THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JACQUELINE C. DUNLAP,

Grievant,

v. Docket No. 2008-0808-DEP

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ORDER GRANTING DEFAULT

Grievant Jacqueline Dunlap filed a written notice of default with her employer, the Department of Environmental Protection ("DEP"), on September 10, 2008. She filed a copy of the notice of default with the Public Employees Grievance Board the same day via e-mail. Grievant's notice states in pertinent part:

"I'm filling [sic] for a default of my level one grievance against the Department of Environmental Protection, naming Ramona Dickson. Jack McClung the Administrator of the hearings has not ruled within the 15 day time limit stated in Statute 6C-2 and Rules of Practice 156 CSR-1[sic]."

A hearing was held on the issue of default at the Charleston office of the Grievance Board, on October 22, 2008. Grievant Dunlap appeared pro se and DEP was represented by Raymond S. Franks II, General Counsel for DEP. After the presentation of evidence both parties made closing oral arguments and both declined the opportunity to file written fact/law proposals. This matter became mature for decision on that date.

Synopsis

Grievant avers that DEP is in default because a level one decision was not rendered within fifteen days after the conclusion of the hearing as required by State Code and rules. Respondent counters that the last, of six, hearings was held on April 9, 2008, and Grievant agreed that the Proposed Findings of Fact and Conclusions of Law would be submitted by both parties on May 31, 2008. DEP

contends that Grievant waived her right to a decision within fifteen days when she agreed that fact/law proposals would be submitted more than fifteen days after the last hearing at level one. Grievant insists that she did not waive the time line for rendering a decision but only agreed to a time for submitting the fact/law proposals. She believed that the decision would be rendered within fifteen days after the written proposals were entered. The Grievance Board has held that in situations where the parties have set a time line for submitting proposals but no specific date is set for a decision to be rendered, the decision must be issued within a reasonable time. Respondent did not establish that the decision was filed within a reasonable time after the submission of the Proposed Finding of Fact and Conclusions of Law. Respondent also failed to prove that it was prevented from rendering a decision by one of the reasons allowed for delay established in W. Va. Code § 6C-2-3. Accordingly, Grievant's claim for default is granted.

The following findings of fact are based upon a thorough review of the record in this default claim.

Findings of Fact

1 1. Grievant is an employee of DEP and filed a grievance against the agency on November 11, 2007.

2. Jack C. McClung was named as the Designee for the Chief Administrator of DEP who, at that time, was Stephanie R. Timmermeyer. As the Designee of the Chief Administrator, Mr. McClung was charged with the responsibility to hear and decide the grievance at level one pursuant to the procedures set out in W. Va. Code §§ 6C-2-1 *et seq*.

3. A level one hearing was scheduled and held on January 18, 2008. The hearing was not concluded that day and five more meetings were held at level one to complete the presentation of evidence. The last day of presentation of evidence was April 9, 2008.

4. The transcript of the last meeting reflects an agreement of the parties to submit Proposed Findings of Fact and Conclusions of Law ("FOF & COL") to the Designee of the Chief Administrator by a specific date as follows:

Pursuant to off-record discussions with the parties in this matter, it is determined that the Proposed Findings of Fact and Conclusions of Law will be filed with the Hearing Examiner, Chief Administrator, Designee or Hearing Officer...on or before May 31st, 2008, and that time-frame is subject to extension, to be extended if some sort of problem arises, with respect to the parties being able to provide them. With that we will consider this matter closed. (See footnote 1)

5. The parties did not discuss nor enter into any agreement regarding when the decision would be entered. 6. By e-mail dated May 28,2008, Mr. Franks asked Grievant for an extension in time for submitting the FOF & COL until June 13, 2008. Grievant agreed to extend the time until June 2, 2008, but not until June 13, 2008.

7. Notwithstanding Grievant's objection, Designee Jack McClung granted the extension for submitting the FOF & COL to June 13, 2008.

8. On June 2, 2008, Grievant delivered her FOF & COL to Debbie Hughs, in the DEP Office of Human Resources. Ms. Hughs served as a contact person and conduit of information between the parties and Designee McClung.

9. On June 16, 2008, Grievant sent an e-mail inquiring whether Ms. Hughs had received the FOF & COL from DEP. Ms. Hughs replied that she had not. The next day, Grievant asked Ms. Hughs, “What is my next step?”

10. On June 18, 2008, Grievant notified Designee McClung, by letter, that she had not received the fact/law submission from DEP by the appointed date of June 13, 2008.

11. By e-mail dated June 19, 2008, Ms. Hughs advised Grievant that she had received the Proposed Findings of Fact and Conclusions of Law for DEP and that she would forward it to Grievant electronically.

12 2. Grievant sent an e-mail to Ms. Hughs on July 15, 2008, to check on the status of her grievance. Ms. Hughs replied the same day and indicated that the decision would not likely be ready until the end of the month.

13 3. Grievant inquired again regarding the status of her grievance on August 6, 2008, and Ms. Hughs replied that she had not heard anything yet. 14 4. On August 13, 2008, Grievant e-mailed Ms. Hughs indicating that she was checking to see if Designee McClung had issued an opinion before she sent a letter to the Grievance Board. Ms. Hughs indicated that she thought Mr. McClung was almost finished and stated: “You may want to wait until the end of the week.”

15 5. Grievant inquired, once more, on August 26, 2008, about the status of the decision and Ms. Hughs indicated that the decision would be ready at the first of the next week, at the earliest.

16 6. On September 10, 2008, Grievant called the Grievance Board to ask for information about the grievance process.

17 7. Grievant sent an e-mail to Ms. Hughs on September 10, 2008, notifying the DEP that

she was filing a default in her level one grievance. The same day, she sent a letter to Randy C. Huffman, Cabinet Secretary for DEP, informing him that she was filing a default because: "Jack McClung, the Administrator of the hearings had not ruled within the 15 day time limit stated in Statute 6C-2 and Rules of Practice 156 CSR-1 [sic]." A copy of the letter was sent to the Grievance Board and DEP's counsel, Raymond Franks. (See footnote 2)

18. No decision was issued at level one prior to the filing of the notice of default. All proceedings at level one have been stayed pending the ruling on the issue of default.

Discussion

Grievant claims that Respondent is in default because the Designee for the Chief Administrator did not issue a decision in her grievance within 15 days after the hearing was concluded. In support of her claim she cites W. Va. Code §§ 6C-2-1 *et seq*. and theProcedural Rules of the Public Employees Grievance Board found at 156-C.S.R.-1. W. Va. Code § 6C-2-4(a)(3) requires that the Designee of the Chief Administrator issue a written decision within fifteen days of the level one hearing. W. Va. Code § 6C-2-3(b) provides that a grievant may claim default if the designee fails to render a decision within that statutory time limit.

A grievant who alleges a default at a lower level of the grievance process has the burden of proving it 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 evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Brown v. Logan County Bd. of Educ.* Docket No. 2008-0567-LogED (Oct. 24, 2008). "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 juncture, are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. (See footnote 3)

There is no dispute that the decision was not rendered within fifteen days after the conclusion of the hearing. The last day for evidence was April 9, 2008 and the FOF & COL were submitted on June 19, 2008. Grievant filed for default on September 10, 2008 and no decision had been issued by that time. The default clearly occurred. The remainingissue is whether there is a legally recognized

excuse for the Designee not meeting the statutory time line. DOP offers two defenses for the default: that Grievant waived the statutory time line for rendering the decision or, in the alternative, that the Designee was prevented from meeting the time line by "justified delay."

Waiver:

The transcript of the April 9, 2008 hearing is clear. DEP and Grievant agreed to submit fact/law proposals to the Designee by May 31, 2008. There was no discussion on the record of the Grievant agreeing to an extension to the time for rendering the decision. Waiver of the strict statutory time lines is a common occurrence within the context of the grievance procedure. *Huston v. W. Va. Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R 469D (Feb. 29, 2000); *Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-296D (Nov. 30, 1999). This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. *Jackson v. Hancock County Bd. of Educ.*, Docket No. 99-15-081D (May 5, 1999). Where grievants have agreed to extend the time line for submitting proposals but not specified a date for the issuance of the decision, the Grievance Board has stated that the decision must be issued within a reasonable time which is determined on a case-by-case basis. *See Shirkey v. Dep't of Transp. and Div. of Highways,* Docket No.04- DOH-153DEF (July 30, 2004); *Parker v. Dep't. of Health and Human Services,* Docket No.99-HHR 296D (Nov. 30, 1999); *Bowyer v. Bd. of Trustees and W. Va. Univ.,* Docket No. 99-BOT-197DEF (July 13, 1999). Ms. Dunlap's sworn testimony was that no one explained to her that extending the time for filing Proposed Findings of Fact and Conclusions of Law was the same as agreeing to an extension of the time for rendering a decision. Under oath, she emphatically stated that she never agreed to extending the time requirement for rendering a decision and there is no evidence that she did. However, even if her agreement to extend the time for submitting fact/law proposals can be viewed as a waiver of the statutory time for rendering a decision, the decision must be issued in a reasonable amount of time following the hearing. *Shirkey supra.* "The real questions are how long of a delay is reasonable, and is a grievant forever barred from limiting his/her waiver. Black's Law Dictionary defines reasonable as "[f]air, proper, just, moderate, suitable under the circumstances. . . . Not immoderate or excessive." Black's Law Dictionary 656 (abr. 5th ed. 1983)." *Id.*

The last evidence was taken at level one on April 9, 2008, and the parties agreed to submit their fact/law proposals by May 30, 2008. That date was extended to June 13, 2008. The last proposal

was received by the Designee on June 19, 2008, roughly two months after the close of the evidence. Yet nearly three months later, in mid-September, no decision had been issued. DEP submitted no evidence to explain this extended delay except to say that there had been a large amount of evidence and exhibits for the Designee to go through. While there were six separate hearing dates at which evidence was submitted, we do not know if those hearing lasted one hour or ten hours. The only certainty is that the Designee had the Proposed Findings of Fact and Conclusions of Law, submitted by the parties, to work from and had not issued a decision in approximately three months. The parties were able to go through the same evidence, as well as research the applicable law and submit their proposals in two months. Under the specific circumstances of thiscase, the delay in issuing the level one decision is not reasonable. Therefore, even if Grievant did waive the statutory time limit for issuance of a decision, the defense must fail.

Statutory excuses:

The statute allows the employer to escape default if it can be proven that the Chief Administrator or Designee was prevented from rendering a timely decision for one of three reasons: “injury, illness or a justified delay not caused by negligence or intent to delay the grievance process.” (See footnote 4) There is no claim that Designee McClung was delayed in rendering his decision because of illness or injury. Instead, DEP asserts that McClung was unable to render the decision within the fifteen day limit because of the large volume of testimony and exhibits he had to consider in making that decision. Respondent points out that the testimony was presented in six separate sessions and that the transcripts contain hundreds of pages of evidence. DEP's Counsel noted that his FOF & COL were, at least, 37 pages long. DEP argues that the voluminous and complicated nature of the grievance constitutes just cause for Designee McClung's decision to be issued beyond the statutory time limit. Respondent avers that, given the nature of the grievance, the rendering the decision nearly three months after the fact/law proposals were submitted, is reasonable. (See footnote 5) While it is easy to sympathize with the difficulty of rendering decisions in complex matters in relatively short time frames, “just cause” or “reasonableness” are not the standards by which a delay must be judged.

The excuse, “justified delay not caused by neglect or intent to delay the grievance process,” was added to the grievance statute with the adoption of the new grievance procedure in 2007. (See footnote 6) While “injury” and “illness” are easily understood, what constitutes a “justified delay” is not so obvious. The recognized principle of statutory construction, *noscitur a sociis*, dictates that a word

or phrase is to be interpreted with reference to the other words around it, and that word or phrase is limited in meaning by implications arising from the surrounding words. *Syl. pt.* 3, *Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74, (1998). (See footnote 7) In footnote 10 of *Martin v. Randolph County Bd. of Educ.,* 195 W.Va. 297, 311 S.E.2d 399 (1995), the West Virginia Supreme Court of Appeals noted, "a cannon of statutory construction called *noscitur a sociis*...holds that a word is known by the company it keeps...[t]he fact that several items in a list share acommon attribute counsels in favor of interpreting other items as possessing that attribute as well." (Citations omitted) *Id*. (See footnote 8)

___Applying the principle of *noscitur a sociis*, we must look at the first two words in the list for insight as to the meaning of the final phrase. In addition to the obvious connection to physical incapacity, the words "illness" and "injury" share another commonality. They both imply an unexpected, intervening, occurrence over which the Chief Administrator or Designee has no control. The phrase "justified delay not caused by neglect or intent to delay the grievance process", must be similarly construed. The legislature's inclusion of the phrase, "not caused by neglect or intent to delay the grievance process", which modifies "justified delay", cannot be ignored. Clearly, any delay cannot be an excuse for default if the event giving rise to the delay was caused by inattention or bad faith.

This interpretation is consistent with the grievance Board's prior interpretations of the term "excusable neglect" that was found in W. Va. Code § 29-6A -3(a)(2), the previous statute dealing with default by state public employers. *See* Footnote 8, *supra. p 10.*

Excusable neglect may be found where events arise which are outside the defaulting party's control, and contribute to the failure to act within the specific time limits. *See Monterre, Inc. v. Occoquan Land Dev. Corp.*, 189W. Va. 183, 429 S.E.2d 70 (1993). However, simple inadvertence or a mistake regarding the contents of the procedural rule will not suffice to excuse noncompliance with time limits. *See White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992); *See Bowe v. Workers Compensation Comm'n,* Docket No. 04-WCC-054D (Apr. 12, 2004). (See footnote 9)

Therefore, for the defense of, "justified delay not caused by neglect or intent to delay the grievance process" to excuse a default, the employer must prove, by a preponderance of the evidence, that the failure to act within the required time limit, was the result of an unexpected event, or events, that was outside of the defaulter's control. Noncompliance with the time limits cannot be excused for acts of bad faith, inadvertence or a mistake regarding the contents of the procedural rule. Procedural Rules

of the West Virginia Public Employees Grievance Board, 156 CSR 1 § 3 (2008); *See Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74, (W.Va. 1998)*; Martin v. Randolph County Bd. of Educ.,* 195 W.Va. 297, 311 S.E.2d 399 (1995); *Bowe v. Workers Compensation Comm'n,* Docket No. 04-WCC-054D (Apr. 12, 2004).

In the present case, there was no intervening event that caused the delay in issuing the level one decision. DEP argues that the default should be excused because of thevolume of the evidence and the complexity of the case. Respondent feels that the decision was ready within a reasonable time, given the amount of materials the Designee had to review. While the difficulty of rendering such a decision within the strict statutory time frame, is understandable, it simply is not a recognized defense for default. DEP failed to prove that the default was a result of "justifiable delay" and the default is granted.

Conclusions of Law

___1. A grievant who alleges a default at a lower level of the grievance process has the burden of proving it 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 evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP- 412 (Dec. 31, 1997); *Brown v. Logan County Bd. of Educ.* Docket No. 2008-0567-LogED (Oct. 24, 2008).

2. Grievant proved, by a preponderance of the evidence, that a default occurred when the designee of the Chief Administrator failed to issue a decision, at level one, within fifteen days of the conclusion of the hearing.

3. Where a grievant has agreed to waive the time for issuing a decision but not specified a date for the issuance of the decision, the decision must be issued within a reasonable time which is determined on a case-by-case basis. *See Shirkey v. Dep't of Transp. and Div. of Highways,* Docket No.04-DOH-153DEF (July 30, 2004). 4. There was not sufficient evidence on the record to justify no decision being entered five months after the close of evidence at level one. Under the facts presented in this case the delay in issuing the level one decision was not reasonable.

5. 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 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);

Brown v. Logan County Bd. of Educ., Docket No. 2008-0567-LogED (Oct. 24, 2008).

6. For the defense of, "justified delay not caused by neglect or intent to delay the grievance process" to excuse a default, the employer must prove, by a preponderance of the evidence, that the failure to act within the require time limit, was the result of an unexpected event, or events, that was outside of the defaulter's control. Noncompliance with the time limits cannot be excused for acts of bad faith, inadvertence or a mistake regarding the contents of the procedural rule. Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *See Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 203 W.Va. 74 (1998)*; Martin v. Randolph County Bd. of Educ.,* 195 W.Va. 297, 311 S.E.2d 399 (1995); *Bowe v. Workers Compensation Comm'n,* Docket No. 04-WCC-054D (Apr. 12, 2004).

7. DEP failed to prove, by a preponderance of the evidence, that the default was a result of a "justified delay not caused by neglect or intent to delay the grievance process." Accordingly, this default is **GRANTED**, and Respondent may proceed to show that the remedy sought by Grievant is contrary to law or contrary to proper and availableremedies. The parties are directed to confer with one another and provide the Grievance Board with at least **three mutually agreeable dates** for scheduling the remedy hearing, no later than **December 22, 2008**.

DATE: December 8, 2008

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William B. McGinley

Administrative Law Judge

Footnote: 1

Respondent's Exhibit # 1.

Footnote: 2

Copies of the e-mails sent and received by Grievant were admitted into the record as Grievant's Exhibits 2 through 11.

Footnote: 3

Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 7.1 (2008).

Footnote: 4

W. Va. Code § 6C-2-3(b)(1).

Footnote: 5

DEP represented that the level one decision was completed shortly after the claim for default was made but it has not been issued because all proceedings in the grievance were stayed when the default was filed.

Footnote: 6

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). This new procedure covers both state and education employees. Many sections that differed in the two old procedures, were revised when combined into the new procedure. The employer default provision is one such section.

Footnote: 7

"It is a fundamental rule of construction that, in accordance with the maxim noscitur a sociis, the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language, although apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions." Syl. pt. 4, Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899 (1975).' Syl. pt. 1, Banner Printing Co. v. Bykota Corp., 182 W.Va. 488, 388 S.E.2d 844 (1989)." Syl. pt. 3, Kings Daughters Housing, Inc. v. Paige, 506 S.E.2d 329, 203 W.Va. 74, (W.Va. 1998).

Footnote: 8

Another cannon of statutory construction, ejusdem generis, also holds ambiguous words or phrases in a list should be construed to be consistent with the specific words in the list.
"In the construction of statutes, where general words follow the enumeration of particular classes of persons or things, the general words, under the rule of construction known as ejusdem generis, will be construed as applicable only to persons or things of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown. Syl. pt. 2 Parkins v. Londeree, Mayor, 146 W.Va. 1051, 124 S.E.2d 471 (1962)." Syl. pt. 2, The Vector Co., Inc. v. Board of Zoning Appeals of the City of Martinsburg, 155 W.Va. 362, 184 S.E.2d 301 (1971).

Footnote: 9

This Grievance Board has found excusable neglect, constituting grounds for denying a claim of default, where misfiled documents resulted in the agency's failing to schedule a Level III hearing in a timely manner; (McCauley, Jr. v. Div. of Corrections, Docket No. 99- CORR-101D (May 11, 1999) and Thaxton v. Div. of Veterans' Affairs, Docket No. 98-VA- 426D (Dec. 30, 1998)); and where an agency employee, who lacked authority to resolve the grievance, failed to schedule a Level II hearing because he had just met with grievants on the same issue fewer than two months earlier, and had no new information to present. White v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R- 003D (Aug. 20, 1999); See Bowe v. Workers Compensation Comm'n, Docket No. 04- WCC-054D (Apr. 12, 2004).