default at the Level II meeting. A hearing was held on the default issue at Level IV. Grievant prevailed. 13. Respondent asserted timeliness at Level IV prior to the default hearing.

14. On March 9, 2006, Respondent notified Grievant in writing of the witnesses it intended to rely upon during the Level IV hearing.

Discussion

A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. *W. Va. Code* § 29-6A-3(a)(2); *Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

To rebut the presumption created in *W. Va. Code* § 29-6A-3(a)(2), the employer must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Lohr v. Div. of Corr.*, Docket No. 95-CORR-157D (Nov. 15, 1999).

Before discussing the merits of the parties' arguments, the undersigned believes it is necessary to address Grievant's assertions that he was not provided with a witness list prior to hearing. (See footnote 2) On June 13, 2006, Grievant received a Notice of Hearing from the undersigned scheduling the Level IV remedy hearing for August 7, 2006. The standardlanguage in that order indicated all parties were to provide both the Grievance Board and other counsel with a list of witnesses at least six days prior to the hearing.

On the date of the hearing, Grievant objected to Respondent calling any witnesses, arguing he was not put on notice by Respondent of who would be called to testify at the remedy hearing. However, by letter dated March 9, 2006, Respondent notified both the Grievance Board and Grievant of the witnesses it would rely upon. Grievant argued this list of witnesses was for the default hearing and a new list should have been provided prior to the remedy hearing. Respondent asserted the March 9th, notification referred to any and all Level IV hearings on this matter. Respondent's Disclosure of Witnesses not only listed Terri Arthur and Lt. Charles Collett as witnesses, but also stated it intended to call, "All persons necessary to rebut *any allegation or contention* raised during the Level IV hearing in this matter." (Emphasis added.)

After reviewing the submission from March 9, 2006, the undersigned ruled the March submission was intended to encompass any Level IV hearing in the matter, as specifically stated by Respondent. Therefore, the undersigned ruled Grievant was put on notice of the witnesses who would be testifying in the proceeding, and allowed Respondent to call witnesses. In addition, since Respondent submitted its disclosure of witnesses in March, it clearly complied with the requirement to provide notice of witnesses at least six days in advance of the hearing. It should also be noted that Grievant raised this issue again in the middle of Respondent's second witness. At that time, the undersigned reiterated her ruling, and told Grievant she would grant him a continuance if one was requested. Grievant indicated he wished to proceed. Grievant continually objected to litigating the substantive issue of the grievance. Grievant asserted both at hearing and in his proposed findings of fact and conclusions of law that because he had been granted a default, there was a presumption that he prevailed and that carried through the remedy phase. While a default does create the presumption that Grievant has prevailed on the merits, that presumption is rebuttable by Respondent. At the remedy phase Respondent has the burden of proving by clear and convincing evidence that Grievant's assertions are contrary to law or clearly wrong. It would be virtually impossible for

Respondent to attempt to carry that burden without getting into the merits of the claims.

Lastly, Grievant's proposed findings of fact and conclusions of law also requests the Grievance Board order Respondent to pay attorney fees up to $1,500.00. The Grievance Board has continually ruled that the undersigned has no authority to award attorney fees. *Chafin v. Boone County Health Dep't. and Div. of Personnel*, Docket No. 95-BCHD-362 (June 21, 1996); *See e.g., Smarr v. Wood County Bd. of Educ*., Docket No. 54-86-062 (June 16, 1986). *W. Va. Code* § 29-6A-10 only allows for attorney fees when ordered by circuit court upon a successful appeal.

Respondent has asserted Grievant was untimely in his filing. *W. Va. Code* § 29-6A- 3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing."

Grievant argued Respondent did not assert the timeliness issue at or before the Level II hearing. First, it should be noted the Grievance Board has ruled that because there is not a Level II hearing held for state employees, the timeliness defense must beraised at or before the Level III hearing. *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001) (*citing Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)). At the Level II meeting, Grievant informed Respondent he would be filing for default. Upon learning of Grievant's default claim, Respondent submitted a Motion to Dismiss for Timeliness.

Respondent clearly comported with the requirement to raise the issue of timeliness at or before the Level III hearing. Upon receiving information that Grievant filed for default at Level IV, Respondent filed a motion to dismiss on the grounds of timeliness. Because there was no Level III hearing in this case, asserting the defense before the default hearing is sufficient to preserve the issue.

A default ruling does not prohibit Respondent from asserting the defense of timeliness. Statutorily, default only entitles Grievant to a presumption regarding the merits of the grievance. It does not mandate Grievant prevail. Also, a default ruling does not permit Grievant to prevail on a remedy contrary to law.

Clearly, Grievant believed he should have been selected as Correctional Officer 4 for the Canine Unit at MOCC. However, that position was filled on December 1, 2004. Grievant filed his grievance on that issue on January 31, 2006. A grievance must be filed with the immediate supervisor of the grievant “[w]ithin ten days following the occurrence of the event upon which the grievance is based,

or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .” *W. Va. Code* § 29-6A-4(a). Because Grievant waited almost two months before filing a grievance on this issue, it is untimely. With respect to Grievant's claim that HCC promoted Sgt. Vandevander without the benefit of the interview process, it should clearly be stated that this was a temporary reassignment. Respondent presented clear and convincing evidence that HCC has not permanently filled the position of trainer. Instead, HCC temporarily placed Sgt. Vandevander in the position to assist in completing the thirteen week training course. This temporary upgrade did not result in a salary advancement or in a title change.

"The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Champ v. Pendleton County Bd. of Educ.*, Docket No. 01-36-419R (July 14, 2003); *Khoury v. Public Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways Economic Development and Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17, 1998).

Respondent presented clear and convincing testimony that the position will be posted in the future. At that time, Grievant may choose to apply. However, temporarily assigning an officer at HCC as trainer caused no injury to Grievant and such a decision would merely be advisory.

The following conclusions of law support this Decision.

Conclusions of Law

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or hergrievance, awarding such remedy would be contrary to law or clearly wrong. *W. Va. Code* § 29-6A-3(a)(2); *Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999).

2. To rebut the presumption created in *W. Va. Code* § 29-6A-3(a)(2), the employer must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Lohr v. Div. of Corr.*, Docket No. 95-CORR-157D (Nov. 15, 1999).

3. *W. Va. Code* § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer

at or before the level two hearing."

4. In cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing." *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001) (*citing Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)).

5. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." *W. Va. Code* § 29-6A-4(a).

6. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Champ v. Pendleton County Bd. of Educ.*, Docket No. 01-36-419R (July14, 2003); *Khoury v. Pub. Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17, 1998).

7. Respondent proved by clear and convincing evidence that the claim concerning the selection of Correction Officer 4 of the Canine Unit at MOCC is untimely.

8. Respondent proved by clear and convincing evidence that the temporary promotion of Sgt. Vandevander was temporary and resulted in no additional advancement. Grievant suffered no real injury by that temporary promotion.

Accordingly this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. *W. Va. Code* § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: November 2, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

At the time of the Level IV remedy hearing, the undersigned was informed Grievant had been terminated from employment at MOCC. The undersigned explained on the record that she could not order Grievant back to work as a remedy for this grievance, as his termination was a separate matter all together. She explained the only remedy that could be fashioned is one of back pay. Both parties indicated on the record they agreed with the undersigned's assessment.

Footnote: 2

The undersigned is addressing this issue in the written decision because Grievant continued to argue the issue during the hearing after the ruling was made to allow Respondent's witnesses. Also, in Grievant's Proposed Findings of Fact and Conclusions of Law Grievant once again asserted Respondent should not have been allowed to call witnesses.